No. 129562

IN THE
SUPREME COURT OF ILLINOIS

MARATHON PETROLEUM, CO. LP
f/k/a MARATHON PETROLEUM CO., LLC,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the Appellate Court of Illinois,
First Judicial District, No. 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 DEFENDANTS-APPELLEES.
CROSS-RELIEF REQUESTED

KIMBERLY M. FOXX
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-4366
jonathon.byrer@cookcountysao.org

CATHY MCNEIL STEIN
Chief, Civil Actions Bureau
JONATHON D. BYRER
Supervisor, Civil Appeals & Special Projects
PAUL FANGMAN
Supervisor, Municipal Litigation
Assistant State's Attorneys
Of Counsel

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NATURE OF THE CASE

Following an audit, defendant-appellee Cook County Department of Revenue (hereafter, "Revenue") issued a revised fuel tax assessment against plaintiff-appellant Marathon Petroleum Co. for its failure to properly collect and remit defendant-appellee Cook County's fuel tax on several million gallons of fuel. The County's Department of Administrative Hearings (hereafter, "Department") upheld that assessment, over Marathon's protest, on the ground that Marathon failed to satisfy its burden to rebut Revenue's *prima facie* case of tax liability, and also upheld the imposition of penalties for Marathon's failure to collect and remit the fuel tax. The appellate court, on administrative review, affirmed the tax assessment, but reversed the imposition of penalties. No issues are raised on the pleadings.

ISSUES PRESENTED

1. Whether Marathon forfeited its argument that the tax assessment did not establish a *prima facie* case of tax liability, where Marathon failed to raise that argument in the Department or its petition for leave to appeal.

2. Whether the tax assessment established a *prima facie* case of liability, where Marathon's challenge to that *prima facie* case rests on an Illinois statute inapplicable to County tax proceedings.

3. Whether the Department committed clear error in finding that Marathon failed to rebut Revenue's *prima facie* case of liability, where Marathon failed to come forward with the contract necessary to determine

whether any of the transactions at issue here involved a "sale" of fuel triggering the obligation to collect and remit the County's fuel tax.

4. Whether requiring Marathon to collect and remit the fuel tax renders that tax an unconstitutional occupation tax as applied to the facts of this case, where it is undisputed that the legal incidence of that tax falls on the consumer.

5. Whether requiring Marathon to collect and remit the fuel tax on the transactions at issue here would have an impermissibly extraterritorial effect, where Marathon offers no evidence of such extraterritorial effect.

6. Whether the Department's refusal to forgive penalties was against the manifest weight of the evidence, where Marathon failed to demonstrate reasonable cause for its actions in the manner required by the federal tax laws incorporated into County law.

JURISDICTION

On September 9, 2019, an administrative law judge with the Department issued its final judgment order against Marathon. A21-A44. Marathon filed a petition for administrative review of that judgment in the circuit court on October 7, 2019. C. 23-42. The circuit court entered judgment for Marathon on May 14, 2021, A45-A118, and the County timely appealed that decision on May 28, 2021, C. 14044-45. The appellate court had jurisdiction over that appeal pursuant to Ill. Sup. Ct. R. 303.

On December 30, 2022, the appellate court affirmed in part and reversed in part. A1-A19. Marathon filed a petition for rehearing on January 20, 2023, and the appellate court denied that petition on March 6, 2023. A20. Marathon filed a petition for leave to appeal on April 7, 2023, which this court granted on September 23, 2023. This court has jurisdiction pursuant to Ill. Sup. Ct. R. 315.

STATEMENT OF FACTS

I. Background.

Under the Cook County Retail Sale of Gasoline and Diesel Fuel Tax Ordinance, Cook County Code of Ordinances (hereafter, "Code") § 74-470, et seq., the retail sale of diesel fuel and gasoline is taxed at the rate of $0.06 per gallon, *id.* § 74-472(a). That tax is paid by the purchaser of the fuel at retail, *id.*, and must be included in the price of fuel charged to the retail consumer, *id.* § 74-472(b). While the fuel tax is ultimately paid by a consumer, it is collected at an earlier point in the distribution chain – under the ordinance, the fuel tax "shall be collected by each distributor or supplier who sells" fuel to any "retail dealer doing business in the County" or to another distributor "doing business in the County that is not holding a valid registration certificate. *Id.* § 74-472(c)(1) & (3). For purposes of this requirement, a "sale" and "selling" are defined as "any transfer of ownership or possession or both, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever. In every case where gasoline [or] diesel fuel . . . are exchanged, given or otherwise disposed of, it shall be deemed to have been sold." *Id.* §

74-471. A "retail dealer" is "any person who engages in the business of selling gasoline, diesel fuel, biodiesel fuel or gdiesel fuel in the County to a purchaser for use or consumption and not for resale in any form." *Id.* A "gas distributor" is defined as "any person who either produces, refines, blends, compounds, or manufactures gasoline or diesel fuel in this County or transports or has transported gasoline or diesel fuel into this County or receives gasoline, diesel fuel or biodiesel fuel in Cook County on which this tax has not been paid." *Id.* Ultimately, the amounts previously collected and remitted are reimbursed by adding the tax to the amount charged to the consumer purchasing fuel; they may not be absorbed or otherwise forgiven. Code § 74-472(b).

On May 19, 2014, Revenue started examining Marathon's books and records for compliance with the fuel tax ordinance from January 2006 through July 2014. C. 3108-3110. An "internal summary report" in those books and records detailed several fuel transactions with unregistered distributors, the entries for which listed Marathon as the "seller" and another entity as the "seller/purchaser." C. 8244-8304.[1]

The contracts accompanying the transactions set forth in the internal summary report, *e.g.*, C. 12908-12, set forth the "terms and conditions" of what the contract referred to as a "purchase and sale transaction," C. 12908.

[1] Although what the internal summary reports refer to as "book transfers" are referred to by various names in the record, we refer to them as book transfers throughout, except when quoting record material. No different meaning is intended by the use of particular "book" terminology herein.

Those contracts further provided that "delivery" of fuel from Marathon to the counterparty would occur in February of 2009, and that the fuel would be delivered "into a generic Chicago pipeline. F.O.B. Chicago, IL." C. 12909. Payment, the parties further specified, would be due to the seller upon presentation of an invoice and a pipeline meter ticket or supporting documents. *Id.* The parties also agreed that, if Marathon was required to "collect and remit" any taxes relating to the parties' fuel sale, then the purchaser of that fuel would "promptly reimburse" Marathon "for the amount of such taxes." *Id.* In addition, each of the parties agreed it was acting as "a Forward Trading Merchant, as defined in 11 U.S.C. § 101 (26)." C. 12910.[2] Finally, the parties agreed that their contract represented their "complete agreement . . . and cannot be modified unless in writing." C. 12911.

Based on a review of internal summary reports and the accompanying contracts provided by Marathon, C. 4992, Revenue issued Marathon a revised gas tax schedule in the amount of $4,398,180.76, inclusive of penalties and interest, after concluding that Marathon had sold 31,201,380 gallons of gasoline to unregistered gas distributors without collecting and remitting the fuel tax, C. 10750, 9917. Revenue also issued a revised diesel tax schedule in the amount of $10,537,077.16, inclusive of penalties and interest, C. 3309, concluding that Marathon had sold 92,059,380 gallons of diesel fuel to unregistered distributors without collecting and remitting the fuel tax. C.

[2] This is a typographical error, as 11 U.S.C. § 101(26) uses the term "forward contract merchant."

9090-92. In issuing its revised assessment, Revenue noted that Marathon had admitted that the transactions at issue involved a "'transfer of ownership between Marathon and its business partners.'" C. 9907.

II. Administrative Proceedings.

This matter then proceeded before the Department, where Marathon admitted that its "ordinary" practice was to enter into arrangements "to buy and sell fuel with independent third parties where title to the fuel is traded via pipeline transfer or paper inventory transfer or booked out in a cash only transaction." C. 296. According to Marathon, book transfers do not result in a physical transfer of fuel, *id.*, because they involve circumstances in which intersecting fuel delivery obligations among various parties are such that "no physical transfer of product was required," C. 298. Rather, Marathon claimed, "each party cancels its obligations and rights with respect to the other parties." C. 299. Marathon claimed that book transfers involved "no transfer of ownership" of fuel, *id.*, but instead "a cancellation of corresponding rights and obligations under contract," C. 300. Regarding the choice of Chicago as the delivery location for the book transfers, Marathon claimed that it "chose a generic virtual location based on the region where delivery was initially contemplated under the contracts," which for the transactions at issue was "the Chicago, Illinois pricing region." C. 299-300.

An administrative law judge with the Department held a hearing in this matter. C. 11371-98, 10094-10249, 4944-5194, 1993-2063, 12923-79, 3788-3846. During that hearing, Revenue's Audit Supervisor Jose Vega and Deputy Director of Compliance Gary Michals testified regarding their review of Marathon's books and records when determining Marathon's tax liability. C. 11383-98, 10098-10204 (Vega); C. 10204-47, 4950-93 (Michals).

In rebuttal, Marathon offered the testimony of Dr. Gregory Arburn, who testified that he had not looked at the contracts at issue in this matter, nor any other Marathon documents, C. 5037-39. In fact, Marathon successfully objected to Dr. Arburn being shown those documents, *id.*, or asked how he determined that Marathon's contracts resulted in book transfers, C. 5040. Rather, Dr. Arburn testified only that his "understanding" was that Marathon had been taxed for "transactions [that] were essentially book-outs" and that his testimony was solely to "discuss book-outs and their purpose, how they work, their role in this particular event." C. 5016-17. Dr. Arburn went on to explain that he defined a book transfer as "a forward contract, a transaction that two parties have agreed to financially settle." C. 5018-19. Under such a settlement, Dr. Arburn testified, there would not be a "change of possession" of the commodity at issue, but there could still be a sale of "an intangible interest" in that commodity. C. 5023.

Marathon also offered the testimony of its commercial analysis manager, Matthew Freeman. C. 5050-51. During his testimony, Freeman identified three forms of book transfers used by Marathon, C. 5085, and explained that what Marathon considers a book transfer will involve "two different contracts," C. 5081; *accord* C. 5099-5100 (noting "two independent contracts"), the first of which is an "original contract" in which one party agrees to sell fuel to another, and then a second contract, "a separate transaction" via which the parties settle that initial contract, C. 5073-75. That second contract setting forth a "different deal" is necessary, Freeman explained, because cancellation of an initial fuel contract "just doesn't happen" in the fuel industry. C. 5077; *accord* C. 5078-80. Instead, the only options are either for the purchaser to demand compliance with the initial contract, or to enter a new "contract that I'll do with you that will now give you those barrels to settle the original contract." C. 5078; *accord* C. 5099 (noting "another contract" to fund initial contract); C. 5154 (agreeing that book out involves payment on "side contract"). As Freeman explained, the "side contract has to happen first" when a transaction is booked, after which invoices for the book transfer issue. C. 5157.

