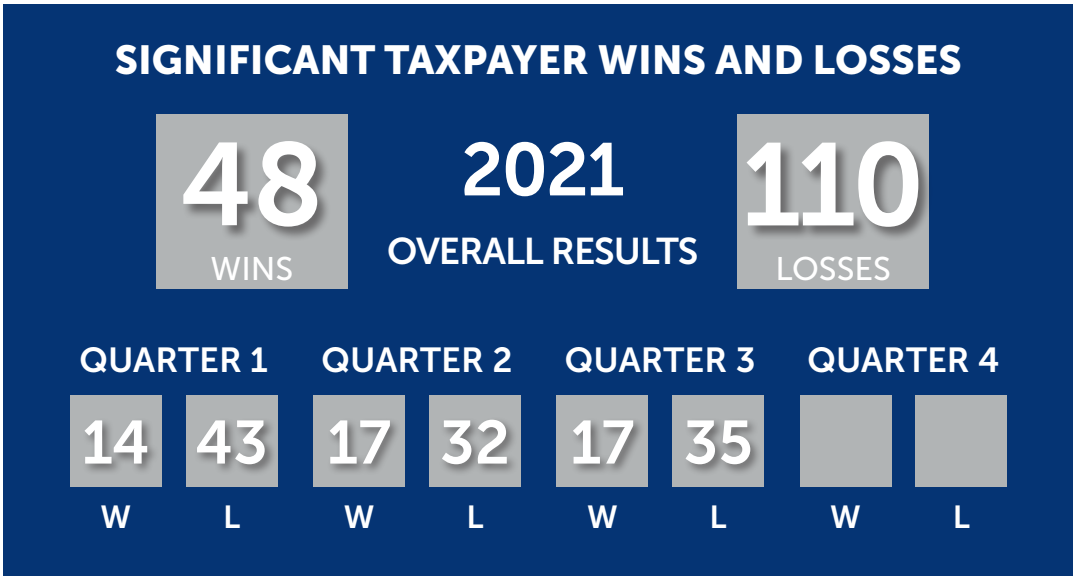
EVERSHEDS SUTHERLAND SALT SCOREBOARD Q3 2021

This is the third edition of the Eversheds Sutherland SALT Scoreboard for 2021. Since 2016, we have tallied the results of what we deem to be significant taxpayer wins and losses and analyzed those results. Our entire SALT team hopes that you have found the SALT Scoreboard's content useful. This edition includes our view of the Ohio Supreme Court's decision on Cincinnati's billboard excise tax, and a New York Administrative Law Judge's opinion on New York residency, along with a spotlight on a recent series of video service provider fee cases.

3rd quarter 2021

In the third quarter of 2021, taxpayers prevailed in 32.7% (17 out of 52) of the significant cases.* Taxpayers won 15.4% (2 out of 13) of the significant corporate income tax cases and 27.8% (5 out of 18) of the significant sales and use tax cases. In the first half of the year, taxpayers prevailed in 29.2% of all significant cases, 27.2% of the significant corporate income tax cases, and 32.6% of the significant sales and use tax cases. Taxpayers showed improvement in total significant cases, but fell behind for both corporate income tax and sales and use tax cases. We hope the fourth quarter will bolster this year's numbers.



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

Taxpayers prevailed in **19** out of 61 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

First Amendment

CASE: *Lamar Advantage GP Co., L.L.C. v. Cincinnati*, Slip Op. No. 2021-Ohio-3155 (Ohio Sept. 16, 2021).

SUMMARY: The Ohio Supreme Court recently held that Cincinnati's billboard excise tax violated the First Amendment to the US Constitution. The Cincinnati City Council passed an ordinance that imposed an excise tax on advertising hosts with signs in the city, effectively targeting a small group to bear most of the tax burden. The Ohio Supreme Court reviewed U.S. Supreme Court decisions and distilled four principles: (1) the press may be subjected to a generally applicable tax; (2) a tax is unconstitutional if an official must look at the content of speech to determine whether the tax applies to it; (3) a tax that selectively singles out the press or targets a small group of speakers creates the danger that the tax will be used to censor speech; and (4) it is not necessary to prove that the purpose of a tax is to suppress or punish speech to establish that the tax violates the First Amendment. The court struck down the tax because it burdened activities protected by the First Amendment, it created a potent tool for censorship, and an alternative means of achieving the same interest existed. View more information.

Apportionment

CASE: *Vectren Infrastructure Services Corp. v. Department of Treasury*, Dkt. No. 17-000107-MT (Mich. Ct. App. Sept. 30, 2021).

SUMMARY: The Michigan Court of Appeals reaffirmed its March 2020 decision that the state's statutory apportionment formula was unconstitutionally distortive as applied to a taxpayer's Michigan Business Tax liability. The Michigan Supreme Court vacated and remanded the prior appellate court decision, noting that determining the proper statutory calculation method was a "foundational issue" necessary to ascertain whether alternative apportionment was required. Thereafter, the Court of Appeals remanded the case to the trial court, which rejected the taxpayer's argument that the sale of an entire business should be included in the sales factor denominator. The Court of Appeals agreed with the trial court's conclusion,

vacated the tax assessment and penalty, and remanded the case once again in pursuit of determining a proper apportionment method. View more information.

Residency

CASE: *Matter of Pilaro*, No. 829204 (N.Y. Div. of Tax Appeals Aug. 26, 2021).

