EVERSHEDS SUTHERLAND SALT SCOREBOARD Q2 2018

This is the tenth edition of the Eversheds Sutherland SALT Scoreboard, and the second edition of 2018. 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 a discussion of the United States Supreme Court's decision in *South Dakota v. Wayfair*, Inc., insights regarding Chicago's taxation of streaming video, and a spotlight on New York cases.

2nd quarter 2018

Taxpayers fared better in the second quarter of 2018 than the first, as taxpayers prevailed in 37.3% (19 out of 51) of the significant cases.* Taxpayers won four significant corporate income tax cases and eight significant sales and use tax cases in the second quarter. These results slightly elevated the 2018 overall taxpayer winning percentage to 33.7% (34 out of 101) and the sales and use tax taxpayer winning percentage to 32.7% (16 out of 49). However, the corporate income tax taxpayer winning percentage decreased to 40.0% (8 out of 20).

SIGNIFICANT TAXPAYER WINS AND LOSSES

34 WINS — **2018 OVERALL RESULTS** — **67** LOSSES

	QUARTER 1		QUARTER 2		QUARTER 3		QUARTER 4	
	15	35	19	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.

Corporate income tax vs. sales tax

Taxpayers prevailed in **8** out of 20 significant corporate income tax cases across the country

Taxpayers prevailed in **16** out of 49 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Nexus

CASE: *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018).

SUMMARY: In *Wayfair*, the United States Supreme Court overruled its landmark decision in *Quill Corp. v. North Dakota*, eliminating the "physical presence" rule that has served as the bright-line standard for whether remote sellers are required to collect state sales taxes. The Court held that South Dakota's law—which required an out-of-state seller to collect tax if it makes at least 200 separate sales or $100,000 worth of sales in the state—satisfied the substantial nexus prong of the dormant Commerce Clause. View more information.

EVERSHEDS SUTHERLAND OBSERVATION: Although the Court rejected *Quill's* physical presence standard, the Court left open on remand whether the South Dakota law satisfies the remaining prongs of the *Complete Auto Transit, Inc. v. Brady* test—specifically, whether the tax: (1) is fairly apportioned; (2) discriminates against interstate commerce; or (3) is fairly related to services provided by the state. It is still uncertain how the Court's decision will apply to non-Streamlined Sales and Use Tax Agreement states, safe harbor thresholds lower than South Dakota's, or retroactive collection requirements.

CASE: *Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Dep't of Revenue*, 814 S.E.2d 43 (N.C. 2018).

SUMMARY: The North Carolina Supreme Court held that the presence in the state of an irrevocable inter vivos trust's beneficiary is not sufficient to establish income tax nexus for the trust. Other than the trust's beneficiaries being residents of North Carolina, there were no other connections between the state and the trust. The trust did not have sufficient minimum connections with North Carolina to satisfy the due process requirements of the United States and North Carolina constitutions. Because the trust was a separate and distinct entity from its beneficiaries, it is the trust's connections with the state that matter for determining whether the tax violates due process. View more information.

CASE: *Ooma, Inc. v. Oregon Dep't of Revenue*, No. TC-MD 160375G (Or. T.C. Apr. 13, 2018).

SUMMARY: The Oregon Tax Court held that the state was not constitutionally prohibited from imposing its statewide 911 tax on an out-of-state VoIP service provider with no physical presence in the state. The court held that the 911 tax was not controlled by the *Quill* physical presence standard because it was not a sales or use tax. Instead, the court found that the taxpayer's regular sales of telecommunication devices and services directly to Oregon residents satisfied the United States Constitution's Due Process and Commerce Clauses. View more information.

Streaming video

CASE: *Labell v. City of Chicago*, Case No. 15 CH 13399 (Cook Cnty. Cir. Ct. May 24, 2018).

SUMMARY: The Circuit Court of Cook County upheld the City of Chicago's amusement tax, as imposed on streaming services. The court held that the amusement tax did not: (1) violate the federal Internet Tax Freedom Act; (2) violate the Commerce Clause of the United States Constitution; (3) violate the Uniformity Clause of the Illinois Constitution; or (4) exceed Chicago's home rule authority by taxing services occurring outside of Chicago. View more information.