The exhibits Marathon offered into evidence at the close of the hearing contained no examples of these second contracts. C. 2060-62; *see* C. 5158 (admitting that Freeman identified only "a contract, a deal sheet, invoices, and book transfer letters"); C. 3806-07 (same); C. 12907-21 (exhibits). Rather, the only contract offered into evidence was a matching buy/sell contract, C. 12907-12, which Freeman testified was not the contract creating a book transfer, but rather "the deal that starts a transaction and then after this comes the book-out," C. 5114; *accord* C. 5115-16 (describing matching buy/sell agreement as "original deal . . . that will eventually move into a book-out transaction"); C. 5146 (noting that matching buy/sell contract had different contract number from contract creating book transfer); C. 5150 (noting contract number for "stand-alone deal" used in book transfer). The other documents relating to the supposed book transfers were not contracts, but a physical deal sheet, which Freeman testified "would actually come out before the contract" for a book transfer, and is an "internal piece" that "gets routed around Marathon," C. 5138; a book-out letter, which Freeman testified was an "internal document inside of Marathon," C. 5145, used solely "to tell [accounting] what to do," C. 5147; and an invoice, which Freeman testified merely "link[ed] all these deals together," and was used to let the counterparty to a transaction know its "scheduler agreed to let you book this out," C. 5149.

III. Department Decision.

At the conclusion of the evidence, the Department issued a written decision, A21-A44, upholding the tax assessments and penalties against Marathon "in their entirety," A44. As the Department explained, Marathon's claim that "book transfers" of fuel did not involve any transfer of ownership was undermined by multiple standard dictionaries defining the term "book transfer" to involve "transferring ownership of a product," a "transfer of the legal right of ownership" or a "change in ownership." A26-A27. Similarly, the term “book out” is defined as “an agreement between two physical gas shippers to exchange legal title.” A27. And while some sources offered different definitions, the fact that “a range of sources do not share Marathon’s [definition] and because the meaning of the terms indicates that ownership or title to the item referenced in a ‘book transfer’ or ‘book out’ often transfers, it falls to Marathon to establish the exact nature of the transactions” at issue here. A28.

Turning to the evidence on that subject, the Department observed that Marathon’s expert witness had not even “looked at any Marathon documents. A29. As a result, his testimony “leaves open the issue of whether or not ownership might transfer between the parties when a commodity forward contract is settled for cash.” A30. While that left the testimony of Marathon’s fact witnesses that the transactions at issue did “not involve a transfer of ownership,” *id.*, Marathon bore “the burden of producing documentary evidence” to establish that the transactions on which a tax was assessed were not, in fact, taxable, A32 n.9. Despite bearing this burden, Marathon failed to corroborate that testimony with documentary evidence showing that those transactions did not involve any transfer of “either possession or ownership of the product” at issue. A30.

As a demonstrative example, the Department noted that, while Freeman testified about the process of settling “distressed” forward contracts, Marathon “did not attempt to quantify” how many distressed contracts were even included in the assessments at issue. A32-A32. In fact, Marathon did not offer even a single "representative sample" of such a distressed contract and a corresponding settlement. A32. As a result, the Department concluded, "Freeman's testimony is, at most, educational only" and thus "insufficient to establish as fact that Marathon settled 'distressed' forward contracts for cash during the audit period and how often Marathon did so." *Id.* Freeman's testimony regarding "indirect" forward contracts suffered the same deficiency, and thus "cannot establish as fact that the cash settlement of 'indirect' forward contracts actually occurred during the audit period." A33. His testimony regarding "direct" contracts was deficient for the same reasons. A34-A35.

In sum, the Department explained, Freeman's testimony regarding book out contracts had running through it a "common thread," which was that "there is a contract to buy or sell and a corresponding cash-settlement agreement." A37. But with the exception of one forward contract, Marathon produced no other examples of the contracts regarding which he had testified, nor any documentary evidence memorializing agreements to settle forward contracts for cash. *Id.* This evidentiary failure, the Department explained, made it "impossible" to determine whether settling forward contracts is subject to the fuel tax ordinance, since "it is well settled that a taxpayer or tax collector contesting the assessment cannot defeat the assessment by testimony alone but must corroborate its testimony by producing documentary evidence drawn from its books and records." *Id.* (collecting authority).

The Department rejected Marathon's remaining arguments for lack of evidence as well. A38. Starting with Marathon's claim that the distributors with which it had alleged book transfers did not conduct business activities in Cook County, the Department noted that one such distributor – Phillips 66 – had registered with the County and thus was a distributor in Cook County during the audit period. A39. As to the rest, Marathon failed to produce evidence that the other unregistered entities were not present in the County. *Id.* As for Marathon's claim that the fuel at issue was not for sale to retail consumers, it offered only one such contract, and Freeman testified that this contract involved fuel that was not yet ready for retail sale, not that it would never be sold at retail. A39-A40. Because Marathon did not demonstrate that this fuel would never be sold at retail, it failed to sustain its burden of proof on this contention. A41.

Regarding Marathon's claim that the assessments here taxed transactions occurring outside Cook County, the Department noted that Marathon does business in the County as a distributor and offered no evidence that other parties to its forward contracts were not also present and doing business in the County. A41. In fact, the Department again noted, Phillips 66 was present and doing business in the County, as indicated by its registration with the County. *Id.* Absent any evidence to support this argument, it failed as well. *Id.* Finally, Marathon's claim that applying the fuel tax to its settlements of forward contracts converted the tax into an illegal occupation tax failed because the fuel tax ordinance emphasizes that it is not an occupation tax and that the ultimate liability for payment of the tax falls on the consumer. A42. Moreover, collect-and-remit obligations such as that imposed by the County have been repeatedly upheld against claims that they impose occupation taxes. *Id.* That is true even when liability is imposed on a distributor for failing to collect and remit a tax. A43.

Finally, the Department rejected Marathon's challenges to the penalties included in the assessments. A43. Marathon's argument that no taxable fuel was involved or moved in Cook County failed for the same lack of evidence that defeated its arguments on the merits. A43-A44. And no authority supported relieving Marathon of penalties merely because no other taxing body had imposed a fuel tax on Marathon's forward contracts. A44.

IV. Administrative Review.

Marathon then petitioned the circuit court for administrative review, C. 23-42, and the court vacated the Department's decision in its entirety, with instructions to enter judgment in favor of Marathon, A45-A118. The County appealed, and the appellate court affirmed the Department's imposition of tax liability but reversed its imposition of penalties. A1-A18. As the court explained, Marathon's own expert admitted that a book transfer can involve the transfer of an intangible interest in ownership of fuel. A12.

And because the Code "broadly defines the sale of fuel," the transfer of an intangible ownership interest in fuel constitutes a sale triggering Marathon's obligation to collect and remit the fuel tax. A12-A13. The court reversed the imposition of penalties, however, concluding that the Illinois Administrative Code, as interpreted by this court, required forgiveness of a tax penalty when the "decision not to pay the taxes resulted from a reasonable interpretation of the law." A17-A18. This court granted Marathon's petition for review.

ARGUMENT

Under the Code, when a taxpayer challenges the assessment of a tax, that assessment makes out a *prima facie* case of taxability, Code § 34-64(b)(2), placing the burden on the taxpayer to overcome that case using its books and records, *id.* § 34-81(g)(1). Here, after evaluating the evidence presented, the Department concluded that Marathon failed to come forward with evidence from its books and records sufficient to rebut Revenue's *prima facie* case because it failed to produce even a single example of the contracts setting forth the terms of its supposed book-out agreements. A21-A44. Under the Administrative Review Law, this court will reverse the Department's factual conclusions only if they are against the manifest weight of the evidence. *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008). In conducting this analysis, the court will not reweigh evidence or substitute its judgment for that of the agency and may reverse only if a different factual conclusion is clearly evident, *id.*, such that "no trier of fact could have agreed with the agency," *In re Fatima A.*, 2015 IL App (1st) 133258, ¶58. An agency's conclusions of law are reviewed de novo, and its applications of law to fact for clear error. *Cinkus*, 228 Ill. 2d at 210-11. This court reviews the decision of the administrative agency itself, not the intervening judgment of the courts sitting in administrative review. *Wade v. City of N. Chicago Police Pension Bd.*, 226 Ill. 2d 485, 504 (2007).

Applying these standards here, this court should affirm the Department's judgment. To the extent that Marathon challenges Revenue's *prima facie* case of taxability, that issue is forfeited because Marathon failed to properly raise it before the Department or in its petition for leave to appeal. It is also meritless, as Marathon has mistakenly interjected a principle of Illinois statutory law into a tax proceeding governed by the Code, which does not contain any language permitting taxpayers to challenge the reasonableness of the Department's *prima facie* case. The only question, then, is whether Marathon rebutted Revenue's *prima facie* case, but Freeman admitted that book transfers involve two contracts, and as the Department observed, Marathon conspicuously failed to offer into evidence the contracts setting forth the terms of its supposed book transfers. Instead, Marathon offered only testimony *about* those supposed book transfers, but the Code makes clear that a taxpayer may not rebut a *prima facie* case of taxability with testimony, rather than books and records. Given Marathon's failure to substantiate its claims with documentary evidence in its sole possession, the

Department committed no error, clear or otherwise, in concluding that Marathon was liable for the full amount of the assessment here.

That failure of proof makes it unnecessary for this court to express an advisory opinion whether hypothetical, unproven book transfers are taxable under the plain language of the fuel tax ordinance, let alone whether taxing such hypothetical transactions would constitute an occupation tax or unlawful extraterritorial tax. But even assuming that a book transfer took place here, Marathon's own expert witness admitted that such a book transfer can involve the transfer of ownership of fuel, and the lack of any documentary evidence showing that no such transfer of ownership ever occurred makes it impossible for Marathon to show otherwise. That is enough to show a taxable sale under the Code, which triggers the obligation to collect the fuel tax upon the transfer of ownership of fuel even if possession has not transferred.

Finally, to the extent that the appellate court set aside the Department's assessment of penalties against Marathon, cross-relief reinstating those penalties is appropriate because that decision rested on serious legal error. The Code specifically incorporates the demanding criteria applied by the Internal Revenue Service when determining whether to relieve penalties for unpaid taxes. Those criteria require a showing of inability to pay or extreme hardship, but Marathon made no such showing here – indeed, it did not even attempt to make such a showing. In reaching a contrary conclusion, the appellate court mistakenly applied rules derived from Illinois law, rather than the federal rules incorporated by the Code. We address all these issues, in turn.

I. This Court Should Reject Marathon's Challenge To Revenue's *Prima Facie* Case.

While Marathon challenges whether Revenue made out a *prima facie* case that "taxable sales" of fuel occurred here, Marathon Br. 31-35, this court should reject that argument, for two reasons.[3] First, it is forfeited. During the administrative proceedings before the Department, Marathon never argued, in either its closing statements C. 3799-3822, or its post-hearing brief, C. 3190-3200, 3334-3358,[4] that Revenue's assessment did not establish a *prima facie* case of taxability because it was created using unreasonable methods or assumptions. To the contrary, Marathon expressly admitted during its closing argument, "There's absolutely no doubt that tax assessments are prime facie correct, and the burden rests with us, Marathon, to overcome the prima facie correctness of that assessment." C. 3810; *accord* C. 3335-36 (noting that "assessments are deemed prima facie true and correct" and arguing that Marathon "has overcome the Department's *prima*

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[3] Although the Code also requires, in relevant part, that the sale have been to an unregistered fuel distributor, Code § 74-472(c)(3), Marathon does not dispute the reasonableness of Revenue's methodology on that issue. Accordingly, it has forfeited that issue, *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶23, which we address no further in this response.

