

Sutherland SALT has been closely tracking litigation and controversy developments for years—and we'd like to share the results of our efforts going forward! Each quarter, we tally the results of what we deem to be significant taxpayer wins and losses—i.e., those developments that have the greatest impact on our clients, the industries that we serve and the overall SALT landscape—and analyze those results to identify trends by issue, state and forum. This issue of the SALT Scoreboard presents the results for the First Quarter of 2016, along with some of the most significant developments.

FIRST QUARTER 2016

Overall, it was a solid start for taxpayers in 2016, as taxpayers prevailed in 24 out of 48 significant cases.¹ 22 sales and use tax cases made our cut of significant developments, with 14 corporate income tax cases also making the list. As discussed in our First Quarter Spotlight on New York (see page 2), the Empire State commanded a lot of attention this quarter by issuing 12 decisions that factored into our tallies.

SIGNIFICANT TAXPAYER WINS AND LOSSES

24

WINS

2016
OVERALL RESULTS

24

LOSSES

QUARTER 1

24

W

24

L

QUARTER 2

W

L

QUARTER 3

W

L

QUARTER 4

W

L

Taxpayers prevailed in **8** OUT OF 14 significant corporate income tax cases across the country

Taxpayers prevailed in **11** OUT OF 22 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

E-commerce

CASE: *Direct Mktg. Ass'n v. Brohl*, Case No. 12-1175 (10th Cir. Feb. 22, 2016) (petition for rehearing en banc denied April 1, 2016).

SUMMARY: The U.S. Court of Appeals for the Tenth Circuit held that Colorado's notice and reporting requirements imposed on non-collecting retailers did not violate the dormant Commerce Clause because they neither discriminated against, nor unduly burdened, interstate commerce. The court further held that the application of *Quill v. North Dakota* is narrowly limited to sales and use tax collection.

SUTHERLAND OBSERVATION: Colorado's reporting requirements may embolden states to enact legislation contravening *Quill*'s physical presence standard, making it

more likely that the U.S. Supreme Court will reassess *Quill*. View our [Legal Alert: Tenth Circuit Upholds Colorado's Use Tax Reporting, Limits *Quill* to Sales and Use Tax Collection](#).

Freight companies

CASE: *Regency Transp., Inc. v. Commissioner of Revenue*, 42 N.E.2d 1133 (Mass. 2016).

SUMMARY: The Massachusetts Supreme Judicial Court denied a freight company's Commerce Clause challenge to the application of an unapportioned use tax on its vehicles purchased out-of-state but used in Massachusetts. [View](#) more information.

¹ Some decisions issued this quarter will not be released to the public until after this publication goes to print. This quarter's tallies will be adjusted, if necessary, in our next publication.

SIGNIFICANT MULTISTATE DEVELOPMENTS CONT'D

Online travel companies

CASE: *Wisconsin Dep't of Revenue v. Orbitz, LLC*, No. 2015P200 (Wis. Ct. App. Feb. 11, 2016).

SUMMARY: The Wisconsin Court of Appeals held that the receipts earned by an online travel company from its services and markups for reserved rooms are not subject to sales tax. [View](#) more information.

Electric utilities

CASE: *In re PacifiCorp Inc.*, Nos. 2012-51, 2013-03 (Wyo. State Bd. of Equalization Jan. 8, 2016).

SUMMARY: The Wyoming Board of Equalization held that purchases of chemicals by an electric utility operating coal-fired electric generation plants were subject to sales tax because the utility was not a manufacturer or a processor. [View](#) more information.



SIGNIFICANT NY INSURANCE DEVELOPMENTS

CASE: *In re AXA Versicherung AG*, DTA No. 825518 (N.Y. Div. Tax App. Mar. 3, 2016).

SUMMARY: A Division of Tax Appeals ALJ determined that the taxpayer was not subject to insurance franchise tax for years prior to 2012 because it qualified as a life insurance company even though it primarily insured non-life risk.

CASES: *In re Bayerische Beamtenkrankenkasse AG*, DTA No. 824762 (N.Y. Div. Tax App. Mar. 3, 2016); *In re Landschaftliche Brandkasse Hannover*, DTA No. 825517 (N.Y. Div. Tax App. Mar. 3, 2016).

SUMMARY: A Division of Tax Appeals ALJ determined that unauthorized non-life insurance companies are subject to the insurance franchise tax.

SUTHERLAND OBSERVATION: Significant uncertainty has surrounded New York State's taxation of unauthorized insurance companies since New York State amended its insurance tax provisions (Article 33) in 2003. These ALJ determinations provide much needed clarity, although questions still remain. [View our Legal Alert: New York State Division of Tax Appeals Addresses Unauthorized Insurance Company Taxation.](#)

CASE: *In re Stewart's Shops Corp.*, DTA No. 825745 (N.Y. Div. Tax App. Mar. 10, 2016).

SUMMARY: A Division of Tax Appeals ALJ determined that payments by a corporation to its captive insurance company did not qualify as deductible insurance premiums because the arrangement lacked risk shifting and risk distribution. [View](#) more information.

OTHER SIGNIFICANT NY DEVELOPMENTS

CASE: *Owner Operator Indep. Drivers Ass'n v. New York State Dep't of Taxation and Fin.*, No. 005551/2013 (N.Y. Sup. Ct. Albany Cty. Jan. 22, 2016).

SUMMARY: The New York Supreme Court, Albany County, held that New York's unapportioned vehicle registration fees violated the Commerce Clause. The court found that the flat fees—imposed on all carriers operating motor vehicles in New York—were indistinguishable from those struck down by the U.S. Supreme Court in *American Trucking Ass'ns., Inc. v. Scheiner*, 483 U.S. 266 (1987). [View](#) more information.

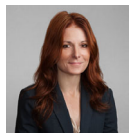
CASE: *In re RetailData, LLC*, DTA No. 825334 (N.Y. Tax App. Trib. Mar. 3, 2016).

SUMMARY: The Tax Appeals Tribunal sustained the Division of Tax Appeals ALJ's determination that receipts obtained from the sale of retail pricing information services are not excluded from sales tax, finding that the service is not personal or individual in nature because the source of the information is publicly available. [View](#) more information.

CASE: *In re Entergy Nuclear Operations, Inc.*, DTA No. 826017 (N.Y. Div. Tax App. Jan. 28, 2016).

SUMMARY: A Division of Tax Appeals ALJ held that an electricity producer's purchases, installations and repairs of "step-up transformers" were not subject to sales and use tax because the transformers were "used directly" in the production of electricity. [View](#) more information.

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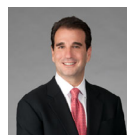
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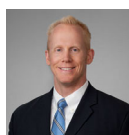
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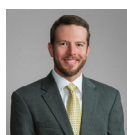
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