EVERSHEDS SUTHERLAND SALT SCOREBOARD Q3 2022

This is the third edition of the Eversheds Sutherland SALT Scoreboard for 2022. 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 a discussion of P.L. 86-272, a focus on remote work and a spotlight on apportionment cases.

3rd quarter 2022

In the third quarter of 2022, taxpayers prevailed in 38.9% (21 out of 54) of the significant cases.* Taxpayers won 43.8% (7 out of 16) of the significant corporate income tax cases and 26.7% (4 out of 15) of the significant 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.

Year-to-date

Taxpayers prevailed in **15** out of 34 significant corporate income tax cases across the country

Taxpayers prevailed in **15** out of 50 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Remote Work

CASE: *Morsy v. Dumas*, Case No. CV 21 946057 (Ohio Ct. Comm. Pleas, Sept. 26, 2022).

SUMMARY: The Ohio Court of Common Pleas held that Cleveland's municipal income tax on remote workers was unconstitutional as applied. The taxpayer lived in Pennsylvania and was employed by a company located in Cleveland, Ohio. In response to a COVID-19 pandemic stay-at-home order, the Ohio legislature passed a law requiring employers to treat work-from-home days as days worked at the employer's place of business. The taxpayer sought a refund of income tax withheld under this law on the basis that she was not physically located in Cleveland when performing her duties. The court agreed with the taxpayer that her physical presence in early 2020 did not give rise to ongoing personal jurisdiction for the entire year when she was not otherwise physically present, and concluded there was no legal basis authorizing tax jurisdiction because of the virtual network connection with her employer. Therefore, the court held that the law was unconstitutional. View more information.

Sales Taxability

CASE: *Alcatel-Lucent USA Inc. v. Virginia Department of Taxation*, Case No. CL 20-3591 (Va. Cir. Ct., published Sept. 9, 2022).

SUMMARY: The Circuit Court of the City of Richmond held that a telecommunications equipment company was entitled to a refund of sales tax on its sales of software, equipment, and related services sold to a telecommunications company. Under Virginia law, software delivered electronically via the Internet is exempt from sales tax. The court rejected as extra-statutory the Commissioner's argument that the software was not exempt because there was no invoice, contract, or other sales agreement certifying the delivery method. The court also held that the company's sales of equipment were exempt because (1) they were broadcasting equipment sold to an entity regulated and supervised by the Federal Communications Commission, and (2) they were non-taxable sales of amplification equipment used by an open video system. View more information.

Resident Tax Credits

CASE: *Matter of Allison Greenberg and Scott J. and Martha M. Farrell*, DTA Nos. 829737, 829738 (N.Y.S. Tax. App. Trib., July 14, 2022).

SUMMARY: The New York State Tax Appeals Tribunal upheld an income tax assessment, disallowing the taxpayers' claim of resident tax credits to the extent such credits were also claimed on the taxpayers' carried interest income in Connecticut. The taxpayers, both New York residents, received flow-through investment income in the form of carried interest, on which they paid both Connecticut and New York income tax. The taxpayers claimed a credit against the New York income tax for income taxes paid in Connecticut, arguing that the carried interest constituted income derived from property employed in a business, trade, profession, or occupation within another jurisdiction. The Tribunal disagreed, finding that the taxpayers had not met their burden of demonstrating that the hedge fund operations were based solely in Connecticut. Also, the Tribunal concluded that the carried interest income was intangible income derived from the trading of intangible property subject to New York tax based on their residency. The Tribunal determined that the resulting double taxation did not violate the Commerce Clause because New York did not tax the intangible income of nonresidents. View more information.

New York Residency

CASE: *Matter of Joseph Pilaro and Joe Gorrie*, DTA No. 829204 (N.Y.S. Tax App. Trib., Aug. 18, 2022).

SUMMARY: The New York State Tax Appeals Tribunal concluded that an individual was not a statutory resident of New York in 2014 because he did not maintain a permanent place of abode in New York for at least 11 months of the year. In 2014, a statutory resident was defined as a person who was not domiciled in New York State but who (1) maintained a permanent place of abode in the state for substantially all of the taxable year, and (2) spent at least 183 days in the state during the taxable year. The Tribunal noted that the Department's Nonresident Audit Guidelines for 2014 stated that the Department considers "substantially all of the taxable year" to mean more than 11 months. The Tribunal found that the individual maintained a permanent place of abode in New York for the first 10 months of the year by renting an apartment in New York City, but did not maintain a permanent place of abode in New York during either of the last two months of the year. The Tribunal acknowledged that the individual stayed with a friend for an additional month in New York City, but that the individual lacked a legal right to the friend's dwelling and the living arrangement was "brief and clearly temporary." View more information.

Public Law 86-272 Protection

CASE: *Santa Fe Natural Tobacco Co. v. Department of Revenue*, TC 5372 (Or. T.C., Aug. 23, 2022).

SUMMARY: The Regular Division of the Oregon Tax Court held that P.L. 86-272 did not preclude Oregon from imposing its excise (income) tax on an out-of-state manufacturer of cigarettes and other tobacco products because the manufacturer engaged in two unprotected activities. First, the court held that the manufacturer's contractual mandate that the in-state wholesalers accept product returns was not a protected activity. The court found that these activities were performed, under the language of P.L 86-272, "on behalf of" the manufacturer. Second, the court held that the manufacturer's "Pre-Book Order" process was not a protected activity. The manufacturer's employees solicited sales for in-state wholesalers and used the "Pre-Book Order" process to help ensure the retailers completed the sales. Specifically, the court found that "addressing [r]etailers' failure to follow through" with orders by implementing the process was something the manufacturer had reason to do, and was thus unprotected. View more information.

Spotlight on Apportionment

CASE: *American Express Companies and Subsidiaries v. Office of Tax and Revenue*, Case Nos. 2020-OTR-00029, 2020-OTR-00030 (D.C. Off. Admin. Hearings, Apr. 19, 2022).

SUMMARY: The D.C. Office of Administrative Hearings (the "OAH") held that the two financial institution subsidiaries of a credit and charge card issuer company should have (1) included in their payroll factor denominator only the payroll attributable to the financial institution entities, and (2) excluded the payroll generated by the company's non-financial institutions, despite filing as part of a combined group that included both types of entities. While the general D.C. apportionment formula is single sales factor, the apportionment formula for financial institutions also includes a payroll factor. The Office of Tax and Revenue (the "OTR") contended that its adjustment was justified based on administrative guidance it previously issued. The OAH afforded deference to the OTR's agency interpretation and concluded that the company did not show that the tax was disproportionate to the amount of business it transacted in D.C. View more information.

CASE: *Betts, Patterson, & Mines, PS v. Washington Department of Revenue*, Dkt. No. 19-069 (Wash. Bd. Tax App., July 28, 2022).

SUMMARY: The Washington Board of Tax Appeals determined that legal advice provided by a law firm to insurance companies should be sourced to the location of the insurance companies' claim administration and legal departments. However, the litigation and defense services should be sourced to the location where the litigation was filed or occurred. Wash. Admin. Code section 458-20-19402(303)(c) provides that for legal services unrelated to property, the benefit of legal services provided to businesses is received where the customer's "related business activity" occurs. The taxpayer successfully argued on a refund claim that the claims administration departments of its insurance company customers were where the customers received the benefit of insurance coverage opinion services. However, it unsuccessfully argued that the legal departments were where the customers received the benefit of its insurance litigation and defense services.

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