[4] For unknown reasons, Marathon's post-hearing brief is broken in half in the record, with several other documents appearing in the break.

facie case"). Reflecting this fact, the Department never addressed this issue, and instead focused solely on whether Marathon rebutted Revenue's *prima facie* case. *See* A61 (noting, on review, lack of any Department ruling on this issue). While Marathon later reversed course before the circuit court, where it challenged the reasonableness of the revised assessments, C. 10869, it is settled that "any issue that is not raised before the administrative agency . . . will be forfeited," *Bd. of Educ. v. Bd. of Educ.*, 231 Ill. 2d 184, 205 (2008).

Holding Marathon to the consequences of that forfeiture is particularly appropriate here, for two reasons. First, it would be fundamentally unfair to allow Marathon to now complain that Revenue failed to present evidence before the Department responding to a challenge to Revenue's establishment of a *prima facie* case, Marathon Br. 43-44, when Marathon not only never made that argument to the Department in the first place, but affirmatively admitted the assessments established a *prima facie* case, C. 3810.[5] Second, Marathon subsequently compounded its initial forfeiture by failing to challenge Revenue's *prima facie* case in its petition for leave to appeal. That petition raised a number of issues but never complained that Revenue's assessment did not establish a *prima facie* case of taxability, likely because such a fact-bound, threshold issue could not remotely warrant this court's review. That omission results in yet another forfeiture. *E.g.*, *People v.*

[5] Forfeiture would also avoid the analytical strangeness of evaluating for clear error a nonexistent ruling on an argument the Department was not on proper notice that it needed to address.

Whitfield, 228 Ill. 2d 502, 509 (2007).

Forfeiture aside, Marathon is mistaken in believing that it may challenge whether Revenue's revised assessment established a *prima facie* case to begin with. Marathon rests its challenge on the language of the Illinois Retailers Occupation Tax Act, 35 ILCS 120/1, et seq., and admits that its supposed authority to challenge the reasonableness of an assessment is derived from "'the intent of the legislature,'" Marathon Br. 32 (quoting *Grand Liquor Co. v. Dep't of Revenue*, 67 Ill. 2d 195, 201-02 (1977)), rather than an overarching common-law principle applicable to all taxation cases. But as the title of that Act alone should make clear, it applies only to proceedings concerning Illinois' retailers occupation tax, and has no application to the County fuel tax proceedings at issue here. To the contrary, the section of the Act on which Marathon relies specifies that "*the Department* shall examine such return and shall, if necessary, correct such return according to its best judgment and information," 35 ILCS 120/4 (emphasis added), with "Department" specifically defined as the Illinois Department of Revenue, 35 ILCS 120/1.[6] Reflecting this fact, the cases Marathon cites in support of its authority to challenge the reasonableness of Revenue's actions literally all involve assessments by the Illinois Department of Revenue governed by this

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[6] Even were there reason to believe the legislature intended to make the Act more broadly applicable, nothing in the Act expressly strips the County of its traditional home-rule authority to enact a conflicting ordinance regarding the conduct of its administrative tax proceedings. Absent such express language, the Act cannot be read to preempt the County's home-rule authority in this respect. *See* Ill. Const. 1970, art. VII, § 6(i).

language of the Act. *E.g.*, *Grand Liquor Co. v. Dep't of Revenue*, 67 Ill. 2d 195, 197 (1977); *Fillichio v. Dep't of Revenue*, 15 Ill. 2d 327, 336 (1958); *Goldfarb v. Dep't of Revenue*, 411 Ill. 573, 574-75 (1952); *Mel-Park Drugs, Inc. v. Dep't of Revenue*, 218 Ill. App. 3d 203, 207-08 (1991); *Masini v. Dep't of Revenue*, 60 Ill. App. 3d 11, 13-14 (1978). Those decisions are thus irrelevant here, where challenges to County tax assessments are governed not by Illinois law, but by the language of the Code.

Turning to the Code, it is clear that there was no legislative intent to allow preliminary challenges to the reasonableness of the methods and assumptions underlying a County tax assessment. Where Illinois law specifically requires an assessment by the Department of Revenue to rest on its "best judgment and information," 35 ILCS 120/4, thus indicating "that it was not the intent of the legislature to allow *any* document styled by the Department [of Revenue] as a 'corrected assessment' to be 'prima facie' evidence against the taxpayer," *Grand Liquor Co.*, 67 Ill. 2d at 202, the Code contains no such language. In fact, the Code is explicitly to the contrary: "*Any* tax determination and assessment, or amended tax determination and assessment, shall be deemed prima facie correct and the burden shall be on the person assessed to prove the contrary." Code § 34-64(b)(2) (emphasis added). This language makes clear the legislative intent to treat any County tax assessment as sufficient to establish a *prima facie* case, and place the burden squarely on the challenger to an assessment to show that it is incorrect. That language is binding on this court, which has no authority to depart from that language by adding requirements or qualifications nowhere expressed by the legislature. *Solich v. George & Anna Portes Cancer Prevention Ctr.*, 158 Ill. 2d 76, 83 (1994).

II. Marathon Failed To Rebut Revenue's *Prima Facie* Case.

Because the Department made out its *prima facie* case here by submitting the revised assessments, the burden shifted to Marathon to rebut that case. Under the Code, a taxpayer "shall keep accurate books and records of its beginning inventory, purchases, sales and ending inventory including original source documents and books of entry denoting the transactions that gave rise, or may have given rise, to any tax liability, exemption or deduction *or defense to liability*." Code § 74-477 (emphasis added); *accord id.* 34-63(b) (same). That is because a taxpayer seeking to challenge a tax assessment "shall have the burden of proving *with books, records and other documentary evidence* that [it] is incorrect." *Id.* § 34-81(g) (emphasis added). As a result, Marathon could rebut Revenue's *prima facie* case only through documentary evidence; mere testimony denying the accuracy of an assessment never suffices. *E.g.*, *Du Page Liquor Store, Inc. v. McKibbin*, 383 Ill. 276, 278-79 (1943); *Mel-Park Drugs*, 218 Ill. App. 3d at 217.

This fundamental principle of administrative review of tax assessments defeats Marathon's appeal. To the extent that Marathon claims that Revenue improperly required it to collect tax on book transfers, it failed to come forward with books and records showing that any book transfers took place – namely, the separate contracts setting forth the terms of those book transfers. Rather, Marathon came forward with documentation conclusively establishing that Marathon entered into contracts to sell fuel that triggered Marathon's legal obligation to collect and remit the fuel tax to the County. We address these issues in turn.

A. Marathon Offered No Documentary Evidence Of Any Book Transfers.

Because Marathon bore the burden of rebutting Revenue's *prima facie* case of liability using its books and records, the primary question in this appeal is whether the Department clearly erred in concluding that Marathon did not satisfy that burden. It did not. While Marathon identifies certain documents in the record that it says are "used in all Marathon book transfer transactions" via which forward contracts are settled, Marathon Br. 40, it conspicuously omits from that list what is by far the most important document: the *contract* setting forth the terms of the supposed book transfer. As Freeman testified before the Department, book transfers involve *two* contracts – the first, the initial forward contract setting forth the original sale agreement between the parties, and the second, "a separate transaction, a contract" settling that initial forward contract. C. 5074; *see*, *e.g.*, C. 5147 (referencing that "separate contract").[7] That second, written contract was

[7] The use of a second contract to effectuate a book transfer is not unique to Marathon – the Department decision in Marathon's appendix, authored by (continued…)

contemplated by the terms of the forward contracts themselves, which expressly specified that they "cannot be modified unless in writing." C. 12911. And it is beyond reasonable dispute that a book transfer would constitute a modification of the initial sale contract, given Marathon's admitted view below that a book transfer "cancels [a party's] obligations and rights with respect to the other parties." C. 299. But as the Department repeatedly observed, A32; A36, Marathon never introduced that second contract into evidence, and Marathon does not dispute this fact in its opening brief. Indeed, it does not even acknowledge that contract's existence, let alone explain why it should be treated as unnecessary to Marathon's case in rebuttal. That forfeits any argument to the contrary for purposes of this appeal. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶23.

The undisputed absence of that contract was fatal to Marathon's case in rebuttal. Again, the Code squarely placed on Marathon's shoulders the burden of affirmatively proving that it was not liable for any or all of the amount assessed, and specifically required that Marathon make this proof using the books and records of any transactions that gave rise to a defense against tax liability. Code § 34-81(g)(1). As a result, Marathon had to come forward with documentary evidence from its books and records demonstrating that its forward fuel contracts were later booked out and thus

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the same administrative law judge who entered the decision on review here, specifically notes that book transfers by BP also involve two contracts. A134.

ultimately resulted in no transfer of ownership or possession of fuel triggering Marathon's obligation to collect and remit the fuel tax. But despite admitting via Freeman's testimony that book transfers involve a separate contract, *e.g.*, C. 5081, 5099-5100, and offering up initial contracts specifically stating that they could be modified only in writing, C. 12911, Marathon never presented an example of that separate contract in the administrative hearing before the Department.[8] Absent that contract, which is the only document containing the governing terms of Marathon's supposed book transfers, Marathon could not possibly carry its burden to rebut Revenue's *prima facie* case with its books and records. As a result, the Department did not err at all, much less clearly err, when it concluded that Marathon failed to carry that burden here.

The fact that Marathon presented *other* evidence on the subject simply does not suffice. Again, the Code makes clear that the only evidence admissible to rebut Revenue's prima facie case had to come from Marathon's books and records, Code § 34-81(g)(1), but the only such records Marathon cites on appeal with any possible bearing on the existence and terms of its

[8] It is no help to Marathon that Illinois law allows oral modifications of contracts that require modifications to be in writing, *Estate of Kern v. Handelsman*, 115 Ill. App. 3d 789, 794 (1983), since an oral agreement does not constitute a written record necessary to defeat a prima facie case of taxability. That Marathon was permitted to orally alter its sale contracts does not mean that it was also permitted to substitute an oral contract for the written books and records required by County ordinance. Put another way, an oral contract would be legally valid as between the parties to that contract, but not competent evidence in a proceeding before the Department.

supposed book transfers are "a physical deal sheet, a book out or book transfer letter and corresponding invoices." Marathon Br. 5. That effectively admits that Marathon failed to carry its burden of rebuttal here, since those barebones documents say nothing about whether Marathon's supposed agreement to settle its forward contracts resulted in there being no transfer of ownership of fuel. C. 12914-15, 12917, 12919. This court has long held that the mere "introduction of nondescript sheets" of information does not suffice to overcome a *prima facie* case of tax liability, *Du Page Liquor*, 383 Ill. at 279.

