EVERSHEDS SUTHERLAND SALT SCOREBOARD Q4 2023

This is the fourth edition of the Eversheds Sutherland SALT Scoreboard for 2023. 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 discussions of apportionment and the tax classification of software, as well as a spotlight on California cases.

4th quarter 2023

In the fourth quarter of 2023, taxpayers prevailed in 43.6% (17 out of 39) of the significant cases.* Taxpayers won 28.6% (4 out of 14) of the significant corporate and franchise income tax cases and 60.0% (3 out of 5) of the significant sales and use tax cases.

SIGNIFICANT TAXPAYER WINS AND LOSSES

65 WINS	2023 OVERALL RESULTS	91 LOSSES

QUARTER 1		QUARTER 2		QUARTER 3		QUARTER 4	
13	28	18	18	17	23	17	22
W	L	W	L	W	L	W	L

*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 23 significant corporate income and franchise tax cases across the country

Taxpayers prevailed in **8** out of 18 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Apportionment

CASE: *Express Scripts Inc. v. State Tax Assessor*, 304 A.3d 239 (Me. 2023).

SUMMARY: The Maine Supreme Judicial Court held that a prescription drug company's receipts from the performance of pharmacy benefit management services should be apportioned based on the location where prescription drugs are received by individual members (i.e., retail pharmacy location), rather than based on the location of the company's clients' headquarters. The court reasoned that the clients' members or insureds were the primary recipients of the drug company's services, and "if members had not gone to pharmacies to fill their prescriptions, Express Scripts would not have been entitled to that revenue." Therefore, the Court found apportioning the company's receipts based on a "market member basis," to the locations where the members received their prescription drugs, was appropriate. View more here.

CASE: *NuStar Energy, L.P. v. Hegar*, No. 03-21-00669-CV (Tex. Ct. App. Dec. 21, 2023).

SUMMARY: A Texas appellate court upheld the Comptroller of Public Accounts' administrative rule governing the sourcing of gross receipts for Texas franchise tax purposes. Under that rule, receipts are sourced to Texas if property is sold or delivered in Texas, regardless of whether the buyer is ultimately located in the state. The taxpayer challenged the rule, claiming it was contrary to the underlying statute. That statute sourced receipts from sales of tangible personal property to Texas "if the property is delivered or shipped to a buyer in [Texas,] regardless of the FOB point or another condition of the sale." The taxpayer asserted that, under the statute, proceeds are apportioned to Texas only if the buyer is located in the state. In contrast, the apportionment rule apportioned the proceeds to Texas so long as sale or delivery occurred in Texas, and without regard to the location of the buyer. The court disagreed with the taxpayer and concluded that the statute's only "reasonable construction" was that "sales of tangible personal property are apportioned based on where that property is delivered or shipped ...[,] not where the buyer is ultimately located when they plan to use, sell, or otherwise dispose of the property." View more here.

Software

CASE: *SAP America Inc. v. Gerregano*, No. 20-1249-II (Tenn. Ch. Ct., Davidson Cnty. Aug. 9, 2023).

SUMMARY: A Tennessee Chancery Court held that software licenses are intangible property and thus the gross receipts from the sale of the licenses are not subject to Tennessee's business tax. The Tennessee Department of Revenue took the position that software licensing constitutes a taxable service. Applying principles of strict statutory interpretation, the court held that sales of software licenses did not meet the definition of "services" because they involved the sale of intangible property. View more here.

Notice Requirements

CASE: *Ingram Micro, Inc. v. North Carolina Department of Revenue*, 22 REV 04478 (N.C. Office of Admin. Hearings Oct. 27, 2023).

SUMMARY: A North Carolina Administrative Law Judge (ALJ) held that the Department of Revenue did not have the authority to adjust a taxpayer's net income because the Department failed to timely issue a statutorily required written statement. North Carolina law requires that the Department "shall" provide the taxpayer a written statement within 90 days of issuing the proposed assessment, detailing the support for the Department's findings and its proposed method for computation of net income. The Department waited nearly five years after issuing a notice of proposed assessment to provide the required written statement. The ALJ ruled that the use of the word "shall" in reference to providing the written statement, and the imposition of a deadline following the phrase "no later than," indicated the requirement was mandatory, not directory. View more here.

