STATE OF RHODE ISLAND
DEPARTMENT OF REVENUE
DIVISION OF TAXATION
ONE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

IN THE MATTER OF	:	
	:	**20-T-010**
	:	**motor fuel tax - claim for refund**
Taxpayer.	:	

ORDER OF DISMISSAL

I. INTRODUCTION

The above-entitled matter came for hearing pursuant to a Notice of Pre-Hearing Conference and Appointment of Hearing Officer issued on March 5, 2020 to the above-captioned taxpayer ("Taxpayer") by the Division of Taxation ("Division"). Pursuant to a joint scheduling order filed by the parties on April 21, 2020, the Division filed a motion to dismiss ("Motion") to which the Taxpayer filed an objection ("Objection"), and the Division filed a reply on July 24, 2020. The parties were represented by counsel. This matter relates to a tax assessment issued by the Division for motor fuel tax as provided for in R.I. Gen. Laws § 31-36-1 *et seq.*

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 31-36-1 *et seq.*, 280-RICR-20-00-2 *Administrative Hearing Procedures* ("Hearing Regulation"), and 220-RICR-50-10-2, Department of Administration's *Rules of Procedure for Administrative Hearings* ("DOA Hearing Regulation").[1]

[1] The undersigned hearing officer is an employee of the Department of Administration (Administrator of Adjudication) and has been delegated to hear this matter by the Tax Administrator. Section 2.2 of the Hearing Regulation provides that the Division's regulation shall be construed liberally to further the fair, prompt, and orderly administration of hearings regarding contested tax matters in a manner consistent with the provisions of the Administrative Procedures

III. ISSUE

Whether to grant the motion to dismiss.

IV. STANDARD OF REVIEW

Pursuant to §2.7(J) of the Hearing Regulation,[2] the hearing officer has the power to rule on any motion and pursuant to §2.11(A) of the DOA Hearing Regulation,[3] the types of motions allowed are those permissible under said regulation and the Rhode Island Superior Court Rules of Civil Procedure. The Division filed a motion to dismiss for failure to state a claim pursuant to Super. R. Civ. P. 12(b)(6).

In determining a motion to dismiss for failure to state claim, the allegations contained in the complaint will be assumed to be true and all doubts viewed in the light most favorable to the nonmoving party. The motion should not be granted unless it is clear beyond a reasonable doubt that the claimant would not be entitled to relief under any conceivable sets of facts that could be proven in support of claimant's claim. Additionally, the party bringing the action must have standing. *Ho-Rath v. Rhode Island Hospital*, 115 A.3d 938 (R.I. 2015); *Boyer v. Bedrosian*, 57 A.3d 259 (R.I. 2012); and *Ryan v. Department of Transp.*, 420 A.2d 841 (R.I. 1980).

Act. Section 2.6 of the Hearing Regulation provides that the hearing officer may conduct administrative hearings on contested tax matters pursuant to regulations promulgated by another agency and in the event that such other regulations address an issue not in the Hearing Regulation, the hearing officer shall utilize those other regulations. Similarly, § 2.2(C) of DOA's Hearing Regulation provides that if a hearing officer for DOA handles a hearing for another agency, DOA's Hearing Regulation may be used in the absence of that agency's hearing regulation or in the absence of a specific provision in the agency's hearing regulation.

[2] Section 2.7(J) of the Hearing Regulation provides in part as follows:

> Conduct of Hearing.--The hearing shall be convened by the hearing officer, appearances shall be noted, any motions or preliminary matters shall be taken up, and then each party shall have opportunity to present its case generally on an issue by issue basis, by calling and examining witnesses and introducing documentary evidence.

[3] Section 2.11(A) of the DOA Hearing Regulation provides as follows:

> General. Any Party may request that the Hearing Officer enter any order or action not inconsistent with law, regulation, or these Rules. The types of motions made shall be those which are permissible under these Rules and the Rhode Island Superior Court Rules of Civil Procedure ("Super. R. Civ. P.").

V. MATERIAL FACTS

For said Motion, the allegations by the claimant (the Taxpayer) are considered true and all doubts will be resolved in favor of the Taxpayer. Both parties relied on the facts contained in the Taxpayer's July 2, 2019 letter to the Division requesting an administrative hearing.[4]

The Taxpayer represented that it trades in energy commodities and that it and other commodities traders commonly engage in waterborne vessel chain transactions concerning the sale and importation of gasoline into the United States before the gasoline arrives in the country. In these transactions, one entity buys gasoline and then sells the same gasoline to another entity, all while the gasoline purchased is overseas or in international waters, and often before it is even loaded onto a vessel. This process often repeats itself a number of times through a chain of multiple transactions between independent third parties before the gasoline arrives in the United States. The last purchaser - acting as the rightful owner - directs the gasoline to a particular port within the United States and imports the gasoline. The Taxpayer further indicated that for years, the Division has taxed the motor fuel tax at the distribution rack and tracks sales through a monthly reporting process implemented at the distribution racks. The distributor reports each sale of gasoline and identifies its destination. If the destination is in Rhode Island, the distributor is responsible for paying the motor fuel tax on each gallon of gasoline sold. If the destination is outside of Rhode Island, no tax is owed or paid.