Nor could Marathon have offered those documents as circumstantial evidence of that contract's terms, as the Department recognized below. A36 n.10. Under the best-evidence rule, with narrow exceptions inapplicable here, "[t]o prove the content of a writing . . . the original writing . . . is required." Ill. R. Evid. 1002. That rule applies with special force when, as here, the substantive law requires a litigant's proof to come from its books and records. *See* Mueller & Kirkpatrick, EVIDENCE 1081 (3d ed. 2003) (explaining that best-evidence rule is triggered "where the substantive law makes the content of a writing . . . controlling on a particular issue").[9] Otherwise, a taxpayer could effectively circumvent its burden of proof before

[9] While the Department is not bound by the "technical" rules governing the manner in which to offer material into evidence, Code § 34-81(c), this court has long recognized that such language does not "abrogate the fundamental rules of evidence," *Grand Liquor*, 67 Ill. 2d at 199. The best-evidence rule is no mere technical rule, but a fundamental, substantive requirement designed to prevent fraud, applicable whenever a party seeks to prove the content of a written document.

the Department by either failing to maintain, or outright withholding, the most probative document plainly setting forth the terms of a transaction, in favor of other records or testimony that it believes contain some ambiguity or misstatement that it might exploit in its favor.

Marathon's remaining evidence fares no better. To the extent that Marathon offered lay witness testimony that its forward transactions were booked out, that testimony did not suffice because the Code specifically required Marathon's rebuttal evidence to come from its books and records, Code § 34-81(g)(1), and because the best-evidence rule prohibited Marathon from substituting testimony for the books and records the Code required it to keep. And even setting that problem aside, the evidence Marathon emphasizes was far from sufficient to show clear error. For example, Marathon makes much of Steiner's testimony "that each of the disputed transactions identified in the revised Assessment and set forth on the ISR were book transfers," Marathon Br. 38-39, but Steiner rested this conclusion not on any books and records to that effect, or even his personal knowledge of the terms of the transaction, but on the mere fact that the documents contained the phrase "book transfer," C. 12684. In other words, Steiner assumed that, because some unknown person added the phrase "book transfer" to Marathon's records, a book transfer must have in fact taken place. This court has long rejected such assumptions as unreasonable, *see Grand Liquor*, 67 Ill. 2d at 202, so Steiner's bare assumption here cannot possibly suffice to undermine the Department's *prima facie* case, let alone with the evidentiary force necessary to establish clear error.

The testimony of Marathon's expert witness Dr. Arburn was even more unhelpful. That testimony not only ran afoul of both the Code's books-and-records requirements and the best-evidence rule, but was also simply beside the point because it expressly rested on Dr. Arburn's assumption that a book transfer had taken place, and sought only to explain how such a hypothetical transfer might function. C. 12410-11. Indeed, all Dr. Arburn could do was rest on that assumption because he looked at neither the contracts themselves, C. 12431, nor any other documents related to this case, C. 12432. Reflecting that fact, when Dr. Arburn was asked how he could know that contracts he never examined were, in fact, "for book-outs," Marathon *objected* on the ground that his testimony was not offered to speak to "specific contracts," but to "the concept [of book transfers] in general." C. 12434. Because Dr. Arburn could not say whether Marathon had ever booked out even a single transaction, let alone literally every transaction at issue here, his testimony did nothing to rebut Revenue's *prima facie* case, even had it properly been considered for that purpose.

Marathon's remaining arguments to the contrary, Marathon Br. 35-43, fare no better. Marathon makes much of the fact it provided "contracts, correspondence, data files, and invoices" during the Department hearing, *id.* at 38; *accord id.* at 42-43 (characterizing records as "voluminous"), but, again, those records do not contain the contract between the parties setting forth the terms of the book transfer. In insisting to the contrary, Marathon repeatedly misrepresents the record. While Marathon claims that the parties to a forward contract effect a book transfer "through the execution of a Book Out letter," *id.* at 39 (citing C. 12917) – implying that such a letter constitutes the necessary contractual agreement to create a book transfer – Freeman made clear that such a letter is not a contract but an "internal document inside of Marathon," C. 5145, used solely "to tell [accounting] what to do," C. 5147. Next, Marathon claims that Freeman testified that the documents it put into evidence "were representative of *all* documents used in *all* Marathon book transfer transactions," Marathon Br. 40 (emphases added), but that is not what Freeman said. Rather, he said only the documents were "representative of what Marathon uses," C. 12550, while repeatedly making clear that book transfers involve a second contract, *e.g.*, C. 5081, 5099-5100, that never made its way into the evidence before the Department.

That testimony also exposes as a red herring Marathon's lengthy complaint that it should have been allowed to rest on representative documents. Marathon Br. 40-42. The problem here was not that the Department did not *allow* Marathon to rely on representative documents; to the contrary, the Department made clear that its concern was that Marathon "did not *seek* to introduce [even] a representative sample" of the contracts setting forth the terms of its book transfers. A33 (emphasis added). Absent even a representative sample of those contracts, the documents on which Marathon relied were materially incomplete vis-à-vis the specific transaction they involved, and thus could not satisfy its burden of proof as to any of the transactions at issue here.[10] Marathon's invocation of the Administrative Procedure Act, Marathon Br. 41, is no more helpful, since it applies only to state agencies, 5 ILCS 100/1-20, which the Department decidedly is not.

The arguments in rebuttal that Marathon improperly offers as challenges to Revenue's *prima facie* case, Marathon Br. 31-34, can also be disposed of in short order. While Marathon complains that Revenue misunderstood the term "Book Transfer" in Marathon's internal summary reports, *id.* at 33, that argument presumes that Marathon showed, using its books and records, that such a book transfer occurred to begin with. But Marathon made no such showing, having omitted the second contracts Freeman admitted were necessary to effect a book transfer. *E.g.*, C. 5081, 5099-5100. The fact that Marathon offered self-serving testimony about what the term "Book Transfer" supposedly meant, Marathon Br. 33, does not suffice in rebuttal, which the Code requires be made out by books and records, Code § 34-81(g)(1).

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[10] Regardless, even assuming the Department meant to forbid Marathon to rely on a representative document, that was permissible under the best-evidence rule, which specifically allows a court to require that the original documents be produced in court. Ill. R. Evid. 1006. To whatever extent that the predating Illinois decisions on which Marathon relies might be inconsistent with this rule, they were superseded by the enactment of the Illinois rules of evidence. *People v. Smith*, 2022 IL 127946, ¶57.

Marathon also complains that Revenue misunderstood the internal summary reports' listing of Chicago as an origin and destination, Marathon Br. 33-34; and "misinterpreted the term 'Generic Chicago Pipeline. F.O.B. Chicago, IL,'" *id.* at 35, but identifies no books and records establishing that those terms were used in a nonconventional sense.[11] And while Marathon complains that it had to record book transfers in the manner it did because of deficiencies in its internal accounting system, *id.* at 34, that at most shows that Marathon intentionally failed to keep accurate books and records as required by the Code, Code § 74-477, by inputting inaccurate information to circumvent the limitations of an aging accounting system. But that only *undermines* Marathon's case in rebuttal, by calling into question the accuracy of all the documents it offered into evidence, and certainly does not show that the Department committed clear error here.

Perhaps recognizing its failure to rebut Revenue's *prima facie* case, Marathon asks to be relieved of this burden. According to Marathon, because it was being asked to offer "proof of a negative" in rebutting Revenue's *prima facie* case, it should not be forced to provide "conclusive proof," but rather should be deemed to have satisfied that burden even through "vague" evidence. Marathon Br. 38 (citing *Prentice v. Crane*, 234 Ill. 302, 311 (1908)). This reliance on *Prentice* is wholly misplaced. Most obviously, *Prentice*

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[11] And as we explain in more detail, *infra* Part III-B, Marathon's preferred interpretation of this language had to be rejected under rudimentary principles of Illinois contract law.

involved a claim of fraudulent inducement to execute a deed, 234 Ill. at 307, so it cannot be fairly read to say anything about the proof required to rebut a *prima facie* case of taxability, particularly when this court has long held that "nondescript" documentary evidence will not suffice for that purpose, *Du Page Liquor*, 383 Ill. at 279. The decisions in *Conxall Corp. v. iCONN Systems, LLC*, 2016 IL App (1st) 140158, and *Baer v. De Berry*, 31 Ill. App. 2d 86 (1961), are even farther afield. *Conxall* involved trade secrets, while *Baer* involved death benefits, and neither involved rebuttal of a *prima facie* case. Moreover, Marathon's argument is directed at a strawman; neither the Department nor Revenue ever demanded that Marathon provide "conclusive" evidence in the first place, only documentary evidence of the contract setting forth the terms of a transaction that supposedly show the lack of a sale and thus defeat the imposition of the County's fuel tax. *See* A33 (noting lack of even "representative" evidence of book transfer contracts). That is no onerous burden, by any stretch, particularly when the Code expressly imposed on Marathon an affirmative duty to maintain accurate books and records regarding its tax liabilities. Code § 74-477.

Finally, unable to get around its burden of rebuttal, Marathon offers up the Department's subsequent decision in *County of Cook (Dep't of Revenue) v. BP Prods. North America, Inc.*, as evidence that book transfers are not taxable, Marathon Br. 20-21. But the Department noted in *BP* that the taxpayer had come forward with "two contracts" to demonstrate the existence of a book transfer, one of which used the term "book transfer" and "expressly provided that the contracts could be fulfilled by monetary payment." A134. Given that Marathon conspicuously declined to come forward with such evidence, as the very same administrative judge who decided *BP* noted below, A30, the decision in *BP* only highlights Marathon's failure of proof here. Marathon's reliance on the circuit court's decision below, Marathon Br. 21, is no more helpful since a cornerstone of that decision was the circuit court's belief that Marathon had no obligation to present on rebuttal any evidence of a contract creating a book transfer, A85. But that conclusion rested on the circuit court's erroneous belief that Marathon could make out its rebuttal with "vague" evidence, A75, when this court has long held to the contrary, *Du Page Liquor*, 383 Ill. at 279.

In sum, Marathon failed to offer any documentary evidence rebutting Revenue's *prima facie* case by showing that Marathon's forward contracts were, in fact, booked out, let alone enough evidence to give this court a firm and definite conviction to the contrary. And because Marathon failed to rebut Revenue's *prima facie* case with documentary evidence showing the existence of book transfers, it was unnecessary for Revenue to rebut Marathon's evidence. *See* Marathon Br. 43-44.

