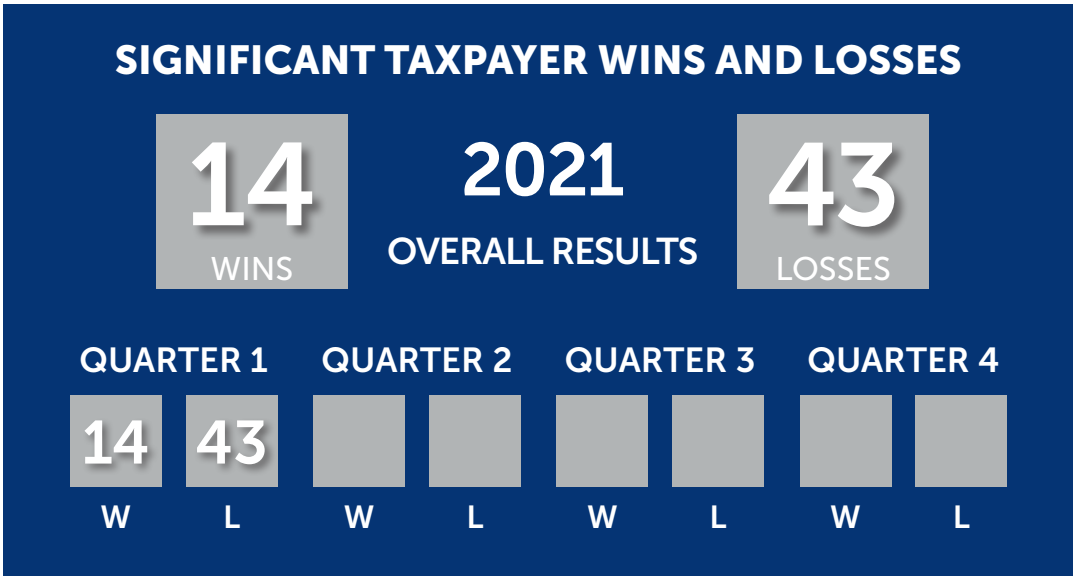
EVERSHEDS SUTHERLAND SALT SCOREBOARD Q1 2021

This is the first edition of the Eversheds Sutherland SALT Scoreboard for 2021. Since 2016, we have tallied the results of what we deem to be significant taxpayer wins and losses and analyzed those results. Our entire SALT team hopes that you have found the SALT Scoreboard's content useful. This edition includes our take on the Arkansas Supreme Court's decision regarding the state's short-term rental excise tax, our insights regarding Texas's claim pleading requirements, and a spotlight on New York cases.

1st quarter 2021

In the first quarter of 2021, taxpayers prevailed in a low 24.6% (14 out of 57) of the significant cases.* Taxpayers won 25% (3 out of 12) of the significant corporate income tax cases and 28% (7 out of 25) of the significant sales and use tax cases. In comparison with prior years, taxpayers prevailed in the following amounts of cases: 2016 (43.0%), 2017 (41.0%), 2018 (36.8%), 2019 (38.1%), and 2020 (40.2%). We are rooting for a turnaround for taxpayers over the rest of 2021!

* Some items may have been decided in a prior quarter but included in the quarter in which we summarized them.



Year-to-date

Taxpayers prevailed in 3 out of 12 significant corporate income tax cases across the country

Taxpayers prevailed in 7 out of 25 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Short-Term Rental Tax

CASE: *Rent-A-Center East, Inc. v. Walther*, 615 S.W.3d 701 (Ark. 2021).

SUMMARY: The Arkansas Supreme Court held that a retailer's weekly and semi-monthly rent-to-own leases are subject to Arkansas' excise tax on short-term – less than 30 days – rentals of tangible personal property. Customers paid for the items on a monthly, semi-monthly, or weekly basis and would acquire ownership of the items once they reached a predetermined number of payments or made a lump-sum payment. On protest from an assessment, the taxpayer alleged that its rental-purchase agreements were nontaxable long-term leases, not taxable short-term leases. The taxpayer argued that the tax did not apply because: (1) its customers almost always renewed their leases beyond the initial term; and (2) the legislature intended to tax "true" short-term leases, not rent-to-own purchases. Looking at the language of the company's rental agreement and the definition of "short-term" in state law, the court concluded that whether the customer renews the lease does not change the length of the rental or lease period in question. The short-term rentals were taxable, regardless. View more information.

Failure to Exhaust Administrative Remedies

CASE: *LA Live Properties, LLC v. County of Los Angeles*, 61 Cal. App.5th 363 (Cal. Ct. App. 2021).