The Taxpayer's request for refund of motor fuel tax concerns a gasoline transaction that began in January, 2018 when it entered into an agreement to sell 300,000 barrels of gasoline to ("Gas Company"), which would be "delivered at place" ("DAP") on the Atlantic coast of the United States between May 10, 2018 and May 20, 2018 by a Gas

[4] Said letter was attached to the Division's Motion. For the purpose of its Motion, the Division did not dispute any of the facts from said letter.

Company approved vessel. When the Taxpayer and the Gas Company entered into their contract, the Taxpayer did not yet have the 300,000 barrels of gasoline it agreed to sell to the Gas Company.

On March 15, 2018, the Taxpayer purchased those 300,000 barrels of gasoline from ("Original Seller"). To meet the Gas Company's requirements, the Original Seller agreed that delivery of the gasoline would be DAP on the Atlantic coast of the United States between May 10, 2018 and May 20, 2018. Thus, by March 15, 2018 via its purchase from the Original Seller, the Taxpayer had secured the 300,000 barrels of gasoline that it agreed to sell to the Gas Company in January, 2018. The Gas Company in turn then subsequently transacted to sell down the chain to ("Second Gas Company") the same 300,000 barrels of gasoline it had purchased from the Taxpayer.

On May 1, 2018, the gasoline involved in these transactions was loaded onto a ship in . The ship left Europe bound for the Atlantic coast of the United States on May 5, 2018 and pursuant to the Second Gas Company's instructions, docked in and finished discharging the gasoline to the Second Gas Company on May 21, 2018. The Second Gas Company, and no other entity, took physical possession of the gasoline in Rhode Island. The Second Gas Company eventually distributed the gasoline from its rack in . Through its distribution at the racks and in accordance with Division policy, the Second Gas Company paid all applicable motor fuel tax on every gallon of gasoline at issue here that it distributed within Rhode Island through its monthly reporting to the Division.

The Division issued a motor fuel tax assessment to the Original Seller in October, 2018. In early 2019, the Original Seller appealed the assessment but did not challenge the tax but rather challenged the interest and penalties on the tax assessment. That proceeding eventually ended in a settlement between the Division and the Original Seller. Around the same time, pursuant to the

parties' prior sales' agreement, the Original Seller "sought contractual reimbursement of the motor fuel tax from the [Taxpayer]." See Taxpayer's Objection. Ultimately, the Taxpayer paid the amount of the tax to the Original Seller and obtained an assignment from the Original Seller of its rights to challenge the tax assessment.

The settlement between the Division and the Original Seller concerned only the penalties and interest charged by the Division, and the Original Seller's appeal did not concern the principal tax amount charged by the State. The Taxpayer represented there was no release or discharge of any claim concerning the principal amount, and the Division did not argue otherwise.

In short, the Taxpayer agreed to sell gasoline to the Gas Company. The Gas Company sold the gasoline to the Second Gas Company. In order to meet its obligation to the Gas Company, the Taxpayer bought gasoline from the Original Seller which was delivered in Rhode Island to the Second Gas Company. The Original Seller was assessed motor fuel tax, penalties, and interest and after challenging the assessment, it resolved its appeal with the Division and paid the tax. Pursuant to its contract with the Original Seller dated April 28, 2018, the Taxpayer reimbursed the Original Seller the amount of the tax assessment issued to the Original Seller. Said contract was attached to the Taxpayer's July 2, 2019 appeal letter which was attached to the Division's Motion.

The Taxpayer represented that it filed a request for clarification with the Division on January 15, 2019 through a written letter request to which the Division did not respond substantively for six (6) months so that the Taxpayer commenced its appeal. The Division dated the Taxpayer's request for refund of the tax paid by the Original Seller to May 31, 2019 with the Division's denial of same dated on June 6, 2019. The Taxpayer's July 2, 2019 letter also indicated that the denial of the refund request by the Division was made on June 6, 2019.

VI. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM*, 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Arguments

The parties' arguments will be discussed in the pertinent sections of this order.