B. Marathon's "Rebuttal" Evidence Demonstrated Transfers Of Ownership Triggering The Code's Collection Requirement.

Having failed to come forward in rebuttal with books and records showing that any of the transactions at issue here were, in fact, book transfers, Marathon can prevail here only if the books and records it *did* produce demonstrated that its transactions did not constitute sales triggering Marathon's obligation to collect and remit the fuel tax.[12]

They did not. To the contrary, the books and records Marathon offered into evidence made clear that such a sale had, in fact, taken place. As noted above, the only document purporting to identify the actual *terms* of the transactions at issue here is the "matching buy/sell" agreement, C. 12908-12, which Freeman admitted was entered with an intention to actually "sell and purchase physical barrels . . . of gasoline or diesel," C. 5106. And that intent is reflected by the language of that contract. Marathon candidly admits that its matching buy/sell contracts were forward contracts, Marathon Br. 8, which is confirmed by the contractual language agreeing that the parties were acting as "Forward Trading Merchants" for purposes of the federal bankruptcy code. C. 12910.[13] The bankruptcy code defines a "forward contract merchant" as "an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity,"

[12] While the Code also requires, in relevant part, that a sale have been to an unregistered distributor of fuel, Marathon does not argue that it rebutted Revenue's conclusion that the counterparties to the fuel transactions at issue here were unregistered distributors. The failure to address an issue in an opening brief forfeits it for purposes of appeal, *BAC Home Loans*, 2014 IL 116311, ¶23, so we address that issue no further in this response.

[13] This designation is extremely significant under the Bankruptcy Code, which prevents the avoidance of settlements of forward contracts via bankruptcy. 11 U.S.C. § 546(e).

11 U.S.C.S. § 101(26), and a "forward contract" as "a contract . . . for the purchase, sale, or transfer of a commodity . . . with a maturity date more than two days after the date the contract is entered into," *id.* § 101(25)(A). Bankruptcy is governed exclusively by federal law, *e.g.*, *In re Gruntz*, 202 F.3d 1074, 1080 (9th Cir. 2000) (en banc), and it is well settled as a matter of federal law that a forward contract is an agreement under which a commodity "is *presently sold* but its delivery is, by agreement, delayed or deferred," *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 318 (6th Cir. 1998) (emphasis added); *accord CFTC v. Zelener*, 387 F.3d 624, 626 n.2 (7th Cir. 2004) (same); *Grain Land Coop v. Kar Kim Farms*, 199 F.3d 983, 990 n.5 (8th Cir. 1999) (same); *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970 (4th Cir. 1993) (same).[14] Thus, the terms of the contract here indicate that there was an immediate transfer of ownership of fuel, even though the contract contemplated future physical delivery of that fuel.

That transfer of ownership – what Marathon unhelpfully refers to as an "intangible right" – is all that was necessary to effect a sale of fuel triggering Marathon's obligation to collect and remit the fuel tax to the County. The definition of a "sale" under the Code is extraordinarily broad and reaches "any transfer of ownership or possession or both, exchange or

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[14] Although the cases often use the term "cash forward contract," that term is used interchangeably with "forward contract." *E.g.*, *Williams v. Morgan Stanley Capital Group*, 294 F.3d 737, 741 (5th Cir. 2002); *Dzurka Bros., LLC v. Luckey Farmers, Inc.*, No. 1:23-cv-11038, 2024 U.S. Dist. LEXIS 12710, at *18 (E.D. Mich. Jan. 24, 2024).

barter, conditional or otherwise, in any manner or by any means whatsoever. In every case where gasoline [or] diesel fuel . . . are exchanged, given or otherwise disposed of, it shall be deemed to have been sold." Code § 74-471. By entering into a forward contract making a present transfer of ownership of fuel, Marathon effected a sale of that fuel under this broad language. And the occurrence of a "sale" of fuel is all that is necessary to trigger Marathon's obligation to collect and remit the fuel tax here. Code § 74-472(c).

Indeed, even absent the contractual language making clear that the matching/buy sell agreement was to be construed as a forward contract effecting an immediate transfer of ownership of fuel, there would still have been a sale of fuel under the Code. The forward contract specifically stated, in the section regarding delivery, "F.O.B. Chicago, IL," C. 12909, and "F.O.B" is an acronym for "Free On Board," a legal term used to indicate that formal title to a good will transfer to the purchaser upon its arrival in the geographic location specified, *e.g.*, *Commonwealth v. Gilmour Mfg. Co.*, 822 A.2d 676, 678 n.2 (Pa. 2003). Even assuming that this language meant to say that title to the fuel would not transfer immediately, as it normally would under a forward contract, but rather that transfer of title was conditioned upon its physical arrival in Chicago, that would still suffice because the Code expressly defines the "conditional" transfer of ownership to constitute a "sale" triggering a distributor's obligation to collect fuel. Code § 74-471.

While Marathon argues at great length that the mere transfer of ownership of fuel does not suffice to trigger its obligation to collect and remit the fuel tax, Marathon Br. 13-19, those arguments are easily disposed of. Marathon begins by arguing that the fuel tax is imposed only on the retail sale of fuel, and that a retail sale cannot occur without a physical transfer of possession of fuel, *id.* at 13-16. This argument fundamentally misunderstands how the fuel tax functions. While the Code *imposes* the fuel tax on the retail sale of fuel to the ultimate purchaser at retail, Code § 74-472(a), the question here concerns the preceding obligation of distributors and retailers to serve as the County's agents for the *advance collection* of that tax, *see*, *e.g.*, *S. Bloom, Inc. v. Korshak,* 52 Ill. 2d 56, 62-63 (1972) (explaining agency nature of collect-and-remit regimes). That collection obligation is triggered not by a "retail sale," as Marathon believes, but *any* time a distributor "sells" fuel, Code § 74-472(c), and the plain language of the Code broadly defines a "sale" as "any transfer of ownership or possession or both," whether conditional or otherwise, *id.* § 74-471. Again, it was not clear error for the Department to conclude, from the plain language of the forward contract Marathon admitted into the record as representative of all the transactions at issue here, that a transfer of ownership occurred.

Trying to get around the Code's plain language, Marathon claims that "Illinois case authority establishes that the minimum elements of 'ownership' are control and possession," Marathon Br. 22. This argument goes nowhere. The question here is not about general principles of Illinois law but about the specific meaning of the Code, and it is well settled that interpretation of a legislative enactment must begin with the language of that enactment itself, to determine the true intention of the enacting legislature. *W. Nat'l Bank v. Kildeer*, 19 Ill. 2d 342, 350 (1960). And as already explained, the plain language of the Code makes clear that the County intended the term "sale" to have the broadest conceivable definition, by making clear that the fuel tax must be collected and remitted whenever there has been "any transfer of ownership *or* possession *or* both" of fuel. Code § 74-471 (emphases added). This language clearly contemplated that there would be sales involving *only* a transfer of possession, sales involving *only* a transfer of ownership, and sales involving *both*. But Marathon's proposed interpretation would transform that broad phrase into a narrow one reading that a sale occurs when there is a "transfer of control and possession or possession or both." Such an interpretation, aside from being incoherent, would render literally the entire definition of "sale" other than the word "possession" superfluous, since no sale could ever occur absent a transfer of possession. That dooms Marathon's interpretation, as no legislative enactment should ever be interpreted in a manner that would render any of its language redundant or superfluous. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 2012 IL 111286, ¶29.

None of the cases Marathon cites on this point is to the contrary. None interpreted the language of the Code at issue here, or even any materially similar language from other legislative enactments, and none addressed the ownership of fuel, of a commodity, or even of personal property. Rather, they addressed the unique legal questions that arise when determining ownership of real property. *See People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 489 (1979) (explaining difference between "title" to land and "ownership" of land); *Chicago Patrolmen's Ass'n v. Dep't of Revenue*, 171 Ill. 2d 263, 273 (1996) (noting that ownership of land is not determined by "title" but by "realistic approach to ownership"); *Dep't of Transp. v. Anderson*, 384 Ill. App. 3d 309, 312 (2008) (discussing "common law" of ownership of land); *Lombard Pub. Facilities Corp. v. Dep't of Revenue*, 378 Ill. App. 3d 921, 931 (2008) (interpreting applicability of statute concerning acquisition of "ownership of or title to tangible personal property for a valuable consideration" to convention center); *Fidelity Fed. Savings & Loan Ass'n v. Grieme*, 112 Ill. App. 3d 1014, 1018-19 (1983) (discussing "change of ownership" of land in context of mortgage agreement). Those decisions are thus inapposite and certainly do not compel the strained reading of the Code Marathon advances.

Finding the Code's plain language and its cases unavailing, Marathon falls back on the Code's general structure. Marathon Br. 16-19. But nothing in the structure of a legislative enactment ever allows a court to disregard its plain language, *W. Nat'l Bank*, 19 Ill. 2d at 350, so this argument stumbles immediately out of the gate. Even considered on its own terms, though, Marathon's argument only evinces a fundamental misunderstanding of how the Code is designed to function. For example, Marathon continues to make much of the fact that the fuel tax is imposed only on consumers, Marathon Br. 16, but that misses the point entirely. While the tax is ultimately *imposed* on consumers at the time of a retail sale, it is *collected and remitted* in advance of that retail sale when distributors sell fuel to retail dealers and unregistered distributors, who are then reimbursed when they sell the fuel to either a retailer or the ultimate consumer. If anything, the structure of the Code makes clear that the County intended the collection and remittance of the fuel tax to occur regardless of whether a retail sale has yet occurred. If a retail dealer of fuel receives fuel "upon which no tax has been collected by the distributor or supplier," it "shall collect such tax and remit it directly to the Department within 30 days of the receipt of such gasoline or diesel fuel." Code § 74-472(f). That provision would be a nullity if, as Marathon believes, a retail sale of fuel to a consumer is necessary. A retail sale is defined as the sale of "fuel in the County to a purchaser for use or consumption and not for resale in any form," *id.* § 74-471, and no retail dealer could ever come into possession of fuel that was already used or consumed.

Marathon next identifies two provisions of the Code that it believes contemplate that a sale occurs only upon the transfer of possession, Marathon Br. 17, but it misrepresents the former and misunderstands the latter. While Marathon claims that the Code "requires collection of the Motor Fuel Tax from purchaser of "fuel in the *possession* of distributors or retail dealers," *id.* (citing Code § 74-472(c)), this is a flagrant misrepresentation of a sentence fragment taken entirely out of context. What this section of the Code actually says is:

> *Except* as provisions are made in this Article for the collection of the tax levied in this Article upon the sale of gasoline, diesel fuel, biodiesel fuel and gdiesal [sic] fuel *in the possession of distributors or retail dealers on the effective date of the ordinance* from which this Article is derived, the tax levied in this Article shall be collected by each distributor or supplier who sells gasoline . . . .

Code § 74-472(c) (emphases added). Far from requiring collection of tax on fuel in possession of distributors and retailers, this provision merely notes that special procedures might have been necessary to collect fuel tax on fuel already in the possession of distributors and retail dealers when the Code was enacted. And that was a problem only because the Code contemplated that the tax would normally be collected earlier, when fuel was sold to those distributors and retail dealers.

