EVERSHEDS SUTHERLAND

SALT SCOREBOARD Q2 2021

This is the second 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 view of the new Seattle payroll expense tax, the New Jersey Tax Court's opinions on Public Law 86-272 and net operating loss carryforwards, and a spotlight on residency cases.

2nd quarter 2021

In the second quarter of 2021, taxpayers prevailed in 34.7% (17 out of 49) of the significant cases.* Taxpayers won 30% (3 out of 10) of the significant corporate income tax cases and 38.9% (7 out of 18) of the significant sales and use tax cases. In contrast, in the first quarter, taxpayers prevailed in only 24.6% of all significant cases, 25% of the significant corporate income tax cases, and 28% of the significant sales and use tax cases. Taxpayers showed improvement in each of these categories in the second quarter. We hope for further successes over the second half of the year.

SIGNIFICANT TAXPAYER WINS AND LOSSES

2021 OVERALL RESULTS

31 WINS | 75 LOSSES

QUARTER 1		QUARTER 2		QUARTER 3		QUARTER 4	
14	43	17	32				
W	L	W	L	W	L	W	L

* 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 6 out of 22 significant corporate income tax cases across the country

Taxpayers prevailed in 14 out of 43 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Payroll Expense Tax

CASE: *Greater Seattle Chamber of Commerce v. City of Seattle*, Case No. 20-2-17576-5 SEA (Wash. Super. Ct. Jun. 7, 2021).

SUMMARY: The Superior Court of Washington for King County held that Seattle's new payroll expense tax is constitutionally permissible. On July 6, 2020, Seattle passed a payroll expense tax ordinance based on compensation paid to Seattle employees. The Seattle Metropolitan Chamber of Commerce challenged the tax, arguing that it was a tax on employers' payment of compensation to employees and thus an impermissible tax on an employee's act of earning a living. The city asserted that the tax is constitutionally permissible as imposed on the privilege of doing business. Highlighting that (1) the tax is levied on businesses based on their aggregate payroll expense and (2) businesses are expressly prohibited from passing the expense of the tax on to employees in the form of wage deductions, the Court concluded that there is no burden on employees. Accordingly, the tax was deemed to be valid and not to represent a tax on an employee's act of earning a living. View more information.

Public Law 86-272

CASE: *Procacci Bros. Sales Corp. v. Div. of Taxation*, Dkt. No. 015626-2014 (N.J. Tax Ct. May 25, 2021).

SUMMARY: The New Jersey Tax Court ruled that the in-state activities of an out-of-state wholesale produce distributor were protected from the Corporation Business Tax under P.L. 86-272, a federal law that prohibits states from imposing a net income tax on an out-of-state taxpayer with limited in-state activities. The taxpayer had no offices, property, or employees in New Jersey and delivered produce to in-state customers primarily using third-party trucks. The court found that the produce deliveries and returns prior to produce acceptance were "ancillary to solicitation of sales" and protected under P.L. 86-272. However, the taxpayer's practice of sending its own trucks into the state to pick-up returned produce after delivery and the customer's acceptance was not protected. In all but one of the tax years, though, these activities were *de minimis* and not subject to the CBT. View more information.

Sourcing

CASE: *Express Scripts Inc. v. Indiana Dep't of State Revenue*, Dkt. No. 19T-TA-00018 (Ind. Tax Ct. May 14, 2021).

SUMMARY: The Indiana Tax Court upheld a pharmacy benefit management company's sourcing of its receipts under Indiana's costs of performance rules applicable to services. The tax court rejected the Department of Revenue's position that the receipts should instead be sourced as sales of tangible personal property. The taxpayer was engaged in the business of administering the prescription drug and pharmacy benefits of health insurers. The tax court relied on its designated affidavits and contracts stating that: (1) its clients engage it and pay for the provision of services; and (2) it does not purchase any drugs for resale or ever acquire possession or title of any drugs sold to its insurer client's members. The tax court found that the taxpayer properly apportioned its income as a service provider. View more information.

NOL Carryforwards

CASE: *R.O.P. Aviation, Inc. v. Div. of Taxation*, Dkt. No. 001323-2018 (N.J. Tax Ct. May 27, 2021).