C. Whether the Motion to Dismiss Should be Granted

i. Timeliness

R.I. Gen. Laws § 31-36-13 provides as follows:

> Exemption and reimbursement for sales to United States or outside state – Emergency sales to other distributors. Any person who shall purchase fuels upon which the tax provided in this chapter shall have been paid and shall sell the fuels outside this state or to the United States government, may be reimbursed the amount of the tax in the manner and subject to the conditions provided in this chapter. All claims for reimbursement shall be made under oath to the tax administrator upon forms to be obtained from the tax administrator, within two hundred forty (240) days from the date of the purchase of the fuels, and shall contain any information and proof that the tax administrator may require, that the claimant has paid the tax and that the fuels have

been sold by the claimant outside this state or to the United States government. Claims for reimbursement shall be paid by the general treasurer from the general fund upon certification by the tax administrator and with the approval of the controller. However, any distributor shall be exempt from the payment of any tax on fuels sold by the distributor to the United States government or to a person, firm, or corporation who or which shall use the fuel solely for the operation of railroad transportation equipment on fixed rails or tracks, upon the presentation to the tax administrator by the distributor of proof satisfactory to the tax administrator as to the sale. Provided, that any distributor shall be exempt from the payment of any tax on fuels sold by the distributor to another distributor who is registered with the tax administrator.

The Taxpayer entered into an agreement to buy gasoline from the Original Seller on March 15, 2018. The gasoline that the Taxpayer purchased from the Original Seller was to be the gasoline that the Taxpayer agreed to sell to the Gas Company in January, 2018. The gasoline was delivered on May 21, 2018 in Rhode Island to the Second Gas Company which had purchased it from the Gas Company. The Division argued that the Taxpayer's request was out-of-time since 240 days from March 15, 2018 was November 10, 2018, and the Taxpayer did not submit its claim for refund of motor fuel tax until May 31, 2019. The Taxpayer argued that it sought review in January, 2019 upon learning of the Division's assessment. The Division argued that the January 2019 request was a private letter ruling request from the Taxpayer and was not a proper claim for refund, but that date still would be out-of-time since it was more than 240 days from the date of purchase.

The Taxpayer also argued that the Division should not run the period to request a refund from the date of purchase but should run it from the date of the assessment or under the doctrine of equitable tolling, the statute of limitations should not begin to run until the claimant is on notice of the injury it suffered.

The statute provides that, "[a]ny person who shall purchase fuels upon which the tax provided in this chapter shall have been paid" and sells the fuel outside of Rhode Island may be reimbursed for the tax paid and such claim for reimbursement shall be made within 240 days from purchase and shall provide proof of the payment of tax. The ability to claim a reimbursement is

dependent on paying the tax at time of purchase. The statute clearly provides that a refund request for tax paid may be made within 240 days of the purchase of said fuel and payment of the tax. This statute does not refer to an assessment because it is a provision for the reimbursement of tax paid. One cannot be reimbursed for something one has not paid. When the Division issues an assessment for motor fuel tax, there is a statutory provision that provides a mechanism for challenging an assessment.

R.I. Gen. Laws § 31-36-9 authorizes the Division to make motor fuel tax assessments if the amount of tax paid is incorrect or no tax was paid. The statute provides for the imposition of interest and a penalty for the nonpayment of said tax. When such an assessment is made, the taxpayer may challenge the assessment and if the taxpayer is not happy with the results at the administrative level, the taxpayer may file a judicial appeal.[5] Indeed, the Division issued a tax assessment to the Original Seller who filed an appeal pursuant to said statute with the Division.

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[5] R.I. Gen. Laws § 31-36-9 provides in part as follows:

> Assessment on determination of incorrectness of report or on failure to file report. (1) Deficiency determination; interest. *** The amount of the determination, exclusive of penalties, shall bear interest at the annual rate provided by § 44-1-7[.] ***
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> (2) Pecuniary penalties for deficiencies. ***
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> (3) Notice of determination.*** [E]very notice of a deficiency determination shall be mailed within three (3) years after the twenty-fifth day of the calendar month following the month for which the amount is proposed to be determined or within three (3) years after the return is filed[.] ***
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> (4) Determination without report; interest and penalties. If any person fails to file a report, the tax administrator shall make an estimate of the amount (number of gallons) of fuels purchased, sold or used which is subject to tax. *** After making his or her determination the tax administrator shall mail a written notice of the estimate, determination, and penalty.
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> ***
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> (7) Hearing by administrator on application. Any person aggrieved by any assessment, deficiency, or otherwise, shall notify the tax administrator in writing within thirty (30) days from the date of mailing by the tax administrator of the notice of the assessment and shall request a hearing relative to it. *** The tax administrator may decrease or increase the amount of any determination.
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> (8) Petition for judicial review; citation and hearing. ***
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> (10) Interest and penalties on delinquent payments. Any person who fails to pay any tax to the state or any amount of tax required to be collected *** shall pay a penalty of ten percent (10%) of the tax or amount of the tax *** plus interest at the annual rate provided by § 44-1-7[.] ***