Marathon also notes that retail dealers who "receive" fuel need not personally remit to the County unpaid amounts of fuel tax until 30 days after "receipt." Marathon Br. 17 (citing Code § 74-472(f)). Marathon simply misunderstands this language. Under the Code, the *initial* responsibility to collect and remit the tax rests with the distributor selling fuel to a retail dealer, Code § 74-472(c), and is triggered by a transfer of "ownership or possession or both," *id.* § 74-471. The language Marathon cites only explains when the distributor's initial responsibility to remit the fuel tax to the County *shifts* to the retail dealer and makes clear that this responsibility does not shift until the retailer has actually received the fuel at issue. *Id.* § 74-472(f). These provisions are entirely consistent with each other.

Moreover, while the wisdom of a law should be irrelevant when, as here, its language is clear, delaying the shift of responsibility until physical receipt has occurred also makes eminent practical sense. As Marathon's own expert witness explained, it is quite common for contracts to specify a future delivery date. C.5019 While delivery is pending, sellers might learn that they are unable to fulfill their contractual obligations, or purchasers might realize that their fuel needs have changed due to unforeseen circumstances. *See*, *e.g.*, C. 5101. There is also the possibility that fuel will simply be lost or destroyed in transit between the distributor and the retail dealer. Given those possibilities, it made eminent sense for the County to defer the shift in remittance responsibility from distributor to retailer to the moment when the retailer knows with absolute certitude that it has in its physical possession fuel that it can sell to a consumer to recoup the fuel tax being remitted to the County. At the same time, it avoids inadvertent over-remittance by retailers, who might have been sold one amount of fuel by the noncompliant distributor, only to receive an entirely different amount of fuel weeks or months later. Rather than forcing those retailers to claw back from the County an inadvertent tax overpayment, the County made them responsible only for remitting the tax that went unpaid on fuel actually received.

Marathon next complains that honoring the Code's definition of sale to apply to transfers of only ownership "effectively reads the 'retail sale' requirement out" of the Code, Marathon Br. 17-18. This argument only further evinces Marathon's fundamental misunderstanding of the Code. As the Department explained below, the Code's advance collection-and-remittance system is built around a rebuttable presumption that every transfer of ownership or possession of fuel from a distributor to another distributor or retailer will eventually lead to the retail sale of fuel of that fuel in the County. A23 n.4; *accord* ILCOC Br. 7 (noting this presumption). That makes eminent sense – since a retailer is defined as a person who is selling fuel to consumers in the County, Code § 74-471, and a distributor as a person who either produces fuel in, or has it transported into, the County, *id.*, it is reasonable to presume that such persons acquiring ownership of fuel intend to ultimately acquire possession of that fuel as well.

The forward contract in the record here further demonstrates the reasonableness of that presumption. While that contract effected only a present transfer of ownership of fuel, the terms of that contract contain a delivery section that clearly contemplated the ultimate delivery of that fuel at a particular place and time. C. 12909. Indeed, the contemplation of "actual delivery" of a commodity is what legally differentiates forward contracts from futures contracts, *Lachmund v. ADM Investor Servs.*, 191 F.3d 777, 787 (7th Cir. 1999), which are price-speculation securities typically ambivalent to the underlying commodity's actual delivery, and thus must be traded on futures exchanges, *Nagel v. ADM Investor Servs.*, 217 F.3d 436, 440 (7th Cir. 2000).[15]

Properly understood, the presumption that transfers of fuel will ultimately lead to consumption of that fuel eliminates any supposed tension Marathon claims here. While distributors must collect and remit the fuel tax whenever they transfer ownership of fuel, they can rebut an assessment seeking to hold them liable for failing to do so by demonstrating, via their books and records, that the fuel was never ultimately sold to a consumer – for example, by showing that the distributor's truck delivering that fuel overturned en route. There is thus no inconsistency between the Code's definition of sale and its imposition of the tax on the ultimate consumer and certainly no serious inconsistency that could possibly justify disregarding the plain language of the Code's definition of "sale."

Finally, Marathon claims that treating a transfer of ownership as a sale "renders the [Code's] registration clause meaningless." Marathon Br. 19. Marathon rests this argument on its belief that the "distributors with whom [it] dealt" were not required to register with the County because they "were not doing business in the County with respect to the transactions at issue" here, *id.* at 18-19, if those transactions effected only a transfer of ownership rather than physical possession. This completely misunderstands how registration works. A person's obligation to register is not determined on a

[15] This fundamental distinction between forward contracts and futures disposes of the misinformed notion, raised in Marathon's petition for leave to appeal but since abandoned, that a ruling in this case will somehow affect the trade in futures on exchanges.

transaction-by-transaction basis, as Marathon believes, but rather on a person-by-person basis, with the operative question being whether that person performs certain activities, such as producing fuel or transporting fuel, in the County. Code § 74-474(a). And because it is unlawful to "engage in the business" of a distributor prior to obtaining a registration certificate, *id.* § 74-474(c), Marathon's interpretation of the Code would transform its unremarkable requirement, that *distributors* must register a single time with the County before engaging in their distribution business, into an absurd, unworkable requirement that every *individual transaction* – which could number in the hundreds of thousands for massive distributors like Marathon – must be individually registered in advance. Such an absurd reading of the Code, like all absurd readings of legislation, must be rejected. *Dawkins v. Fitness Int'l, LLC*, 2022 IL 127561, ¶27.

The testimony Marathon cites, Marathon Br. 18, is not to the contrary. Even setting aside that testimony of a witness can never alter the plain meaning of a legislative enactment, the testimony Marathon cites only states the obvious: that a person who engages in no activity requiring registration as a distributor need not register as a distributor. C. 2772. But Marathon identifies no evidence that even a single person with whom it entered its forward contracts performed no activity in the County qualifying it as a distributor under the Code, let alone evidence that literally every one of them performed no such activity in the County. Nor could it, since it is undisputed that one of those distributors, Phillips 66, subsequently registered with the County as a distributor during the audit period. A39. Rather, all Marathon can say is that the mere transfer of ownership of fuel does not suffice, standing alone, to qualify an individual as a distributor, but saying that a *particular transaction* does not suffice is a far cry from saying that the person engages in *no other activities* that qualify it as a distributor.

In sum, the plain language of the Code makes clear that a distributor's transfer of ownership of fuel to an unregistered distributor constitutes a sale requiring collection and remission of the fuel tax. Because Marathon's books and records show that such a sale took place here and show nothing that might somehow excuse Marathon from its legal obligation to collect the fuel tax, Marathon was obligated to collect and remit the fuel tax to the County at the time of that sale. The Department thus did not clearly err in holding Marathon liable for its failure to do so, and its decision should be affirmed.[16]

C. Even Assuming Book Transfers Occurred Here, Marathon Failed To Prove They Involved No Sales.

While Marathon's failure of proof is enough, standing alone, to warrant affirmance, this court would still have to affirm even had Marathon shown that literally every transaction here involved a book transfer. That is because Marathon admitted below that there are multiple forms of book

[16] Resolution of this case on the ground that Marathon made a simple failure of proof makes it unnecessary to consider the arguments of Marathon's various amici, who all proceed on the mistaken assumption that Marathon proved that its forward contracts were ultimately booked out.

transfer, C. 5085; *accord* Marathon Br. 4 (noting varying circumstances of book transfers), but failed to show that all of the supposed book transfers here were a form of book transfer that does not involve a sale of fuel as broadly defined under the Code. Again, the Code defines a "sale" as any transfer of ownership or possession or both, Code § 74-471, and Marathon's own expert admitted that book transfers can at least in some instances involve the transfer of ownership of fuel, C. 5023.

This was confirmed by Freeman, who testified that one particular kind of book transfer called a "direct book out" takes place when two persons learn that they have unwittingly entered into two contracts to sell fuel, but in opposite roles – namely, the purchaser in Contract A is the seller in contract B, and the seller in contract A is the purchaser in Contract B. C. 5086-87. It is undisputable that those initial contracts would both constitute "sales" under the Code because they involve, depending on their terms, either the immediate or conditional transfer of ownership of fuel. But rather than go through the unnecessary expense of physically shipping materially identical fuel to one another, the parties settle their contracts by agreeing that their respective obligations to deliver fuel under one contract were satisfied by the other. C. 5087-88.

That agreement, too, would result in a "sale" under the Code, because it would still result in the transfer of ownership of fuel from one party to the other. Under the original contracts, the purchaser in Contract A would have a contractual ownership right to the particular gallons of fuel it purchased under that contract that are still in the possession of the seller in Contract A, while the purchaser in Contract B would have a contractual ownership right to the particular gallons of fuel it purchased under that contract that are still in the possession of the seller in Contract B. And as Freeman emphasized below, those contractual obligations cannot be canceled in the fuel industry. C. 5077; *accord* C. 5078-80. With the parties unable to cancel their obligations to one another, the only way for the book transfer to occur and the transactions to settle was for each party to transfer to the other whatever ownership right it has in the fuel in the other party's possession. Otherwise, neither purchaser would have the right to actually dispose of the fuel in its possession because that fuel would still be owned by the seller, who could sue for anticipatory breach of contract if it learned that the purchaser intended to dispose of that fuel. In short, a transfer of ownership of fuel is necessary for a direct book transfer to have its desired effect, because ownership was necessary to enable the purchaser to convey that fuel to others. *See Anderson*, 384 Ill. App. 3d at 312 (noting that "ownership" generally encompasses the "right to convey" property to others). And that transfer of ownership constitutes a sale under the Code, which broadly defines as a sale any transfer of ownership or any other method of disposing of fuel.

This simple fact doomed Marathon's case, for essentially the same evidentiary failings noted above. Even assuming that there are forms of book transfers – perhaps in circumstances similar to a "distressed" transfer, C. 5101-02, except that the seller is neither able to fulfill its contractual obligations nor to purchase offsetting fuel to satisfy those obligations, and thus must find alternative means to settle – that might not constitute a sale because no exchange of ownership or possession took place, Marathon failed to come forward with contracts that would establish that even a single instance of such a transfer took place. Rather, Marathon offered evidence showing at most that *some form* of book transfer took place – for example, documents generically mentioning a book transfer, without further details, C. 12917, 12919 – but never provided evidence showing *which form* of book transfer took place. Absent such evidence, Marathon can only speculate that all of the transactions at issue here involved a form of book transfer not involving a transfer of ownership of fuel. And mere speculation cannot satisfy a litigant's burden of rebuttal, or any other burden of proof, for that matter, because "speculation is speculation whatever the burden." *People v. Davis*, 2019 IL App (1st) 181492, ¶25.

In arguing to the contrary, Marathon declares that its witnesses' testimony established that book transfers are a mere "financial transaction" or "accounting exercise," Marathon Br. 36-37; *accord id.* at 38 (claiming witnesses "confirmed financial nature" of transactions), but such testimony does not suffice, for a host of reasons. Again, mere testimony cannot satisfy a taxpayer's burden to prove its rebuttal by books and records. Code § 34-

81(g)(1). In addition, this testimony is little more than an attempt to use testimony in place of the contracts that Freeman admits exist, but Marathon never offered into evidence, and is thus expressly forbidden by the best-evidence rule. Worse still, this testimony purported to explain the meaning of those never-produced contracts, but the meaning of a contract is a question of law for a court to determine, *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). It is well settled that witnesses may not offer legal conclusions. *E.g.*, *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (2009).