SUMMARY: The New Jersey Tax Court held that the Division of Taxation could not eliminate a taxpayer's net operating losses generated during years beyond the statute of limitations. The Division's proposed reduction in the taxpayer's NOL carryforward was based on a transfer pricing adjustment between related entities for years never audited by the Division and otherwise closed under the applicable statute of limitations. The tax court held that although the Division had broad authority to determine the proper tax amount due from available information, this mandate did not permit the Division to audit closed years to reduce an NOL carryforward. The tax court also held that permitting the Division to audit and adjust the taxpayer's NOL carryforward from these closed years would be tantamount to an adjustment of the income reported in those years and thus constitute an impermissible audit of closed years. View more information.

Spotlight on Residency cases

CASE: *Appeal of Bracamonte, No. 18010932, 2021 – OTA – 156P (Cal. Office of Tax App. Mar. 22, 2021).*

SUMMARY: California's Office of Tax Appeals concluded that taxpayers remained domiciled in and residents of California at the time they sold their business despite renting an apartment and subsequently purchasing a home in Nevada. At the time of the sale, the taxpayers were in the process of moving from California to Nevada, but had not relinquished their California residence. They left much of their property at their California home, maintained a P.O. Box address, numerous bank accounts, and healthcare providers in California, and – most importantly to the OTA – spent over two-thirds of the disputed period in California. Focusing on the temporary nature of the rental property, the OTA reasoned that the taxpayers did not "adopt some other permanent home." Accordingly, on the date of the sale of their business, the taxpayers were residents of California and subject to personal income tax on the gain from the sale. View more information.

CASE: *Matter of Boniface*, DTA No. 829018 (N.Y.S. Div. Tax App., ALJ Det'n Apr. 29, 2021).

SUMMARY: A New York ALJ determined that a married couple that purchased a home in Florida in 2013 with the intention of retiring in the state, could not prove that they abandoned their New York domicile in 2014. The taxpayers argued: (1) the Florida home was larger and more expensive than the New York home, (2) they registered to vote and changed their drivers' licenses to Florida, and (3) they maintained an antique car collection in Florida. The ALJ, however, determined that the taxpayers failed to prove by clear and convincing evidence that they gave up their New York domicile because the taxpayers failed to provide "credible evidence" establishing that their "general habit of life" reflected an abandonment of their New York domicile. View more information.

CASE: *Appeal of Smoot*, No. 19034475, 2021-OTA-041 (Cal. Off. of Tax App. Dec. 2, 2020).

SUMMARY: The Office of Tax Appeals concluded that a husband and wife remained domiciled in and residents of California for the 2013 tax year despite the husband leaving the state for an alleged "permanent" job in Alaska. The OTA based its determination on the taxpayers not providing documents or other evidence showing that the Alaska job was not temporary. Further, the taxpayers did not produce any evidence that they attempted to sell their home in California or that the wife quit or gave notice of an intent to quit her California job at that time. Instead, the evidence showed the wife continued to live in the taxpayers' California home and that both taxpayers lived in the home when the husband returned to California in July. The OTA concluded that the taxpayers remained California residents for the 2013 year because: (1) their closest connections were with California; and (2) their Alaska visits were for temporary or transitory purposes. View more information.

CASE: *Appeal of A. Kahn*, No. 18042861, 2021 – OTA – 064 (Cal. Off. of Tax App. Dec. 21, 2020).

SUMMARY: The Office of Tax Appeals found the taxpayer was not a California resident because he moved to Saudi Arabia in May 2013 with the intention of staying indefinitely and was thus not subject to California individual income tax. The panel based its ruling on the following: (1) the taxpayer's marriage to his former spouse was irreparably broken at that time; (2) the taxpayer sold his California property; (3) the taxpayer closed his California bank accounts; and (4) the taxpayer rented an apartment in Saudi Arabia, joined a mosque, found a job, bought a new car, obtained a local driver's license, and became engaged. The OTA, in particular, did not find that he left his children in California determinative because the mother would not allow the children to go to Saudi Arabia. View more information.

Meet your SALT team


Michele Borens


Nikki Dobay


Jonathan A. Feldman


Jeffrey A. Friedman


Ted W. Friedman


Tim Gustafson


Charles C. Kearns


Todd A. Lard


Breen Schiller


Daniel Schlueter


Maria M. Todorova


Eric S. Tresh


W. Scott Wright


Eric Coffill


Douglas Mo


Michael Hilkin


Cyavash Ahmadi


Catalina Baron


Justin Brown


Charles C. Capouet


Elizabeth S. Cha


Jeremy Gove


Dennis Jansen


Chelsea E. Marmor


Fahad Mithavayani


Alla Raykin


Annie Rothschild


Samantha K. Trencs