EVERSHEDS SUTHERLAND

SALT SCOREBOARD

Q3 2018

This is the eleventh edition of the Eversheds Sutherland SALT Scoreboard, and the third 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 California combined reporting, insights regarding the Washington bad debt deduction, and a spotlight on apportionment cases.

3rd quarter 2018

In the third quarter of 2018, taxpayers were unable to recover from their early 2018 losses. Taxpayers prevailed in 33.3% (20 out of 60) of the significant cases.* Taxpayers won 20% (3 out of 15) of the significant corporate income tax cases and 36.7% (11 out of 30) of the significant sales and use tax cases in the third quarter.

SIGNIFICANT TAXPAYER WINS AND LOSSES

2018 OVERALL RESULTS: 54 WINS, 107 LOSSES

	QUARTER 1		QUARTER 2		QUARTER 3		QUARTER 4	
	W	L	W	L	W	L	W	L
	15	35	19	32	20	40		

* 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 11 out of 35 significant corporate income tax cases across the country

Taxpayers prevailed in 27 out of 79 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Combined Reporting

CASE: *Harley-Davidson, Inc. v. California Franchise Tax Board*, 237 Cal. Rptr. 3d 883 (Cal. Ct. App. 2018).

SUMMARY: The California Court of Appeal affirmed a trial court's holding that the California Franchise Tax Board can require *interstate* unitary businesses to use combined reporting, even though combined reporting is optional for *intrastate* unitary businesses. The taxpayer, a motorcycle retailer, argued that the differential treatment of interstate and intrastate business gave a direct commercial advantage to intrastate unitary companies and, therefore, discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution. The appellate court disagreed, holding that the legitimate state interest to accurately measure and tax all income attributable to California outweighed any possible discriminatory effect. View more information.

Separately Stated Tax

CASE: *Winner Tobacco Wholesale, Inc. v. Commissioner of Revenue*, Dkt. No. 9049-R (Minn. Tax Ct. Aug. 6, 2018).

SUMMARY: The Minnesota Tax Court held that a tobacco distributor was entitled to a refund of separately stated Minnesota tobacco tax that it paid on federal excise tax that had been passed through to it by the tobacco manufacturer. However, the court also held that if the tax is not separately stated, the tobacco tax is imposed on the entire wholesale price, inclusive of any federal excise tax passed through from the manufacturer. View more information.

Telecommunications

CASE: *Unlimited Phone Store, LLC v. South Carolina Department of Revenue*, No. 16-ALJ-17-0399-CC (S.C. Admin. Law Ct. Sept. 21, 2018).

SUMMARY: The South Carolina Administrative Law Court ruled that the taxpayer was required to collect sales tax on its retail sales of prepaid cellular telephone service. The taxpayer argued that its sales of unlimited plans did not constitute "prepaid wireless calling arrangements," which must be "sold in units or dollars which decline with use in a known amount." The court disagreed because, although the taxpayer's prepaid plans were unlimited, they were still subject to a known unit and known expiration date of 30 days. View more information.

Bad Debt Deduction

CASE: *Lowe's Home Center, LLC v. Department of Revenue*, 425 P.3d 959 (Wash. Ct. App. 2018).

SUMMARY: The Washington Court of Appeals upheld the denial of sales tax and business and occupation tax refund claims filed by a retailer based on a bad debt deduction. The court held that deductibility under federal tax law alone is not sufficient to qualify under the Washington bad debt statute. Rather, the bad debt must also be "on sales taxes previously paid" that are "written off as uncollectible" *by the seller* to qualify for a deduction under that provision. In this case, (1) the retailer's bad debts at issue were not "directly attributable" to retail sales on which sales tax was paid, but instead were attributable to the retailer's separate, contractual profit sharing reductions with the banks; and (2) the retailer's books and records did not reflect any written-off accounts that resulted in bad debt. View more information.

Royalties

CASE: *A&W Restaurants, Inc. v. Taxation & Revenue Department of New Mexico*, No. A-1-CA-35999 (N.M. Ct. App. Aug. 22, 2018).