III. Marathon's Constitutional Arguments Are Misplaced.

Unable to dispute that it failed to comply with the plain language of the Code, Marathon argues that it would be unconstitutional to apply the fuel tax to book transfers because doing so would make the fuel tax an occupation tax and give it improper extraterritorial effect. Marathon Br. 27-31. But these arguments are not properly before this court, for the simple reason that Marathon never came forward with books and records demonstrating that any book transfers actually took place here, or at least any involving no transfer of ownership of fuel. *See*, supra, Part II. Absent such proof, this court has no occasion to consider whether such transfers can be taxed and should reserve that question for when it is properly presented. But even setting that foundational problem aside, Marathon's arguments fail.

A. Collection And Remittance Of Fuel Tax Upon The Sale Of Ownership Is Not An "Occupation Tax."

Marathon begins by arguing that application of the fuel tax here would render the fuel tax an occupation tax, Marathon Br. 27-29, but this argument is forfeited. As this court has explained:

> To determine if a tax constitutes an occupation tax, it must be judged by the standard of whether it regulates and controls a given occupation, or imposes a tax for the privilege of engaging in a given occupation, trade or profession, or finally, whether it imposes a tax on the privilege of engaging in the business of selling services.

Illinois Gasoline Dealers Ass'n v. City of Chicago, 119 Ill. 2d 391, 399 (1988) (citations omitted). Marathon does not even *acknowledge* this governing legal standard, let alone explain how it is satisfied here – Marathon does not claim that the fuel tax regulates and controls distributors' occupations, imposes a tax for the privilege of engaging in that occupation, or taxes distributors for selling their services. Instead, Marathon merely notes that an occupation tax "imposes a tax upon given occupations," before leaping directly from that tautological statement to the naked conclusion that the fuel tax would be an occupation tax if it "was in effect imposed on the distributor, instead of on the consumer." Marathon Br. 28. In other words, Marathon thinks that any tax imposed on a distributor is an occupation tax. Marathon offers no authority for such a broad proposition, and such undeveloped arguments, unsupported by authority, are forfeited. *Deckard v. Joiner*, 44 Ill. 2d 412, 419 (1970).[17] Accordingly, this court should reject this argument on forfeiture alone.

[17] Although the amici supporting Marathon offer their own arguments why the fuel tax is an occupation tax as applied here, *e.g.*, ILCOC Br. 9 (arguing that this case is governed by precedent regarding "sales of services"), this court has long made clear that it will not consider arguments raised only by an amicus, *People v. P.H.*, 145 Ill. 2d 209, 234 (1991).

Forfeiture aside, Marathon's argument is frivolous. Regardless of whether the obligation to collect the fuel tax is triggered by the transfer of ownership, or by a transfer of physical possession, the provisions of the Code would still only make Marathon responsible for collecting the fuel tax from the unregistered distributors with whom it contracts, then remitting the collected amount to the County. And the ultimate legal responsibility for that tax would still ultimately lie on the consumers who pay that tax at the time of purchase at retail, thus reimbursing the person from whom the consumer purchased that fuel for any amounts previously collected. Put simply, the Code would still place the ultimate legal incidence of the fuel tax on the consumer because the legal operation of the Code results only in taxation of a consumer. That fact is fatal to any claim that the fuel tax imposes an occupation tax – when, as here, a tax applies to tangible goods like fuel, the fact that the legal incidence of the tax falls on the consumer prevents it from being characterized as an occupation tax. *E.g.*, *S. Bloom*, 52 Ill. 2d at 63.

Although Marathon speculates that a transaction for only ownership of fuel, but not possession, *might* not result in a retail sale to a consumer in the County, Marathon Br. 28, speculation is all that Marathon has to offer on this score, because it cannot identify evidence showing that even a *single gallon* of the fuel at issue here was not, in fact, ultimately sold to a consumer in the County. That is fatal here because it is undisputed that the Code presumes such a retail sale will occur, A23 n.4, and that this presumption can be rebutted by evidence that fuel on which the tax was collected was never ultimately sold at retail in the County, upon which showing any overcollected amounts will be reimbursed to the party from whom it was collected. And under the Code, the ultimate fate of the fuel Marathon sells to unregistered distributors is simply not Marathon's concern in the first place. Marathon was only a collection agent, with a fiduciary duty as "a trustee to the County." Code § 74-472(e). Nothing in the Code gives Marathon the authority in that capacity to speculate whether fuel on which it collects tax will ultimately be sold to a consumer in the County and decline to collect the tax based on that speculation. Indeed, Marathon is in a poor position to even try to speculate on that matter, since it is not privy to the intimate details of other distributors' and retailers' operations and business strategies. And having acted outside the legal authority granted by the Code, Marathon cannot recharacterize the fuel tax as an occupation tax merely because its noncompliance with the Code might now have the economic consequence of making Marathon liable for the amount it failed to collect. Just as voluntarily *passing* the economic burden of a tax on to a consumer does not negate the legal incidence of an occupation tax, *S. Bloom*, 52 Ill. 2d at 63 (citing *Nat'l Bank of Hyde Park v. Isaacs*, 27 Ill. 2d 205, 207 (1963)), voluntarily *assuming* the economic burden of a tax by failing to comply with the law does not create the legal incidence of an occupation tax where none previously existed.

B. Requiring Collection Of Fuel Tax Here Does Not Give The Tax Improper Extraterritorial Effect.

Marathon next argues that requiring collection of the fuel tax here would give the fuel tax an unconstitutional extraterritorial effect. Marathon Br. 29-31. This argument founders on a simple lack of proof. As previously explained, the forward contract in the record specifically states that Marathon would deliver fuel "into a generic Chicago pipeline, F.O.B. Chicago, IL," and that "[a]ny origin other than Chicago" will be assessed tariffs based on that origin point. C. 12908-09. This language makes plain that delivery of fuel would be made in Chicago – if delivery were not contemplated, the term "F.O.B. Chicago, IL" would be superfluous because it is triggered by the delivery of a good to the geographic location specified. *E.g.*, *Gilmour Manufacturing*, 822 A.2d at 678 n.2. And it is well settled that the language in a contract must not be rejected as meaningless or surplusage. *Dolley v. Powers*, 404 Ill. 510, 512-13 (1949); *accord*, *e.g.*, *CIMCO Communs., Inc. v. Nat'l Fire Ins. Co.*, 407 Ill. App. 3d 32, 37 (2011); *Lempa v. Finkel*, 278 Ill. App. 3d 417, 428 (1996).

Marathon's attempts to get around this language are unavailing. Marathon tries to say it meant to identify Chicago only as "a placeholder that identified the pricing of a product," Marathon Br. 31, the testimony Marathon cites was all parol evidence, which may not be considered when, as here, the language of the contract is plain on its face, *e.g.*, *Farm Credit Bank v.*

Whitlock, 144 Ill. 2d 440, 447 (1991). Moreover, Freeman openly admitted during the Department proceedings that Marathon's preferred interpretation of the "F.O.B. Chicago, IL" clause treated it as if it "doesn't mean anything." C. 12521. That alone dooms Marathon's proposed interpretation of this language; again, an interpretation of a contract that negates its language is invalid as a matter of law. *See Dolley*, 404 Ill. at 513; *CIMCO*, 407 Ill. App. 3d at 37; *Lempa*, 278 Ill. App. 3d at 428.

That incompatibility with Illinois law is only the first of the problems with Marathon's suggested interpretation. For example, Marathon conspicuously fails to explain why it was necessary to use a geographic region in the *delivery* section of a contract to identify the *price* of the fuel being sold, when the contract already provided a specific price of "$1.1775 US Dollars per Gallon" on the immediately preceding line regarding *pricing*. C. 12909. Relatedly, Marathon's suggested reading would also have the bizarre effect of construing the "delivery" provision of the forward contract to say nothing about the terms of delivery or, slightly less strangely, to list an entire broad pricing region – of which there are only five spread across the entire United States, C. 12518 – as an acceptable delivery location. Finally, reading "Chicago" to refer to a whole pricing region would make nonsense of the contractual language regarding calculation of tariffs based on the difference between "Chicago, IL and actual origin point," C. 12909, since it would be impossible to calculate the difference of any tariffs for an entire geographic region comprising multiple states and thousands of local governments.

Unable to get around the plain language of its own contract, Marathon declares that five pages of the record provide “unequivocal[ ]” proof “that no transfer of possession, ownership or title occurred in Cook County.” Marathon Br. 29 (citing C. 12412-14, 12466, 12690). But those pages are all trial testimony, which, again, cannot satisfy a taxpayer’s obligation under the Code to rebut a *prima facie* case of taxability using its books and records, Code § 34-81(g)(1). And even setting that problem aside, the testimony is of no help to Marathon. The bulk of the testimony Marathon cites was of its expert Dr. Arburn, C. 12412-14, who was incompetent to testify whether any transfer of fuel occurred in Cook County since he never reviewed any of the documents at issue in this case, C. 5037-38. That leaves Marathon with only two lonely pages of testimony on which to rest its entire argument, but those pages offer only generic descriptions of how book transfers function, C. 12466, 12690, which is of no help to Marathon here because, again, it failed to offer books and records – namely, the governing contract – demonstrating that any book transfers took place here.

There being nothing in this record to indicate that the transactions at issue here did not contemplate the sale and delivery of fuel to Chicago, Illinois, in the heart of Cook County, Marathon’s argument regarding extraterritorial application of the fuel tax fails as a matter of law.

IV. Marathon's Complaints About The Appellate Court's Opinion Should Be Rejected.

Marathon's remaining complaints concern its displeasure with certain aspects of the appellate court's opinion, but that decision is irrelevant here because the only decision on review is that of the Department. *Wade*, 226 Ill. 2d at 504. And even outside the administrative context, it is long settled that this court reviews only judgments, not the language of opinions. *Kehl v. Abram*, 210 Ill. 218, 223 (1904). To say otherwise would strangely imply that a valid judgment of the Department could be undermined by poking holes in the opinion of a subsequent court affirming that judgment.

Regardless, Marathon's criticisms warrant little discussion. Marathon complains that the appellate court should not have taken judicial notice of the Price Waterhouse Cooper glossary. Marathon Br. 23-25. But Marathon waived this issue below when it specifically advised the administrative law judge, in regard to that glossary, that she had "every right to take judicial notice of whatever [she] chose to" and could give that glossary "whatever weight you see fit." C. 3845. It should go without saying that Marathon cannot accede to the consideration of that glossary by the administrative body making the decision now under review, then make an about-face and complain about its consideration by the reviewing court. Marathon compounded this waiver with a subsequent forfeiture. When the County requested that the appellate court take judicial notice of this glossary in its principal brief below, County Br. 21, Marathon's response brief did not offer *any* objection to that request, let alone the strained objections it now offers this court. Having stood silent in the face of a request to take judicial notice of the glossary, Marathon forfeited any objection to that request and cannot now complain that the appellate court failed to appreciate, for example, the nice distinctions between European and American spelling conventions, of all things. Marathon Br. 24.

