# EVERSHEDS SUTHERLAND SALT SCOREBOARD Q1 2017

This is the fifth edition of the SALT Scoreboard, and the first as Eversheds Sutherland! Each quarter, we tally the results of what we deem to be significant taxpayer wins and losses and analyze those results. This edition of the SALT Scoreboard includes insights regarding California's "doing business" standard, Georgia tax credits, and a Spotlight on sales and use tax decisions.

## FIRST QUARTER 2017

Overall, the start to 2017 was less than ideal for taxpayers; they prevailed in only 26 out of 63 significant cases[1] during the first quarter. While the corporate income tax results were even –8 wins and 8 losses each– taxpayers won only 11 out of 27 significant sales and use tax cases.

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

### SIGNIFICANT TAXPAYER WINS AND LOSSES

**26** WINS — **2017 OVERALL RESULTS** — **37** LOSSES

| | QUARTER 1 | | QUARTER 2 | | QUARTER 3 | | QUARTER 4 | |
|---|---|---|---|---|---|---|---|---|
| | 26 | 37 | | | | | | |
| | W | L | W | L | W | L | W | L |

Taxpayers prevailed in **8** out of 16 significant corporate income tax cases across the country

Taxpayers prevailed in **11** out of 27 significant sales and use tax cases across the country

## SIGNIFICANT Q1 MULTISTATE DEVELOPMENTS

### Telecommunications

CASE: *Verizon Online LLC v. Horbal,* 796 S.E.2d 409 (Va. 2017).

SUMMARY: In a case that Eversheds Sutherland successfully argued on behalf of the taxpayer, the Virginia Supreme Court held that set-top boxes are intangible personal property not subject to property tax. The court reasoned that the General Assembly's removal of the words "tuners" and "converters" from the scope of taxable tangible personal property evidenced a narrowing of what property may be assessed. The court further reasoned that, because the statute at issue was a general tax statute, any doubts in the language should be construed against the government and in favor of the taxpayer.

CASE: *In re State Dep't of Revenue v. Decatur RSA LP & AT&T Mobility II, LLC,* Dkt. 2150811 (Ala. Civ. App. Mar. 17, 2017).

SUMMARY: The Alabama Court of Civil Appeals held that a telecommunications company had the authority to file a refund petition on behalf of the members of a class action settlement regarding the over-collection of a public utilities tax. The court reasoned that consumers can join in a refund petition by expressly authorizing the taxpayer to include the consumer as a joint petitioner and by appointing the taxpayer as its agent for that purpose. Also, the consumers' failure to each sign the joint refund petitions did not render the refund petitions invalid.

### "Doing Business"

CASE: *Swart Enters., Inc. v. Cal. Franchise Tax Bd.*, 7 Cal. App. 5th 497 (Cal. Ct. App. 2017).

SUMMARY: The California Court of Appeal held that a taxpayer passively holding a 0.2% interest in a California-based limited liability company was not "doing business" in the state for purposes of being subject to California's franchise tax. The court based its decision on the plain language of the applicable California income tax statutory and regulatory provisions, and expressly declined to consider any constitutional issues. View more information.

EVERSHEDS SUTHERLAND OBSERVATION: California's "doing business" standard under Section 23101 of the California Revenue and Taxation Code remains an applicable standard in California. If a business or individual does not fall within the articulated bright-line economic presence standards that establish "doing business," then businesses and individuals must still determine, like Swart, whether they are doing business in California under the "actively engaged in any transaction for the purpose of financial or pecuniary gain or profit" standard.

## Tax Credits

CASE: *Sewon America, Inc. v. Riley*, No. 1627180 (Ga. Tax Tribunal Jan. 24, 2017).

SUMMARY: The Georgia Tax Tribunal held that under the Department's regulations addressing the Qualified Jobs Tax Credit, a taxpayer's election to claim either the Joint Tax Credit or the QJTC for the creation of a new job is irrevocable and cannot be changed to a different credit in a later tax year. View more information.

EVERSHEDS SUTHERLAND OBSERVATION: The decision rests on significant deference to the Department's interpretation of its regulation. The Legislature intended to only allow one credit per job. The statute is silent, however, on whether the election should be irrevocable, and comparing the QJTC statute to other tax credit statutes suggests that the election was not intended to be irrevocable. Georgia courts have rarely afforded the Department's regulations Chevron deference in the manner applied by the Tax Tribunal.