Agency Exclusion

CASE: *Aramark Corporation v. Harris*, Case No. 2019-2975 (Ohio Bd. Tax App. Nov. 6, 2023).

SUMMARY: The Ohio Board of Tax Appeals denied a food services and hospitality company's refund claim for the Ohio Commercial Activity Tax (CAT) paid on management fees earned by the company in performance of cost-plus agreements. Ohio's CAT provides an exclusion from "gross receipts" for "[p]roperty, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration." An agent is "a person authorized by another person to act on its behalf to undertake a transaction for the other," and "include[s] '[a] person retaining only a commission from a transaction with the other proceeds from the transaction being remitted to another person.'" The taxpayer argued it qualified for the exclusion because it received the management fees as an agent of its clients. The Ohio Board of Tax Appeals found that the taxpayer was not acting as an agent on behalf of its clients because the taxpayer was not endowed with such authority under its agreements. View more here.

Spotlight on California

CASE: *American Catalogue Mailers Association v. Franchise Tax Board*, Case No. CGC-22-601363 (Cal. Sup. Ct. Dec. 13, 2023).

SUMMARY: The California Superior Court for San Francisco County held that the Franchise Tax Board's (FTB) guidance limiting the application of Public Law 86-272 were invalid "underground regulations." P.L. 86-272 (15 U.S.C. §§ 381 – 384) is a federal law that prohibits states from imposing net income taxes on companies engaged in limited interstate activities. In 2022, the FTB published guidance that addressed whether certain Internet-related activities were protected by P.L. 86-272. In particular, the FTB's Publication 1050 stated that "[a]s a general rule, when a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state," and thus is not subject to P.L. 86-272 protection. A non-profit trade association sought a declaratory judgment that the guidance issued by the FTB was invalid because it failed to comply with the California Administrative Procedure Act. On review, the court concluded that the guidance documents constituted regulations within the meaning of the APA. As neither document was enacted in compliance with the APA, both documents were thus void.

CASE: *Appeal of Southern Minnesota Beet Sugar Cooperative & Subsidiary*, 2023–OTA–342P (March 17, 2023), reh'g denied (Jun. 26, 2023).

SUMMARY: The California Office of Tax Appeals held that a Minnesota-based agricultural cooperative, owned by farmer shareholders/members, was entitled to include in its apportionment percentage property, payroll, and sales attributable to deductible member income. When calculating its combined group's California three-factor apportionment percentage, the company included all of its property, payroll, and sales attributable to the deductible member income, which decreased its California apportionment percentage and resulting California source income and tax. On audit, the Franchise Tax Board excluded these items attributable to the company's deductible member income. The OTA disagreed with the FTB because the controlling apportionment statute did not "contain any general exclusion of activities that produce deductible income.

CASE: *One Technologies LLC v. Franchise Tax Board*, 314 Cal.Rptr.3d 718 (Cal. Ct. App. 2023).

SUMMARY: A California appellate court held that Proposition 39, which mandated single-sales factor apportionment, did not violate the single-subject rule. In 2012, California voters enacted Proposition 39, which established a program to promote the creation of clean energy jobs. It funded the program by eliminating the option for taxpayers to apportion its California tax based on a three-factor apportionment formula, requiring instead single-sales factor apportionment. A Texas-based provider of credit score and credit reporting services paid tax to California pursuant to the single sales-factor method and filed a complaint for refund on the basis that Proposition 39 was invalid under the single-subject rule for ballot initiatives. The court held that Proposition 39 did not violate the rule because its purpose was to fund a clean energy job creation program by raising taxes on some multistate businesses. The proposition's provisions were "reasonably germane" to this purpose because "they provided the mechanisms to raise tax revenues and direct them to clean energy job creation." Plus, the provisions were "functionally related" because the apportionment formula change funded the clean energy jobs program.

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