Marathon next complains about the appellate court's consideration of two letter rulings by the Illinois Department of Revenue, Marathon Br. 25-27, but this is simply irrelevant because there is more than enough basis in the record and controlling law to affirm the Department's judgment. That said, Marathon's arguments are without merit even were there some reason to consider them. Marathon begins by complaining that the rulings have both been revoked by operation of the passage of time, *id.* at 25-26, but this misses the point. Such rulings never have any precedential force in court, *Union Elec. Co. v. Dep't of Revenue*, 136 Ill. 2d 385, 400 (1990), only persuasive value, and nothing about the mere passage of time inherently deprives a ruling of the persuasive force of its own reasoning. And those rulings both have persuasive value here. As ruling ST 87-0396-PLR explains, it is not unusual to require collection of tax upon merely a transfer of ownership of fuel. And the factual background of ruling IT 11-0003-PLR demonstrates why a government might draft its tax laws so broadly as to be triggered by mere transfers of ownership, out of concern that doing otherwise would wrongly exclude from the law transactions in which a transfer of physical possession is practically impossible. Although Marathon tries to distinguish the former ruling on the ground that actual transfer of ownership was not established here, Marathon Br. 26, we have already explained that Marathon failed to show the absence of a transfer of ownership, by failing to offer into evidence the contracts negating the transfer of ownership required.

All that being said, this court need not determine whether the appellate court properly relied on these letter rulings for the simple reason that it is unnecessary to consider them. Under the plain language of the Code, Marathon must collect tax at the time of a transfer of ownership *or* possession of fuel. Because the Department did not clearly err in determining that Marathon failed to rebut Revenue's prima facie case that such a transfer occurred here, it was liable regardless of what these letter rulings do or do not say. This court should thus affirm the Department's ruling to that effect.

V. The Department's Imposition Of Penalties Was Not Against The Manifest Weight Of The Evidence.

While the above discussion resolves Marathon's challenge to the imposition of tax liability here, it does not resolve the issue of the County's entitlement to penalties for Marathon's failure to properly collect and remit the fuel tax. Under the Code, penalties must be waived if it is determined that the taxpayer had "reasonable cause" for its actions. Code § 34-68(c). Absent contrary guidance from the Director of Revenue, "reasonable cause" is governed by "the reasonable cause criteria of the United States Internal Revenue Service." *Id.* § 34-76.

The Director has issued no contrary guidance, so the IRS criteria apply here. Under those criteria, a failure to pay a tax is due to reasonable cause "to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship . . . if he paid on the due date." 26 C.F.R. § 301.6651-1(c)(1). The requirements of these criteria are not easy to satisfy, but impose on the taxpayer what the Supreme Court has described as a "heavy burden," *United States v. Boyle*, 469 U.S. 241, 245 (1985). Because the existence of reasonable cause justifying abatement of a tax penalty is a factual determination made on a case-by-case basis, a determination regarding reasonable cause is reviewed to determine if it is against the manifest weight of the evidence, and must be affirmed if the record contains evidence to support the decision to impose penalties. *Horsehead Corp. v. Dep't of Revenue*, 2019 IL 124155, ¶46.

Under the controlling IRS criteria adopted by reference in the Code, the Department correctly concluded that Marathon failed to meet its heavy burden to show reasonable cause for its failure to collect and remit the fuel tax on any of the transactions at issue here. Before the Department, Marathon offered only a cursory discussion of this subject, arguing that book transfers are "strictly financial transactions which involve no tangible Product [sic]," and that it was "surprised" that it had to collect the County's tax because no other jurisdiction had required collection for such transactions. C. 3356-58.

Neither argument suffices. To begin, those arguments both expressly rest on Marathon's mistaken assumption that the more lenient IRS standards governing reasonable cause for underpayment of taxes apply, C. 3357 (citing 26 C.F.R. § 1.6664-4), but Marathon did not underpay the tax on the sales at issue here – in other words, it did not collect and remit only some of the amount required on a particular sale – it simply declined to collect and remit any tax on those sales at all out of a mistaken belief the Code did not require it to collect them. Such actions are governed by the criteria regarding reasonable cause for nonpayment of taxes, even though some amount of tax was ultimately collected. *E.g.*, *Trans-Serve, Inc. v. United States*, 521 F.3d 462, 470 (5th Cir. 2008) (applying IRS nonpayment criteria where employer collected and remitted wrong employment taxes, under mistaken belief that federal laws imposing higher railroad tax rates were inapplicable). And none of Marathon's arguments even touch on the criteria governing reasonable cause for nonpayment – the touchstones of which are inability to pay the tax or the extreme hardship caused by payment, which it is inconceivable that a massive corporation like Marathon could show in the first place – so they were properly rejected out of hand.

Even assuming, for sake of argument, that Marathon needed only satisfy the IRS criteria for underpayment of a paid tax, its arguments to the Department did not suffice. Under those criteria, "the most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability" and reasonable cause may "include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances" when taking into account the taxpayer's "experience, knowledge, and education." 26 C.F.R. § 1.6664-4(b)(1). But Marathon's arguments to the Department did not even attempt to satisfy this requirement with any evidence showing any effort to assess whether it should collect tax on the transactions at issue here. Instead, Marathon claimed that its transactions were merely financial book transfers, but that argument simply assumed that Marathon rebutted Revenue's prima facie case with evidence that a book transfer had occurred to begin with. As already explained, Marathon failed to come forward with the contract setting forth the terms of that book transfer. And to the extent that Marathon complained, without any elaboration, that *other* jurisdictions did not collect tax in similar circumstances, that is simply irrelevant – it should go without saying that a taxpayer cannot simply assume that one jurisdiction does not impose a tax on a transaction merely because others do not.

In reversing the imposition of penalties here, the appellate court committed significant legal error. Despite agreeing that this case involves a "fail[ure] to pay," A17, the appellate court did not apply the governing language of the IRS regulations regarding good cause for nonpayment of taxes, as expressly required by the Code. Instead, the appellate court rested its analysis on the Illinois Administrative Code and this court's interpretation of that code in *Horsehead*, *id.*, which the court read for the broad proposition that a taxpayer can escape penalties merely by showing that it had a "reasonable interpretation of the law." A18.

That reliance on Illinois statutory law was misplaced. Reasonable cause under the Code is not governed by Illinois statute, but by IRS regulations, so neither the Illinois Administrative Code nor any decisions interpreting its language have any bearing here. And under the IRS criteria, a mere claim that the taxpayer's interpretation of the law is reasonable does not suffice, standing alone, to relieve the taxpayer of a penalty because a taxpayer "is generally charged with knowledge of the law," *Chambers v. Comm'r*, No. 1345-01S, 2002 Tax Ct. Summary LEXIS 107, at *14 (T.C. Aug. 7, 2002). Rather, the taxpayer must show that the mistake was made despite "tak[ing] reasonable steps to determine the law and to comply with it." *Id.* For example, the taxpayer can show that its interpretation was settled on in advance of nonpayment and "relied on the opinion of an expert." *Transupport, Inc. v. Comm'r*, 882 F.3d 274, 283 (1st Cir. 2018). Such a showing is necessary to honor the IRS' instruction that "the most important factor is the extent of the taxpayer's *effort* to assess the taxpayer's proper tax liability." 26 C.F.R. § 1.6664-4(b)(1) (emphasis added). After all, the mere fact that a taxpayer made a reasonable mistake of law says nothing about the *effort* that was made to avoid that mistake, if any. As a result, letting a reasonable mistake of law suffice, as the appellate court thought, would allow taxpayers to simply decline to pay their taxes and seek out a justification for their actions only after penalized, without ever making any advance effort, let alone an objectively reasonable one, to determine their liability.

Finally, even assuming that merely offering a reasonable alternative interpretation of a tax law allowed a taxpayer to escape penalties under the Code, that would still not save Marathon from penalties here because its interpretation is simply not reasonable, for all the reasons already stated above in our discussion of the merits. That is particularly true of Marathon's constitutional arguments, as the IRS regulations specifically provide that a belief in the invalidity of a tax may not be relied upon as evidence of reasonable cause unless the taxpayer's belief is disclosed to the taxing body in advance, 26 C.F.R. § 1.6664-4(c)(1)(iii), and Marathon does not claim that it provided such notice here.

This court's decision in *Horsehead* is not to the contrary. There, the governing provision of the tax law was undefined. 2019 IL 124155, ¶51. Here, by contrast, the Code specifically defines a "sale" in the broadest possible terms, to include transfers of mere possession or those of mere ownership. Code § 74-471. No reasonable person reading that plain language could be in any doubt that it reaches transactions involving only transfers of ownership, which is the absolute most the rebuttal evidence in this record ultimately showed. Moreover, the Illinois law applied in *Horsehead* is materially distinguishable from the federal law incorporated by the Code. Where a taxpayer seeking abatement under the reasonable cause exception of Illinois law "is not specifically required to produce such evidence of its decision-making process or show that it sought guidance on the issue," 2019 IL 124155, ¶51, federal law specifically requires the taxpayer to show its "reasonable steps to determine the law and to comply with it," *Chambers*, supra, at *14. No such reasonable steps were even claimed here, let alone shown. Rather, Marathon simply decided not to collect and remit the tax as required by the Code, and it must now bear the consequences of that decision.

In sum, the Department's imposition of penalties was not against the manifest weight of the evidence and should be upheld along with the assessment of taxes on which it rested.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the Department of Administrative Hearings.

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

BY: /s/ Jonathon D. Byrer
JONATHON D. BYRER

Supervisor of Civil Appeals
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 603-4366
jonathon.byrer@cookcountysao.org

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 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 16,617 words.

/s/ Jonathon D. Byrer
JONATHON D. BYRER, Attorney

No. 129562

IN THE
SUPREME COURT OF ILLINOIS

MARATHON PETROLEUM, CO. LP
f/k/a MARATHON PETROLEUM CO., LLC,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

NOTICE OF FILING & PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on March 20, 2024, there was electronically filed and served upon the Clerk of the above court the Brief of Defendants-Appellees. On March 20, 2024, service of the brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Catherine A. Battin
Mary Kay Martire
MCDERMOTT WILL & EMERY LLP
444 West Lake Street, Suite 4000
Chicago, Illinois 60606
(312) 984-3233
cbattin@mwe.com
mmartire@mwe.com

Michael J. Wynne
JONES DAY
Mwynne@jonesday.com

Stanley R. Kaminski
Dakota S. Newton
DUANE MORRIS LLP
SRKaminski@duanemorris.com
dnewton@duanemorris.com

Jason P. Stiehl
Christopher Gurley
Carina C. Federico
CROWELL & MORING LLP
JStiehl@crowell.com
CGurley@crowell.com
CFederico@crowell.com

Robert E. Elworth
Alec Messina
HEPLERBROOM LLC
relworth@heplerbroom.com
amessina@heplerbroom.com

Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Jonathon D. Byrer
Jonathon D. Byrer

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Jonathon D. Byrer
Jonathon D. Byrer