EVERSHEDS SUTHERLAND OBSERVATION: During the pendency of the litigation, Chicago continued an aggressive outreach program targeted at streaming service providers not remitting their amusement tax. Now that Chicago has received a court ruling that the tax does not violate state and federal law, taxpayers should expect that Chicago will aggressively step up its enforcement of the tax.

Multistate tax compact

CASE: *Health Net, Inc. v. Oregon Dep't of Revenue*, 415 P.3d 1034 (Or. 2018).

SUMMARY: The Oregon Supreme Court held that the amendment to Oregon's income tax apportionment formula provisions did not violate the contractual obligations of the Multistate Tax Compact or the Oregon Constitution. First, the 1967 Oregon legislature did not enter into a binding contract when it enacted the Multistate Tax Compact because the legislature's intent to do so was not "clear and unmistakable." Second, the 1993 Oregon legislature's implied repeal of the income tax apportionment formula election provision did not violate the state constitution's prohibition on revising an act without setting forth and publishing the act at full length. Rather, the repeal reflected a "complete and perfect" legislative choice to replace one set of apportionment formulas with another. View more information.

Spotlight on New York

CASE: *Matter of XO Commc'ns Servs.*, LLC, DTA Nos. 826686 & 827014 (N.Y. Tax. App. Trib. May 9, 2018).

SUMMARY: The New York Tax Appeals Tribunal denied a telecommunications services provider's claim for a refund on sales tax paid on its purchases of electricity. The Tribunal rejected the service provider's argument that the purchases were sales for resale on the basis that the electricity was a "component" of the services it provided to its customers. In addition, the Tribunal held that electricity did not constitute tangible personal property and therefore could not be considered as a component part of its services sold to consumers. The Tribunal further noted that the provider did not charge its customers for electricity, receive resale certificates from its customers, or provide resale certificates to its vendors.

CASE: *Matter of GKK 2 Herald LLC*, DTA No. 826402 (N.Y. Tax. App. Trib. May 10, 2018).

SUMMARY: The New York Tax Appeals Tribunal held that the New York real estate transfer tax applied to the sale of a 45% interest in a limited liability company holding real property in New York. The Tribunal held that a multi-step transfer was not a mere change of identity or form of ownership. Instead, it was the taxable transfer of a controlling interest in the underlying real estate. The Tribunal rejected the taxpayer's contention that the transactions should not be aggregated for purposes of determining whether a taxable transfer had occurred, based on the statute's anti-avoidance purpose, along with the simultaneous timing of the transactions at issue. The Tribunal concluded that avoidance of the tax was a factor in the structure of the transactions.

CASE: *Matter of TransCanada Facility USA Inc.*, DTA No. 827332 (N.Y. Div. Tax Appeals June 7, 2018).

SUMMARY: The New York Division of Tax Appeals held that an electricity producer was not a "qualified New York manufacturer" and therefore was not entitled to the $350,000 franchise tax liability cap. To be a qualified New York manufacturer, the taxpayer must, among other requirements, have tangible personal property that is "principally used by the taxpayer in the production of goods by manufacturing or processing." The ALJ determined that the production of electricity does not satisfy this requirement.

CASE: *Matter of RJB Slick's, Inc.*, DTA No. 825079 (N.Y. Tax. App. Trib. Feb. 8, 2018).

SUMMARY: The New York Tax Appeals Tribunal held that because the Division of Taxation's audit methodology was reasonable, the taxpayer was not entitled to a refund of sales and use tax paid. Because the taxpayer consented to the audit changes through a negotiated settlement and signed the statement of audit change, the taxpayer had agreed to the reasonableness of the audit adjustments. Further, the taxpayer was not entitled to a refund of sales and use tax paid because the taxpayer could not prove that its actual sales tax liability was less than the tax it consented to pay as part of the agreement.

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