The reimbursement statute does not apply to the Taxpayer since it did not pay the motor fuel tax at the time of the transaction/purchase so it could not request to be reimbursed within 240 days of the purchase and payment of tax. Therefore, the issue of timeliness is not relevant as the statute does not apply in this matter. Assessments of tax can be appealed under a different statute, and no assessment was issued to the Taxpayer. The Taxpayer cannot request reimbursement for a tax it did not pay at the time of purchase (and if it had, it would be out of time) and by statute, it cannot appeal a tax assessment that was never issued to it.[6]

ii. Standing

"A party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing." *Tanner v. East Greenwich*, 880 A.2d 784, 792 (R.I. 2005). The Taxpayer does not have statutory standing as it cannot seek reimbursement under R.I. Gen. Laws § 31-36-13 because it did not pay a tax at the time of purchase, and it cannot appeal the assessment under R.I. Gen. Laws § 31-36-9 because no tax assessment was issued to it.

Since the Taxpayer does not have a statutory standing, there is the issue of whether the Taxpayer suffered an injury in fact. When determining whether a plaintiff has standing, the court must focus on the party who is advancing the claim rather than the issue sought to be adjudicated. The challenged action must have caused the injury, economic or otherwise. An injury in fact is economic or otherwise and is defined as an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Warfel v.*

[6] The Taxpayer also argued that if it did not fall under the statutory deadline to request reimbursement, the statute of limitations should be equitably tolled so as not to run until the claimant was on notice of the injury it suffered. Equitable principles are not applicable to an administrative procedure. *Nickerson v. Reitsma*, 853 A.2d 1202 (R.I. 2004) (Supreme Court vacated a Superior Court order that had vacated an agency sanction on so-called inherent equitable powers). Nonetheless, it should be noted that the reimbursement statute - R.I. Gen. Laws § 31-36-13 - only applies when the motor fuel tax is paid and then a reimbursement request may be made. R.I. Gen. Laws § 31-36-9(7) provides the timeline to appeal to the Division an assessment by the Division of the motor fuel tax. The Original Seller availed itself of that statutory provision: the ability to appeal a tax assessment. The statute already provides that a taxpayer who is issued a tax assessment has time to appeal a tax assessment to the Division. As discussed below, any injury suffered by the Taxpayer relates to its contract with the Original Seller.

Town of New Shoreham, 178 A.3d 988 (R.I. 2018); *Cruz v. Mortgage Electronic Registration System*, 108 A.3d 992 (R.I. 2015); *Watson v. Fox*, 44 A.3d 130 (R.I. 2012); and *Rhode Island Ophthalmological Society v. Cannon,* 317 A.2d 124, 128 (1974). Indeed, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly * * * trace [able] to the challenged action of the defendant, and not * * * th[e] result [of] the independent action of some third party not before the court." *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 535 (R.I. 2013) (internal citation omitted). Further, the injury must be of a personal nature and distinct from the community as a whole. *N&M Prop., LLC v. Town of W. Warwick*, 964 A.2d 1141 (R.I. 2009). In addition, standing is generally limited to those plaintiffs asserting their own rights, not the rights of others. *Cruz*; *Mruk; and Ophthalmological Society.*

a. *Injury in Fact*

In its Objection, the Taxpayer argued that the Division imposed a tax of $ that the Taxpayer paid. The Taxpayer argued that this tax assessment is a concrete and particularized injury so that it possesses standing on its own account (separate from the assignment, *infra*). The Division relied on *Ophthalmological Society* to argue that the injury must result from the challenged statute.

For standing, the issue is not the claim but the claimant. *Watson.* The Division did not assess a tax on the Taxpayer. It assessed a tax to the Original Seller. The Taxpayer refers to it as a tax that it paid but it did not pay the tax; it reimbursed the Original Seller for the amount of tax that the Original Seller paid to the Division. If, for example, the contract provided that the Taxpayer pay half of any taxes assessed then the Taxpayer would have reimbursed the Original Seller $. If the Taxpayer had refused to pay that contractual amount to the Original Seller, the Division would not have sought payment of the tax from the Taxpayer.

