

This is the sixth edition of the Eversheds Sutherland SALT Scoreboard. 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 observations regarding beverage tax issues and California's documentary transfer tax.

2nd quarter 2017

The overall results from the second quarter were much like the first quarter, as taxpayers again prevailed in only 40% (22 out of 55) of the significant cases.* Although taxpayers fared well in corporate income tax cases (7 wins and 6 losses), success was far more limited on the sales and use tax front (7 wins and 21 losses).

So far this year, taxpayers have prevailed in more than 50% of the significant corporate income tax cases, while hovering near the 30% mark for success in significant sales and use tax cases.

SIGNIFICANT TAXPAYER WINS AND LOSSES

48

WINS

2017
OVERALL RESULTS

70

LOSSES

QUARTER 1

26

W

37

L

QUARTER 2

22

W

33

L

QUARTER 3

W

L

QUARTER 4

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 **15** out of 29 significant corporate income tax cases across the country

Taxpayers prevailed in **18** out of 55 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Online travel companies

CASE: *City of Chicago v. Expedia, Inc. et al*, No. 1-15-3402 (Ill. App. Ct. Apr. 26, 2017) (joint petition to vacate granted May 16, 2017).

SUMMARY: The Appellate Court of Illinois held that a corporation's online facilitation and service fees were not subject to the Chicago Hotel Accommodations Tax. The court held that the fees were not part of a taxable "gross rental or leasing charge." The fees were in exchange for the corporation's booking convenience and the benefits of its pre-negotiated hotel rates, rather than for the right to occupy hotel rooms. [View](#) more information.

Manufacturing

CASE: *Duke Energy Corp. v. South Carolina Dep't of Revenue*, No. 12-ALJ-17-0031-CC (S.C. Admin. Law Ct. Apr. 28, 2017).

SUMMARY: The South Carolina Administrative Law Court held that a corporation's canister systems used to contain spent nuclear fuel rods following the manufacture of electricity are exempt from sales and use tax. The court held that the canister systems met the manufacturing exemption from sales and use tax for machines that are necessary to comply with the order of a United States agency

to prevent or abate pollution that is precipitated by other manufacturing machines used in the process of generating electricity.

Beverage tax

CASE: *Williams v. City of Philadelphia*, Nos. 2077 and 2078 C.D. 2016 (Pa. Commw. Ct. June 14, 2017) (en banc).

SUMMARY: The Commonwealth Court of Pennsylvania upheld the Philadelphia Beverage Tax, finding that the tax: (1) did not impermissibly duplicate the Commonwealth's sales tax; (2) was not preempted by the federal Food Stamp Act and the Internal Revenue Code, which prohibits the imposition of tax on items purchased at retail with food stamps; and (3) did not violate the uniformity clause of the Pennsylvania Constitution because the tax was not imposed on an ad valorem basis. [View](#) more information.

EVERSHEDS SUTHERLAND OBSERVATION: Sweetened beverage taxes are gaining traction across localities. In June, the Massachusetts legislature's Joint Committee on Revenue held a hearing regarding a potential one to two cent per ounce tax. In Illinois, Cook County's sweetened beverage tax was set to take effect July 1, but the enforcement of the tax is currently enjoined pending a hearing.

SIGNIFICANT MULTISTATE DEVELOPMENTS *CONT'D*

Telecommunications

CASE: *State Tax Assessor v. MCI Commc'ns Servs., Inc.*, Dkt. No. Ken-16-358 (Me. June 15, 2017).

SUMMARY: The Maine Supreme Judicial Court held that property tax recovery charges and carrier cost recovery charges imposed by a provider of long distance telephone service on its customers in Maine were not subject to "service provider tax." Because the charges were calculated with reference to revenue from exempt interstate and international telecommunications services and were not collected from customers with only intrastate services, the additional charges were also exempt. [View](#) more information.

Memberships

CASE: *Books-A-Million, Inc. v. South Carolina Dep't of Revenue*, No. 16-ALJ-17-0113-CC (S.C. Admin. Law Ct. June 6, 2017).