SUMMARY: A New York Administrative Law Judge recently determined that a taxpayer was liable for income tax as a statutory resident of New York State and New York City for the entire 2014 tax year because he: (1) maintained a permanent place of abode in New York City; and (2) was physically present in New York State and City for more than 183 days in that year. It was uncontested that the taxpayer became a New York domiciliary when he purchased an apartment in New York City in December 2014. The ALJ, however, found that New York's tax statutes allow a taxpayer to be treated as a statutory resident during the portion of the year when the taxpayer was not domiciled in New York. View more information.

Use Tax on Mailed Advertisements

CASE: *Bed Bath & Beyond, Inc. v. Department of Treasury*, Dkt Nos. 352088, 325667 (Mich. Ct. App. Jul. 8, 2021).

SUMMARY: The Michigan Court of Appeals held that a retailer was not subject to use tax on advertising materials mailed to Michigan residents. The retailer designed the materials in-house and had them printed by a third-party printer, outside of Michigan. After printing, the retailer sent the materials to a provider of marketing solutions, who was in charge of preparing and delivering the advertising materials. On appeal, the Michigan Court of Appeals upheld the decision of the Court of Claims, rendering the use tax assessment invalid and finding that (1) the retailer did not exercise any control over the materials within the state's border; and (2) the provision of a list of Michigan customers and direction of the dates of distribution did not constitute adequate power or control to subject the retailer to use tax. View more information.

Spotlight on video service provider fee cases

Recently, a number of localities across the US (in Arkansas, California, Georgia, Illinois, Indiana, Kansas, Louisiana, Missouri, Nevada, New Jersey, Ohio, Tennessee, and Texas) have filed class action complaints against streaming video providers, asserting that they are required to pay the localities' video service provider fees. Over the third quarter of 2021, four courts have issued decisions rejecting the localities' arguments. Also, two state supreme courts have accepted certified questions of state law. The Ohio Supreme Court and Tennessee Supreme Court are determining whether two streaming video providers are video service providers. The Ohio Supreme Court is also determining whether the locality can sue them to enforce the state's video service provider provisions.

CASE: *City of Reno, Nevada v. Netflix, Inc.*, Case No. 3:20-cv-00499-MMD-WGC (D. Nev. Sept. 3, 2021).

SUMMARY: On September 3, 2021, the United States District Court for the District of Nevada held that streaming video providers were not subject to Nevada localities' franchise fees (i.e., video service provider fees). The city of Reno filed a class action lawsuit against two streaming video providers, claiming that they were required to register as video service providers and pay local franchise fees. A "video service provider" is "any person that provides or offers to provide video service over a video service network to subscribers[.]" Nev. Rev. Stat. § 711.151(1). The term "video service" excludes "[a]ny video content provided solely as part of, and through, a service which enables users to access content, information, electronic mail or other services that are offered via the public Internet." Nev. Rev. Stat. § 711.141(3)(a). The court held that the streaming video providers were not "video service providers" because they satisfied this exclusion from "video service." The court rejected the city's arguments that the taxpayers did not qualify for the exclusion because: (1) the providers' video streaming offering must be only a part, rather than the entirety, of the service; and (2) the "public" Internet is no longer public if a fee is charged for its usage. The court also concluded that local governments do not have a private right of action under the Nevada video service laws to pursue its claims against the streaming video providers. View more information.

CASE: *City of Lancaster, California v. Netflix, Inc.*, Case No. 21STCV01881 (Los Angeles Cnty., Cal. Super. Ct. Sept. 20, 2021).

SUMMARY: Lancaster, California filed a class action complaint against two streaming video providers, claiming that they must pay local video service provider fees because they provide video services in California using broadband wireline facilities located at least in part in public rights-of-way. After holding that California localities such as Lancaster lacked the right to bring a case under the state statute against streaming video providers, the court further concluded that the local video service provider fees imposed by the Act do not apply to the streaming video providers. First, the court reasoned that the streaming video providers' use of Internet service providers' networks to distribute their content does not constitute the type of "use" of the public right-of-way rendering them liable for the local video service provider fees. Second, the court concluded that the streaming video providers do not meet the definition of a "video service provider" that provides "video programming" under the Act because the streaming video providers' services were not comparable to the live, linear, channelized, scheduled, or programmed programming provided by a television broadcast station. View more information.

The United States District Courts for the Western District of Arkansas and the Eastern District of Texas have also recently issued decisions in favor of the streaming video providers. *See City of Ashdown, Arkansas v. Netflix, Inc. & Hulu, LLC*, Case No. 4:20-cv-4113 (W.D. Ark. 2021)*; City of New Boston, Texas v. Netflix, Inc. & Hulu, LLC*, No. 5:20-CV-00135-RWS (E.D. Tex. 2021).

Meet your SALT team


Michele Borens


Nikki Dobay


Jonathan A. Feldman


Jeffrey A. Friedman


Ted W. Friedman


Tim Gustafson


Charles C. Kearns


Todd A. Lard


Breen Schiller


Daniel Schlueter


Maria M. Todorova


Eric S. Tresh


W. Scott Wright


Eric Coffill


Douglas Mo


Michael Hilkin


Cyavash Ahmadi


Catalina Baron


Justin Brown


Charles C. Capouet


Elizabeth S. Cha


Danyelle Dukes*


Jeremy Gove


Dennis Jansen


Chelsea E. Marmor


Laurin McDonald


Fahad Mithavayani


Alla Raykin


Annie Rothschild


Samantha K. Trencs

* Not admitted to practice. Application submitted to the Georgia Bar.

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