Any injury that the Taxpayer suffered is not because the Division assessed a tax on it. Any injury is because the Taxpayer 1) chose to enter into a contract to pay another party's taxes; and/or 2) chose to pay the amount of the tax assessed to the Original Seller even if it did not think it was contractually obligated to pay the amount of the tax. An injury must be concrete and particularized. Here, the Division's challenged action – the tax assessment to the Original Seller - did not cause a particular and concrete injury to the Taxpayer by the Division. Rather, the Taxpayer is trying to recoup its contractual payment to the Original Seller from the Division. The Taxpayer might not agree with how the Division applied the motor fuel tax to the Original Seller, but the Division never applied the tax to the Taxpayer. The action by the Division was not personal in nature to the Taxpayer but was only personal to the Original Seller. *N&M Prop.*

Any injury that the Taxpayer suffered was from its contractual arrangement with the Original Seller.[7] It has not suffered an injury in fact and has no standing under that theory.

b. *Assignment*

The Taxpayer argued that the Division's contention that only the Original Seller and not its assignees can challenge tax assessments overlooks Rhode Island law. The Taxpayer cited to R.I. Gen. Laws § 9-2-8[8] which allows for the assignment of a right such as a debt to argue that the Taxpayer obtained a contractual assignment of the Original Seller's rights. The Taxpayer

[7] As noted in a prior administrative tax decision, 2011 WL 456778 (R.I.Div.Tax.), any contract for sale of a business can include, if the parties choose, provisions that take into account tax consequences of a sale. In that matter, the taxpayer sold its company mid-year which impacted its request for a refund of certain expenses, but it could have included provisions that addressed that in its contract for sale. Here, the Original Seller was able to be reimbursed for its tax paid to the Division by the Taxpayer due to their contract, and now the Taxpayer is trying to obtain that amount of money from the Division because the Taxpayer does not like the consequence of its own contract.

[8] R.I. Gen. Laws § 9-2-8 provides as follows:

> Assignee of nonnegotiable chose in action. The assignee of a nonnegotiable chose in action which has been assigned in writing may maintain an action thereon in his or her own name, but subject to all defenses and rights of counterclaim, recoupment, or setoff to which the defendant would have been entitled had the action been brought in the name of the assignor.

represented that there was no release or discharge of any claim regarding the tax amount; however, the Original Seller appealed the assessment and challenged the interest and penalties connected to the tax assessment and settled with the Division. The Original Seller obtained contractual reimbursement from the Taxpayer for the amount of the tax, and the Taxpayer obtained an assignment from the Original Seller of its right to challenge the tax assessment.

The Taxpayer relied on *Weybosset Hill Invs. LLC v. Rossi*, 857 A.2d 231 (R.I. 2004) to argue that the Courts have allowed the assignment of tax appeal rights. In that case, the taxpayer bought property for which the seller was in the midst of challenging various property tax assessments. The taxpayer did not only obtain an assignment of a right but rather the taxpayer bought the property that was the subject of the taxes being challenged. Indeed, the Court pointed out that that taxpayer had not bought a hypothetical right to bring an appeal but rather purchased the property along with the pending appeals. *Id.*, at 241 (internal citation omitted).

Both parties cited to *Independence Square Foundation v. Booth*, 1999 WL 1062205 (R.I. Super.) in support of their positions. In that case the taxpayer owned property on which taxes had been assessed. Another entity had paid those taxes on the property. The Court found that even if someone else paid the tax, the taxpayer was the one responsible for the payment of taxes on the property and thus the one who is responsible for the payment of taxes is the one who can assign the right to challenge the assessment. In that matter, the property was foreclosed on and purchased at public auction by the mortgage holder so that the new entity challenging the taxes was the successor property owner. The city had argued that since the prior owner/taxpayer had not actually paid the challenged assessment, the new assignees could not challenge the assessments. However, the Court found the assignees had the right to challenge from the one who owned the property and was responsible for the payment of the taxes.

In *Weybosset* and *Independence Square*, the new property owners had the right to challenge assessments on their own property. Those are not the facts in this matter. The Taxpayer did not purchase property from the Original Seller for which there was a pending challenge of a tax assessment. Rather, the Original Seller settled its appeal of its tax assessment and then assigned its right to appeal that assessment to the Taxpayer. The Original Seller could not have challenged its tax assessment again because of *res judicata* or claim preclusion. *Infra*. Nor could it have challenged its tax assessment again due to the doctrine of administrative finality. *Infra*. The Original Seller's assignment to challenge the tax assessment does not give the Taxpayer standing to challenge something that cannot be challenged. See below for discussion of how *res judicata* or claim preclusion and administrative finality applies to the Taxpayer. The same analysis would apply if the Original Seller settled its tax appeal and then it again tried to appeal the assessment.

