EVERSHEDS SUTHERLAND SALT SCOREBOARD Q2 2023

This is the second edition of the Eversheds Sutherland SALT Scoreboard for 2023. 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 discussions of retroactive laws and manufacturer-specific apportionment formulas, as well as a spotlight on digital services cases.

2nd quarter 2023

In the second quarter of 2023, taxpayers prevailed in 50.0% (18 out of 36) of the significant cases.* Taxpayers won 33.3% (3 out of 9) of the significant corporate and franchise income tax cases and 55.5% (5 out of 9) of the significant sales and use tax cases.

SIGNIFICANT TAXPAYER WINS AND LOSSES

31 WINS	2023 OVERALL RESULTS	46 LOSSES

QUARTER 1		QUARTER 2		QUARTER 3		QUARTER 4	
13	28	18	18				
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 17 significant corporate income and franchise tax cases across the country

Taxpayers prevailed in **11** out of 32 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Retroactivity

CASE: *Alabama Department of Revenue v. Cellular Express, Inc.*, No. CL-2022-0701 (Ala. Civ. App. May 12, 2023).

SUMMARY: The Alabama Court of Civil Appeals rendered unconstitutional the retroactive application of a 2014 state sales tax legislative amendment that applied only to taxpayers under audit or with an assessment as of the amendment's effective date. The court found that retroactively subjecting only a small number of taxpayers to the amendment amounted to a due process rights violation and was not supported by a legislative purpose furthered by rational means. View more here.

Exemptions

CASE: *Envolve Pharmacy Solutions, Inc. v. Washington Department of Revenue*, 524 P.3d 1066 (Wash. Ct. App. 2023).

SUMMARY: The Washington Court of Appeals held that a provider of pharmacy benefit management services to its affiliate's enrollees met the insurance business exemption to the Business and Occupation (B&O) Tax because its activities were at least functionally related to insurance business. Washington provides a B&O Tax exemption to "any person in respect to insurance business upon which a tax based on gross premiums is paid to the state." The taxpayer fulfilled the pharmacy benefits management services required by the affiliate's contract with the Washington State Health Care Authority, including managing the availability and payment of the enrollees' pharmacy benefits on behalf of the affiliate. Because the activities performed by the taxpayer were required under its affiliate's Health Care Authority contract—and if performed by the affiliate would constitute insurance business activities—the court concluded that the taxpayer's activities were functionally related to the insurance business and qualified for the exemption. View more here.

CASE: *Reagan v. Commissioner of Revenue*, 203 N.E.3d 1150 (Mass. 2023).

SUMMARY: The Supreme Judicial Court of Massachusetts held that capital gains resulting from the sale of an urban redevelopment project were not subject to Massachusetts personal income tax. As an incentive for private entities to invest in constructing, operating, and maintaining urban redevelopment projects, Massachusetts exempts these entities "from the payment of any tax, excise or assessment to or from the commonwealth... on account of a project." The court concluded that the exemption extends to capital gains from the sale of such urban redevelopment projects because the gains are "on account of" the project. The court's conclusion was further supported by the statute as a whole and its legislative history, which demonstrated that the tax exemption was established to stimulate the investment of private capital. View more here.

Recordation Tax

CASE: *District of Columbia v. Design Center Owner (D.C.) LLC, et al.*, 286 A.3d 1010 (D.C. 2022).

SUMMARY: The District of Columbia Court of Appeals held that, where a taxpayer purchased land, as well as the termination of a ground lease, transfer and recordation taxes were due on both the sale of land as well as the related reversionary interests in the buildings on the land. The District generally does not tax the formation or termination of ground leases of less than thirty years. The taxpayer apportioned the purchase price to: (1) taxable purchases of the land, via special warranty deeds; and (2) non-taxable terminations of pre-existing ground leases encumbering the land, via lease termination memoranda. The Court of Appeals held that the taxpayers had not accounted for—and thus owed tax on—reversionary interests in the buildings transferred between parties. Because the consideration attributed by the taxpayers to the non-taxable ground lease terminations also included a taxable portion attributable to the reversionary interests in the buildings on the land, the Court of Appeals remanded the case to the Superior Court to determine how much of the purchase price should have been taxable consideration for the value of the reversionary interests. View more here.

Manufacturer Apportionment

CASE: *Commonwealth of Virginia, Department of Taxation v. 1887 Holdings, Inc.*, 887 S.E.2d 176 (Va. Ct. App. 2023).

SUMMARY: The Virginia Court of Appeals held that a taxpayer could elect the manufacturer's apportionment method for the first time on a timely filed amended corporate income tax return. Virginia's standard apportionment method prescribes a three-factor formula comprised of property factor, payroll factor, and double-weighted sales factor, whereas for tax years beginning on or after July 1, 2014, manufacturers can elect to use a single-sales factor apportionment. The Court of Appeals reasoned that unlike other Virginia tax elections, the plain language of the statute did "not prevent a taxpayer company from electing to use the manufacturer's apportionment method in a timely amended return." View more here.

Spotlight on digital services

CASE: *In the Matter of the Petition of Beeline.com, Inc.*, DTA No. 829516, (N.Y. Div. Tax App. Feb. 9, 2023).

SUMMARY: An administrative law judge (ALJ) of the New York Division of Tax Appeals held that a company's vendor management system fees were taxable as sales of pre-written software. The company argued that fees from its web-based application, which helps to manage and procure staffing services, were not taxable because the primary purpose of its service was to act as a "matching" agent for suppliers of temporary labor and customers needing such labor, rather than the taxable license of software. The ALJ rejected the company's argument, finding that the company used the same software for all of its customers. Therefore, the product was taxable as pre-written software. The ALJ further noted that, even if the primary function test applied, the primary function of the sale was a license of software because the software technology and license were completely intertwined with the services the company offered, and the customer contract required the use of the software technology license. View more here.

CASE: *Apple Inc. v. Samuel*, Dkt. No. L01283 (La. Bd. Tax. App. Jan. 12, 2023).

SUMMARY: The Louisiana Board of Tax Appeals held that sales of remote personal electronic storage capacity services were not subject to the New Orleans French Quarter Economic Development District sales and use tax. The federal Internet Tax Freedom Act (ITFA) prohibits states and political subdivisions from imposing taxes on Internet access, including "personal electronic storage capacity" that is provided independently or not packaged with Internet access. The taxpayer offers a service that allowed users, via an Internet connection, to upload their personal digital content to the taxpayer's remote servers and access their personal digital content from any of their Internet-connected devices. The Board held that under the plain meaning of the ITFA, the storage service provided subscribers with "personal electronic storage capacity." Therefore, the storage service is Internet access and not taxable. View more here.

CASE: *City of Kenner v. Netflix, Inc.*, No. 22-CA-466 (La. Ct. App. May 3, 2023).

SUMMARY: The Louisiana Court of Appeals held that streaming video providers were not subject to a 5% local franchise fee because either the plaintiff locality had no right of action or the providers were not video service providers. The court agreed with the providers that Louisiana's Consumer Choice for Television Act prohibits local jurisdictions from applying franchise fees to companies that are not certified by the Louisiana Secretary of State as providers that "construct or operate wireline networks in public rights of way." The court further held that the streaming video providers were not subject to the Act because they did not qualify as "video service providers"; they did not construct or operate their own wireline facilities in the public right of way. Rather, the court reasoned, their customers accessed their video services through their own devices via an internet connection provided by a third-party internet service provider.

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