EVERSHEDS SUTHERLAND SALT SCOREBOARD Q3 2017

This is the seventh 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 highlights developments regarding the sales taxation of drop shipments and the inclusion of entities in a combined report. Also included is a Spotlight on cases involving the United States Commerce Clause.

3rd quarter 2017

The third quarter was much like the two previous quarters, as taxpayers prevailed in 40% (29 out of 72) of significant state tax cases.*

In particular, taxpayers prevailed in 10 out of 24 (42% success rate) significant sales and use tax cases this quarter. Compared to the second quarter (25% success rate), this quarter was a step in the right direction for taxpayers in sales and use tax cases.

* 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

77 WINS	2017 RESULTS	113 LOSSES

QUARTER 1		QUARTER 2		QUARTER 3		QUARTER 4	
26	37	22	33	29	43		
W	L	W	L	W	L	W	L

Corporate income tax vs. sales tax

Taxpayers prevailed in **25** out of 51 significant corporate income tax cases this year

Taxpayers prevailed in **28** out of 79 significant sales and use tax cases this year

SIGNIFICANT MULTISTATE DEVELOPMENTS

False Claims Act

CASE: *Illinois ex rel. Stephen B. Diamond, P.C. v. Lush Internet, Inc.,* No. 1-16-1601 (Ill. App. Ct. Sept. 25, 2017).

SUMMARY: The Illinois Appellate Court held that the trial court properly determined that an Internet retailer that did not collect and remit use tax on its online and catalog sales to Illinois customers did not violate the Illinois False Claims Act. The court held that the retailer did not have substantial nexus with Illinois under the Commerce Clause because it lacked a physical presence and brick-and-mortar retail stores located in Illinois did not act as its agent or on its behalf. Also, the retailer did not act with reckless disregard of an alleged obligation to collect and remit use tax on its internet and catalog sales, which was supported by the CEO's consultations with legal and tax professionals and consideration of the results of other states' audits.

Drop Shipments

CASE: *D&H Distrib. Co. v. Commissioner of Revenue,* 79 N.E.3d 409 (Mass. 2017).

SUMMARY: The Massachusetts Supreme Judicial Court held that an in-state wholesaler was, under the state's drop shipment rule, required to collect and remit sales tax on drop shipment sales made to Massachusetts customers. The court also held that the drop shipment rule did not violate the dormant Commerce Clause because: (1) even if the rule penalized wholesale suppliers with Massachusetts nexus for doing business with out-of-state retailers, the rule would result in a disadvantage, rather than an advantage, for Massachusetts retailers; and (2) the taxpayer failed to demonstrate any unconstitutional burden created by the tax itself. View more information.

Sourcing: Satellite Television

CASE: *DIRECTV, Inc. v. South Carolina Dep't of Revenue,* No. 2015-001509 (S.C. Ct. App. Aug. 30, 2017).

SUMMARY: The South Carolina Court of Appeals held that all of a satellite television provider's South Carolina customer subscription receipts were properly sourced to the state for purposes of determining the provider's corporate income tax apportionment factor due to the location of its satellite signal delivery. The court found that the provider's sole income-producing activity related to its South Carolina customer subscription receipts was the delivery of its satellite signal to those customers. View more information.

Net Operating Losses

CASE: *Sinclair Broad. Group, Inc. v. Commissioner of Revenue,* No. 8919-R (Minn. Tax Ct. Aug. 11, 2017).

SUMMARY: The Minnesota Tax Court held that the annual limitation on net operating losses of an acquired corporation is to be applied only once to a taxpayer's pre-apportioned income. View more information.

Captive Insurance

CASE: *In re Stewart's Shops Corp.,* DTA No. 825745 (N.Y. Tax App. Trib. July 27, 2017).

SUMMARY: The New York State Tax Appeals Tribunal affirmed an Administrative Law Judge's determination that payments by a corporation to its captive insurance company did not qualify as deductible insurance premiums because the arrangement did not constitute insurance for federal income tax purposes. Thus, the payments were not deductible for corporate franchise tax purposes. View more information.

Tax vs. Fee

CASE: *Camden-Wyoming Sewer & Water Auth. v. Town of Camden,* C.A. No. 12347-VCS (Del. Ch. Sept. 18, 2017).

SUMMARY: The Delaware Chancery Court held that a town's building permit "fee" was, in substance, a tax that could not be levied against a tax-exempt water and sewer authority because it was calculated without regard to any benefits to the authority and would be used within the town's general revenue fund. View more information.

Combined Reporting

CASE: *Ashland Inc. v. Minnesota Commissioner of Revenue,* 899 N.W.2d 812 (Minn. 2017).

SUMMARY: The Minnesota Supreme Court respected a foreign entity's federal check-the-box election for the purpose of determining which entities were included in Minnesota combined franchise tax reports under the state's water's-edge rule. View more information.

Spotlight on United States Commerce Clause Cases

SIGNIFICANT DEVELOPMENTS

CASE: *South Dakota v. Wayfair Inc.,* Dkt. No. 28160 (S.D. Sept. 13, 2017).

SUMMARY: The South Dakota Supreme Court held that the state's sales tax economic nexus provision violated the Commerce Clause of the United States Constitution. The economic nexus provision required out-of-state sellers with at least $100,000 of in-state sales or 200 separate in-state transactions to collect and remit sales tax, regardless of whether the seller established a physical presence in the state. The court held that requiring out-of-state sellers without any physical presence in the state to remit sales tax directly conflicts with the United States Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

EVERSHEDS SUTHERLAND OBSERVATION: On October 2, 2017, South Dakota filed a petition for a writ of certiorari to the Supreme Court of the United States. Eversheds Sutherland will continue to follow this case.

CASE: *S. California Edison v. Nevada Dep't of Taxation,* 398 P.3d 896 (Nev. 2017).

SUMMARY: The Nevada Supreme Court held that a power company was not entitled to a refund of use tax paid on coal brought into Nevada from Arizona because it failed to demonstrate that the scheme discriminated against interstate commerce. To prove the unconstitutionality of the tax, the court required the power company to demonstrate that the tax provided substantially similar entities with a competitive advantage. The court declined to find that energy producers using geothermal, oil and natural gas resources mined in Nevada were substantially similar to the power company, which used coal.

CASE: *Shared Imaging, LLC v. Hamer,* No. 1-15-2817 (Ill. App. Ct. June 28, 2017).

SUMMARY: The Appellate Court of Illinois held that Illinois use tax was fairly apportioned under the United States Supreme Court's test in *Complete Auto Transit, Inc. v. Brady* even though the taxpayer's property was stored in Illinois and used outside the state. The taxpayer was engaged in the business of leasing trailers and other mobile equipment outfitted with medical devices and instruments. The taxpayer leased its equipment to customers both within and outside of Illinois. The court concluded that the existence of a credit provision, which allows a tax credit for sales and use tax paid to another state, satisfied the fair apportionment requirement of the *Complete Auto* test because "the danger of multistate taxation is averted."

CASE: *In re Bayerische Beamtenkranekenkasse AG,* DTA No. 824762 (N.Y. Tax App. Trib. Sept. 11, 2017); *In re Landschaftliche Brandkasse Hannover*, DTA No. 825517 (N.Y. Tax App. Trib. Sept. 11, 2017).

SUMMARY: The New York State Tax Appeals Tribunal held that the Department's assessment of two non-admitted German insurance companies violated the United States-Germany Tax Treaty's anti-discrimination clause and the United States Constitution's Foreign Commerce Clause, the assessment discriminated against the insurance companies based on their status as alien insurers. View more information.

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