The Taxpayer is not a successor property owner asserting ongoing challenges to its own property's assessments but rather seeks to be reimbursed from the Division for its contractual reimbursement to the Original Seller in the amount of tax paid. The assignment of this settled matter does not give the Taxpayer standing.

iii. Res judicata

Since the Taxpayer does not have standing to appeal its refund request, the analysis could end here. However, the Division also argued that the Taxpayer's request for refund was barred by *res judicata*. Therefore, while the Taxpayer lacks standing, the undersigned will examine the applicability of *res judicata* to this matter. *Res judicata* requires that there exists identity of parties, identity of issues, and finality of judgment in an earlier action. *Gaudreau v. Blasbalg*, 618 A.2d 1272 (R.I. 1993). Here, for the purposes of this analysis, it is assumed that the Taxpayer is the same party as the Original Seller by virtue of the assignment of the appeal right. The identity

of issues is the same since the Taxpayer is trying to challenge the motor fuel tax assessment that the Division issued to the Original Seller.

As explained in *Plunkett v. State*, 869 A.2d 1185 (R.I. 2005), *res judicata* actually refers to two (2) different theories: 1) collateral estoppel or issue preclusion; and 2) *res judicata* or claim preclusion. *Plunkett*, at 1187-1189, found as follows:

> The doctrine of res judicata relates to the preclusive effect of a final judgment in an action between the parties. (internal citations omitted). "This doctrine ensures that judicial resources are not wasted on multiple and possibly inconsistent resolutions of the same lawsuit." *ElGabri v. Lekas,* 681 A.2d 271, 275 (R.I.1996) (internal citation omitted). The doctrine applies when "there exists identity of parties, identity of issues, and finality of judgment in an earlier action." *Beirne v. Barone,* 529 A.2d 154, 157 (R.I.1987).
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> As we recently explained, the term "res judicata" is commonly used to refer to two preclusion doctrines: (1) collateral estoppel or issue preclusion; and (2) res judicata or claim preclusion. (internal citations omitted). In *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the United States Supreme Court discussed the preclusion terminology and elected to use the term "claim preclusion," instead of res judicata, to avoid confusion. The Court explained:
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> > The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of 'res judicata.' See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. *Cooper, Federal Practice and Procedure* § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion.' Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. *See Restatement, supra,* § 27. * * * Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. *See id.,* Introductory Note before § 24. *Migra,* 465 U.S. at 77 n.1, 104 S.Ct. 892, 79 L.Ed.2d 56.
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> Although issue preclusion generally operates to bar relitigation of only those issues that *actually* were decided in the prior lawsuit, it may even apply when the second lawsuit asserts a different claim. *Foster–Glocester Regional School Committee,* 854 A.2d at 1014 n.2. Claim preclusion, on the other hand, "'precludes the relitigation of *all* the issues that were *tried or might have been tried* in the original suit.'" *Id.* (Emphasis added.)

This Court considered the question of what constitutes a "claim" for purposes of claim preclusion in *ElGabri* and adopted the transactional rule set forth in the Restatement (Second) *Judgments. ElGabri,* 681 A.2d at 276. Section 24 of the Restatement provides:

> Dimensions of 'Claim' for Purposes of Merger or Bar–General Rule Concerning 'Splitting"
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> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim * * * *the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.*
>
> (2) What factual grouping constitutes a 'transaction'[ ] and what groupings constitutes a 'series'[ ] are to be determined pragmatically, *giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.*" (Emphases in original.)

Collateral estoppel is more restrictive than *res judicata. Mulholland Construction Co. v. Lee Pare & Associates, Inc.*, 576 A.2d 1236 (R.I. 1990). While cases have spoken of the requirements in different terms, collateral estoppel requires that matters have been litigated or could have been litigated in the prior matter (*Mulholland*), a full and fair opportunity to litigate (*Casco Indemnity Company v. O'Conner*, 755 A.2d 779 (R.I. 2000); *Gaudreau*), and a final decision on the merits (*Casco; Beiren v. Barone*, 529 A.2d 154 (R.I. 1987)). Arbitration proceedings are considered to have been a litigated matter that can collaterally estop a later action. *Mulholland.* Administrative decisions after an administrative hearing have been found to collaterally estop a later matter. *Department of Corrections v. Tucker*, 657 A.2d 546 (R.I. 1995).

In this matter, the Original Seller and the Division settled. There was no administrative hearing with a final decision on the merits. The Taxpayer argued that the tax itself was not challenged and there was no final actual litigated decision.