SUMMARY: The South Carolina Administrative Law Court held that the proceeds from a book retailer's sales of discount-club memberships to customers in South Carolina are includible in the retailer's "gross proceeds of sales" and, therefore, are subject to sales tax. The court reasoned that, but for the retailer's sale of books and other tangible personal property, the retailer would not be able to sell discount-club memberships that allow for discounts on books and free shipping on purchases, and concluded that the membership sales constitute "value proceeding or accruing from the sale of tangible personal property."

Nexus

CASE: *Apex Labs. Int'l Inc. v. City of Detroit*, Dkt. No. 16-000724 (Mich. Tax Tribunal May 2, 2017).

SUMMARY: The Michigan Tax Tribunal held that a passive holding company formed by a private equity fund to hold an investment in a Canadian entity was not subject to the City of Detroit income tax because the company did not have nexus with the City. The company was not "doing business" in Detroit because it did "not engage in an active trade or business that required either a physical location or express direction or management" and the activities performed in the City by the company's directors and officers were at the direction and control of the private equity fund.

Addbacks

CASE: *BMC Software, Inc. v. Dir., Div. of Taxation*, No. 000403-2012 (N.J. Tax Ct. May 24, 2017).

SUMMARY: The New Jersey Tax Court held that a corporation's royalty payments to its parent company qualified for the "unreasonable" exception to the state's addback requirement. The court reasoned that an addback would be unreasonable because the payments at issue were "substantively equivalent" to payments made by the corporation (or its parent) to unrelated third parties in similar transactions.

Telecommunications

CASE: *SegTEL, Inc. v. City of Nashua*, Dkt. No. 2016-0305 (N.H. June 9, 2017).

SUMMARY: The Supreme Court of New Hampshire held that a telecommunications company that owned and operated a fiber optic cable network was not subject to the City of Nashua's property

tax on its use of the City's rights of way. The court explained that City-owned property is exempt from taxation unless: (1) that property is used or occupied by another "under a lease or other agreement"; and (2) the terms of that agreement provide for the payment of property taxes. The company did not own any poles or conduits within the City, and did not have its own license from the City authorizing its occupation of the City's rights of way. Instead, pursuant to pole attachment agreements with utility providers, the company remitted a fee to the utility providers in exchange for the right to place its fiber optic cables on their poles and conduits. The court reasoned that, while the utility providers had pole licenses from the City that provided for the payment of property taxes, the company did not use or occupy the City's rights of way "under" those pole licenses and was not a party to those pole licenses. Therefore, the court concluded that the company was not subject to the terms of the pole licenses providing for the payment of taxes.

Transfer tax

CASE: *926 North Ardmore Ave., LLC v. Cnty. of Los Angeles*, Case No. S222329 (Cal. June 29, 2017).

SUMMARY: The California Supreme Court held that California's documentary transfer tax may be imposed by localities on transfers of interests in legal entities holding title to real property if: (1) the legal entity interest transfer is memorialized in writing; (2) the transfer is made for consideration; and (3) the transfer constitutes a "change of ownership" in the legal entity within the meaning of the phrase for property tax reassessment purposes. Under this holding, it is irrelevant whether the written instrument at issue memorializing the legal entity interest transfer is recorded or directly references the real property. [View](#) more information.

EVERSHEDS SUTHERLAND OBSERVATION: Many legal professionals expect that the holding will dramatically expand the scope of California's documentary transfer tax. Because the tax applies regardless of whether the real property is referenced in a written instrument, any transfer of interests in legal entities holding title to real property could trigger the tax. Expect cities and counties in California to amend their documentary transfer tax ordinances in accordance with the court's change in beneficial ownership analysis.

Deductions

CASE: *Ameris Bank v. Alabama Dep't of Revenue*, Dkt. No. BIT. 16-255 (Ala. Tax Trib. Feb. 9, 2017).

SUMMARY: The Alabama Tax Tribunal held that a banking corporation properly deducted dividends received from an affiliated REIT for financial institution excise tax purposes because the REIT qualified as a "corporation." The Tribunal rejected the Department of Revenue's assertion that the REIT was not a corporation based on its tax treatment as a REIT, explaining that the deduction applies more broadly to dividends received from payor entities that are corporations organized and existing under Alabama law.

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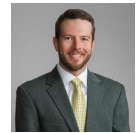
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