SUMMARY: The California Court of Appeal held that a county's failure to comply with statutory notice requirements did not render an assessment a "legal nullity" that would excuse the taxpayer from the requirement to exhaust administrative remedies. For property tax purposes, California requires a "Notice of Proposed Escape Assessment" be issued ten days before the assessments are enrolled. The assessor, however, mailed the taxpayer such Notices only five days before the assessments were enrolled. For escape assessments, taxpayers

are required to file an administrative request for reassessment and refund before filing a refund action in court unless the assessment is a "nullity as a matter of law." The taxpayer instead filed a refund action in court, arguing that the assessments were void because the Notices were issued less than ten days before enrollment. The court held that the taxpayer must have first exhausted its administrative remedies. The court would treat an assessment as a nullity only when the real property at issue was nonexistent, tax exempt, or outside the county's jurisdiction. View more information.

Telecommunications

CASE: *Cellular Express, Inc. v. Alabama Department of Revenue*, Dkt. No. S. 14-320-JP (Ala. Tax Trib. Jan. 21, 2021).

SUMMARY: The Alabama Tax Tribunal held that payments to a retailer accepting payments for monthly cellular plans on behalf of a wireless service provider are subject to sales tax as sales of prepaid wireless service. Alabama treats the sale of prepaid telephone calling cards and prepaid authorization numbers not evidenced by a physical card as the sale of tangible personal property subject to sales tax. The taxpayer argued that while it accepted payments that replenished the customers' monthly cellular service plans, it did not provide a card or authorization number to its customers and was merely facilitating customer payments to the provider. However, the Tax Tribunal disagreed and concluded that the transaction was subject to sales tax, even if a physical card or authorization number was not provided, because the taxpayer sold wireless service and the service was prepaid. View more information.

Manufacturing Exemption

CASE: *Hegar v. El Paso Electric Company*, No. 03-18-00790-CV, – S.W.3d – (Tex. Ct. App. Mar. 5, 2021) (en banc).

SUMMARY: The Texas Court of Appeals held that a taxpayer's purchases of electricity meters qualify for the manufacturing exemption from sales tax. After the taxpayer sought a sales tax refund, the ALJ concluded that the taxpayer's manufacturing exemption was not sufficiently raised within the deadline for the taxpayer to amend its statements of grounds and the taxpayer had therefore waived the argument. On appeal, the court of appeals found it to be sufficient that the taxpayer: (1) expressly referenced the manufacturing exemption and quoted the relevant statute in the statement of grounds; and (2) provided notice in the accompanying schedules, which referred to one of the relevant items as "mfg. equip. – 100% exempt" and referred to the applicable statute and rule. With respect to the merits of the claim, the court held that the items qualified for the manufacturing exemption from sales tax as telemetry units related to step-down transformers. View more information.

Spotlight on New York cases

CASE: *In the Matter of Dynamic Logic, Inc. (By Kantar LLC, as Successor-in-Interest)*, DTA No. 828619 (N.Y. Div. Tax App., ALJ Det'n Jan. 14, 2021).

SUMMARY: The New York Division of Tax Appeals held that a taxpayer's service measuring the effectiveness of advertising campaigns constituted information services subject to sales tax. The service's primary function was to "collect information regarding the effectiveness of its clients' advertising" by conducting surveys, analyzing the information, and furnishing the information and analysis to its clients via reports. The Division held that the exception for information that is personal or individual in nature did not apply because the taxpayer could use the data it collects in its separate benchmarking database product and the clients could furnish the information in their own reports to the public and clients. View more information.

CASE: *In the Matter of Secureworks, Inc.*, DTA Nos. 828328, 828329 (N.Y. Div. Tax App., ALJ Det'n Jan. 14, 2021).

SUMMARY: The New York Division of Tax Appeals held that a taxpayer's numerous computer security services – including managing and monitoring firewalls and generating threat reports – were, almost entirely, taxable as either protective services or information services. The managing, monitoring, and scanning services were taxable protective services because they constituted preventing the theft, unlawful taking or damage of goods. Also, reports generated to clients as part of its threat monitoring service were information services; the service did not qualify for the personal or individual exception because the information was derived from non-confidential and widely accessible sources. However, the log retention service, which collected and stored events created by the different devices across the customer's network, was not taxable as it was neither a protective service nor an information service because the business merely reported the events without any additional intelligence.

CASE: *In the Matter of the Petition of Coulson*, Dkt. No. 827736 (N.Y. Tax App. Trib. Jan. 25, 2021).

SUMMARY: The New York Tax Appeals Tribunal held that a vacation home constitutes a "permanent place of abode" and rendered a married couple statutory residents for New York income tax purposes. New York imposes an income tax on those not domiciled in the state but who maintain a permanent place of abode in the state and who are present in the state for more than 183 days during the year. The taxpayers met the second prong because the husband primarily worked out of his New York City office and was present in the state for more than 183 days per year. The couple spent two to three weeks each year at the vacation home. The Tribunal concluded that the vacation home qualified as a permanent place of abode because it was suitable for year-round habitation. The taxpayers' actual use of the residence only for vacation purposes was not determinative. View more information.

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