Nonetheless, a lack of a final decision on the merits does not affect claim preclusion (*res judicata, supra*).[9] *C.D. Burnes Co. v. Guilbault*, 559 A.2d 637, 640 (R.I. 1989) held, "[w]e have held that a consent agreement between the parties has the full force and effect of a decree and is res judicata (sic)." (internal citations omitted). See also *Belanger v. Weaving Corporation of America*, 387 A.2d 692 (R.I. 1978); and *Marsh v. Billington*, 2006 WL 2555911 (Super.) (consent order acted as *res judicata*).[10]

The courts have found that the purpose of *res judicata* "ensures that judicial resources are not wasted on multiple and possibly inconsistent resolutions of the same lawsuit." *Plunkett*, at 1188 (internal citations omitted). See also *Gaudreau*, at 1275. Indeed, its applicability is to prevent re-litigation of issues that have been decided or in some cases issues that could have been tried and to prevent re-litigation of claims that were tried or might have been tried in the original suit. *Plunkett*, at 1188, *supra*.

Here, the Taxpayer is making the same claim as the Original Seller. The claim is barred by *res judicata* (claim preclusion). The barring of this claim fulfills the purpose of *res judicata*. The Original Seller had a claim and challenged its tax assessment. That was resolved. To allow the Taxpayer to bring another action challenging the same tax assessment (regardless of whether it is of the tax, penalties, or interest) would allow successive challenges to tax assessments which is a waste of resources. Indeed, *res judicata* acts to prevent the splitting of claims and actions. *Plunkett, supra*. While the Original Seller did not challenge the amount of tax, it could have in its

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[9] Thus, while *deBourgknecht v. Rossi*, 798 A.2d 934 (R.I. 2002) held there had been no previous litigation regarding a tax assessment so *res judicata* was not applicable, such a finding refers to what *Plunkett* calls collateral estoppel or issue preclusion in order to make it easier to distinguish between the two (2) types of *res judicata*.

[10] The Court held in *In re McBurney Law Services, Inc.*, 798 A.2d 877 (R.I. 2000) that a stipulated agreement entered into by the parties is conclusive upon the parties and courts will enforce compromised agreements without regard to what the result might have been if the parties had litigated. Similarly, in *res judicata* or claim preclusion, a settlement/consent agreement acts as a bar to the same claim or those claims that could have been litigated previously.

appeal. Therefore, the Taxpayer's claim is barred. *Id.* The applicability of *res judicata* serves to prevent re-litigation of a resolved claim and prevents inconsistent resolutions on the same claim.

iv. Administrative Finality

In discussing the applicability of *res judicata* to decisions of administrative agencies, *Johnston Ambulatory Surgical Associates, Ltd. v. Nolan,* 755 A.2d 799 (R.I. 2000) expounded on the doctrine of administrative finality in that while *res judicata* is a final bar to a further action, it may be in the context of an administrative agency application that there should be some leeway for another action instead of a final bar. While the Taxpayer's lacks standing to bring its refund request, the undersigned will also address the issue of administrative finality especially as it acts similarly to *res judicata.*

Thus, according to the doctrine of administrative finality, when an administrative agency "receives an application for relief and denies it, a subsequent application for the same relief may not be granted absent a showing of a change in material circumstances during the time between the two applications." *Johnston,* at 808. In deciding that the doctrine of administrative finality did not only apply to land-use regulation, *Johnston Ambulatory,* at 810, found as follows

> Further, it is our opinion that there is no inherent reason that the rule should not be generally applicable to most areas of administrative regulation. The purpose of the doctrine is to promote consistency in administrative decision-making, such that if the circumstances underlying the original decision have not changed, the decision will not be revisited in a later application.

The Division argued that under administrative finality, the Taxpayer could not bring the same action that the Original Seller already had brought. The Taxpayer relied on *deBourgknecht* to argue that the initial request for tax relief must have been denied in order for administrative finality to apply. *DeBourgknecht* addressed a challenge to a property tax valuation as opposed to the issuance of a sales tax or use tax or motor fuel assessment. *Johnston Ambulatory* spoke in general of

original administrative decisions acting to preclude another action on the same request which would promote consistency in administrative decision-making. It may be in some areas of administrative decision-making, the original decision is not a denial but only a partial grant of the original request or application or the matter is settled.