## Rental Transactions

CASE: *Hertz Corp. v. City of Chicago*, 2017 IL 119945 (Ill. Jan. 20, 2017).

SUMMARY: The Illinois Supreme Court invalidated a Chicago ruling obligating suburban car rental companies to collect Chicago's personal property lease transaction tax on rental transactions occurring outside the city on the grounds that it violated the Illinois Constitution. The court observed that the ruling imposed the tax based on the customer's stated intent to use the property in Chicago—not actual use in Chicago—or on a presumption of use based on the customer's place of residence. View more information.

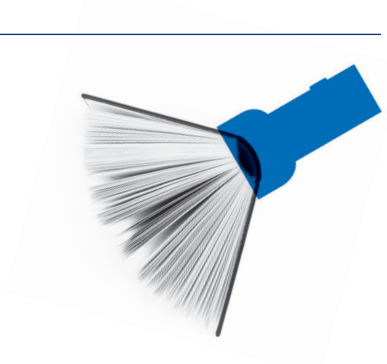
## Texas Franchise Tax

CASE: *Hegar v. Sunstate Equip. Co., LLC*, No. 03-15-00738-CV (Tex. App. Jan. 20, 2017).

SUMMARY: The Texas Court of Appeals concluded that a taxpayer's delivery and pick-up fees could not be deducted as Texas Franchise Tax under section 171.1012 of the Texas Tax Code. The taxpayer, a heavy construction equipment rental company, included its delivery and pick-up fees in its COGS deduction on the basis that it could not operate its business without providing such delivery and pick-up services to its customers. The court rejected the taxpayer's position, holding that the plain language of section 171.1012 makes clear that a taxpayer may only deduct direct costs of acquiring or producing the heavy construction equipment.

# SPOTLIGHT ON SALES AND USE TAX CASES

Taxpayers prevailed in **11** out of 27 significant sales and use tax cases



### SIGNIFICANT DEVELOPMENTS

CASE: *Scholastic Book Clubs, Inc. v. Riley*, No. 155237 (Ga. Tax Tribunal Feb. 14, 2017).

SUMMARY: The Georgia Tax Tribunal held that a remote seller with limited connections to Georgia had nexus in Georgia and must collect sales tax. Specifically, the tribunal found that the remote seller was a "dealer" under Georgia law because, among other things, it "solicits business" in Georgia through teacher "representatives" in the state. View more information.

CASE: *Agri-Plex Heating and Cooling, LLC v. Hegar et al.,* No. 03-15-00813-CV (Tex. App. Jan. 19, 2017).

SUMMARY: The Texas Court of Appeals held that a purchaser of a business is liable for sales tax assessed prior to the date of the purchase, up to the value of the purchase price. Because the taxpayer failed to withhold any amount of the purchase price and failed to obtain a receipt or certificate from the Comptroller stating that no tax was due, the taxpayer was liable for the unpaid taxes.

CASE: *Matter of XO Commc'ns Servs., LLC*, DTA Nos. 826686 & 827014 (N.Y. Div. Tax App. Mar. 9, 2017).

SUMMARY: A New York State Division of Tax Appeals administrative law judge determined that a telecommunications provider's electricity purchases were not exempt from sales tax as sales for resale. In so doing, the ALJ rejected the taxpayer's assertion that it resold electricity by incorporating it into its telecommunications services, explaining that the regulation on which the taxpayer relied applies to tangible personal property purchases, which electricity is not.

CASE: *W. Soule & Co. v. Dep't. of Treasury*, No. 329213 (Mich. Ct. App. Jan. 17, 2017) (unpublished).

SUMMARY: The Michigan Court of Appeals held that a taxpayer was precluded from recovering sales tax it voluntarily paid in response to a preliminary audit determination, even though an assessment of the tax may have been barred under the four-year statute of limitations. The court reasoned that a preliminary audit determination is not an "assessment" and, as a result, the four-year statute of limitations on assessments was not triggered to bar the audit determination. View more information.

CASE: *Merch. Warehouse Co. v. Indiana Dep't of Revenue*, 67 N.E.3d 666 (Ind. Tax Ct. 2017).

SUMMARY: The Indiana Tax Court held that a taxpayer that freezes and stores food ultimately shipped to restaurants was not entitled to sales tax exemptions for its electricity and freezer equipment purchases. The taxpayer's services did not culminate in the production of new, distinct marketable goods, and the taxpayer did not use the electricity and equipment in its own integrated process of producing other tangible personal property.

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