SUMMARY: The New Mexico Court of Appeals upheld the imposition of gross receipts tax on certain trademark-related royalty fees received by an out-of-state corporation pursuant to its franchise agreements with New Mexico businesses. The court examined whether the royalty fees flowing from a limited trademark license provision contained within the franchise agreements "should be treated as being received from the grant of a franchise" and, thus, subject to the gross receipts tax, "or from the licensing of a trademark" and, therefore, not subject to the gross receipts tax. The court concluded that the trademark licensing provision was "central to the overall franchise and should be treated as part of the franchise" and, thus, taxable. View more information.

Spotlight on Apportionment Cases

CASE: *Associated Bank, N.A. & Affiliates v. Commissioner of Revenue*, 914 N.W.2d 394 (Minn. 2018).

SUMMARY: The Minnesota Supreme Court held that the state's standard apportionment method did not fairly reflect a national financial institution's net income allocable to the state. The national financial institution had transferred its loan portfolios to two newly formed partnerships, which were not financial institutions. For apportionment purposes, Minnesota requires financial institutions to include loan interest in their sales factor numerators, but does not require other entities to do so. The Commissioner proposed an alternative apportionment method requiring the partnerships to follow the rules for financial institutions and include interest income in their receipts factors. The court agreed, concluding that the statutory apportionment formula failed to recognize any of the taxpayer's income from its Minnesota business activities. View more information.

CASE: *In re Dish DBS Corporation*, Dkt. No. 1713444 (Pa. Bd. Fin. & Revenue May 14, 2018).

SUMMARY: The Pennsylvania Board of Finance and Revenue held that a satellite television service provider's receipts from its sales of satellite television services were includable in its Pennsylvania numerator. During the years at issue, Pennsylvania sourced receipts based on cost of performance. Because the taxpayer could not support that a greater portion of its income-producing activities occurred outside the state, the sales were included in the numerator. The Board also held that the taxpayer's orbiting satellites were includable in its property factor numerator as a percentage of the satellite values based on Pennsylvania subscription fees because they were owned by the taxpayer and used in the state to provide satellite television service. View more information.

CASE: *Staples, Inc. v. Comptroller of Treasury*, Dkt. No. 2597 (Md. Ct. Spec. App. Aug. 9, 2018).

SUMMARY: The Maryland Court of Special Appeals held that a retailer and its subsidiary lacked economic substance, justifying the use of an alternative apportionment formula. Because the standard three-factor formula yielded an apportionment factor of zero for the entities, the court approved an apportionment formula based on the apportionment factors of the affiliate entities doing business in the state. Upon review, the court held that this apportionment formula did not violate the Commerce Clause because it was both internally and externally consistent.

CASE: *USC Consulting Group LLC v. Testa*, Dkt. No. 2017-2246 (Ohio Bd. Tax App. June 8, 2018).

SUMMARY: The Ohio Board of Tax Appeals affirmed the Tax Commissioner's assessment of commercial activity tax against an out-of-state consulting company. Ohio applies market-based sourcing in order to source sales of services, including consulting services. The Board agreed that while much of the consulting company's work was performed at its primary offices in Ontario, Canada, the benefit of its services were received at its client locations, including Ohio.

Meet your SALT team


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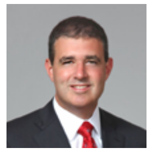
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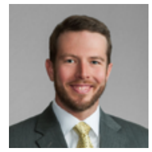
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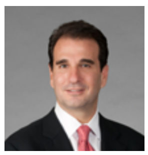
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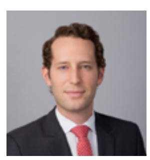
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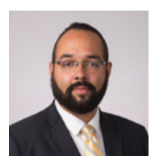
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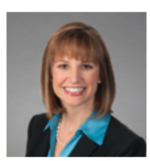
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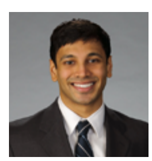
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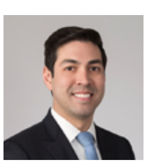
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