Again, the Taxpayer brings up the argument that its challenge is not the same as the Original Seller because its challenge is to the tax and is not the Original Seller's penalty and interest challenge. The Taxpayer never was assessed a tax. As much as the Taxpayer wants to characterize this matter as its challenge to its tax assessment, the Taxpayer – as detailed in its facts - contractually paid the amount of tax to the Original Seller. The Original Seller challenged its tax assessment and resolved its appeal. An administrative decision by way of settlement resolved the challenge to the tax assessment. There is no change in material circumstances as the Taxpayer is challenging the tax assessment to the Original Seller. Thus, like claim preclusion, administrative finality precludes a challenge here because there has been a final resolution via administrative action on the challenge to the assessment.

v. Constitutional Issues

The Taxpayer raised the issue of due process and argued the Division imposed a tax on it without any meaningful course of redress. Again, the Taxpayer tries to make its claim be that it was assessed a tax. It was not. The statute provides a chance to request a refund of the tax within 240 days of purchasing motor fuel and paying said tax. It also provides that generally the Division has three (3) years to issue a notice of tax deficiency for motor fuel tax and provides a statutory time to appeal said assessment. The Original Seller received a tax assessment and availed itself of the statutory right to appeal said assessment. The Taxpayer paid the amount of the tax assessment

to the Original Seller. The Division never assessed the Taxpayer. The Original Seller had notice of the tax assessment because it is the entity to which the Division issued the tax assessment.

To the extent the Respondent seeks a finding that the Division's statutes are unconstitutional under either the United States or Rhode Island Constitutions, the determination of unconstitutionality of a statute is a not an issue that is properly before an administrative agency. *Easton's Point Association et al v. Coastal Resources Management Council et al.,* 522 A.2d 199 (R.I. 1987). The undersigned has assumed all statutes are constitutional and discussed all arguments relying on relevant Rhode Island court decisions and relevant statutes and regulations.

D. Conclusion

Based on the foregoing, the Taxpayer lacks standing – independently and via its assignment from the Original Seller – to file its request for refund of said motor fuel tax. While the Taxpayer lacks standing, its request for refund is also barred by *res judicata* or claim preclusion. While the Taxpayer lacks standing, its request is also barred by the doctrine of administrative finality. While the Taxpayer lacks standing, it is statutorily not entitled to claim a reimbursement of the tax since it did not pay the motor fuel tax when purchasing the gasoline (and would be out-of-time if it had).

Based on the foregoing, the Division's motion to dismiss should be granted due to a failure to state a claim.[11]

VII. FINDINGS OF FACT

1. On March 5, 2020, the Division issued a Notice of Pre-Hearing Conference and an Appointment of Hearing Officer to the Taxpayer.

[11] In its Motion, the Division requested that it be awarded attorneys' fees pursuant to R.I. Gen. Laws § 44-1-37(b). Such a request by the Division, if still sought, shall be addressed separately on a renewal of said request by the Division with the Taxpayer having a chance to object.

2. Pursuant to a joint scheduling order filed by the parties on April 21, 2020, the Division filed a motion to dismiss to which the Taxpayer filed an Objection and the Division filed a reply on July 24, 2020 to the Objection.

3. The facts contained in Section V and VI are reincorporated by reference herein.

VIII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 36-1-1 *et seq.*, the Hearing Regulation, and the DOA Hearing Regulation.

2. The Taxpayer has failed to state a claim on which relief can be granted.

IX. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends as follows: that the Division's motion to dismiss be granted and the matter be dismissed since the Taxpayer failed to state a claim.

Date: October 15, 2020

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

✓ ADOPT
_____ REJECT
_____ MODIFY

Dated: 11/12/20

Neena S. Savage
Tax Administrator

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DIVISION. THIS ORDER MAY BE APPEALED TO THE SIXTH DIVISION DISTRICT COURT PURSUANT TO THE FOLLOWING WHICH STATES AS FOLLOWS:

R.I. Gen. Laws § 31-6-9 states in part as follows:

(8) Petition for judicial review; citation and hearing. After a hearing, and provided all taxes, interest, and penalties as determined by the tax administrator have been paid, any person aggrieved by the determination may, within fifteen (15) days from the date of mailing by the tax administrator of the determination, petition the sixth division of the district court, setting forth the reasons why the assessment is alleged to be erroneous and praying relief from it. The clerk of the court shall then issue a citation, substantially in the form provided in § 44-5-26, to summon the tax administrator to answer the petition, and the court shall proceed to hear the petition and to determine the correct amount of the tax, interest, and penalties.

CERTIFICATION

I hereby certify that on the 12th day December, 2020 a copy of the above Order and Notice of Appellate Rights was sent by first class mail and electronic delivery to the Taxpayer's attorneys' addresses on record with the Division and by electronic delivery to Bethany Whitmarsh, Esquire, Department of Revenue, Division of Taxation, One Capitol Hill, Providence, RI 02908.

Gail Belasco