

This is the third edition of the Sutherland SALT Scoreboard. Each quarter, we tally the results of what we deem to be significant taxpayer wins and losses and analyze those results. This issue of the Sutherland SALT Scoreboard includes our observations on False Claims Act and class action cases, the Tax Injunction Act, and states' treatment of fees vs. taxes.

### THIRD QUARTER 2016

Taxpayers rebounded from a tough second quarter by posting a 27-26 comeback in the third quarter.<sup>1</sup> 23 sales and use tax cases and 7 corporate income tax cases made our cut of significant cases. In our Third Quarter Spotlight, we review the significant False Claims Act and class action cases decided this year.

<sup>1</sup> Some items may have been decided in a prior quarter but included in the quarter in which we summarized them.

## SIGNIFICANT TAXPAYER WINS AND LOSSES

72

WINS

2016  
OVERALL RESULTS

89

LOSSES

QUARTER 1

24

W

24

L

QUARTER 2

21

W

39

L

QUARTER 3

27

W

26

L

QUARTER 4

W

L

### YEAR-TO-DATE

Taxpayers prevailed in **19** OUT OF 41 significant corporate income tax cases across the country

Taxpayers prevailed in **30** OUT OF 73 significant sales and use tax cases across the country

### SIGNIFICANT MULTISTATE DEVELOPMENTS

#### Sourcing

**CASE:** *Powerex Corp. v. Oregon Dep't of Revenue*, TC 4800 (Or. Tax Ct. Aug. 1, 2016).

**SUMMARY:** On remand from the Oregon Supreme Court, the Oregon Tax Court ruled that receipts from sales of electricity to California purchasers cannot be sourced to Oregon. The Tax Court ruled that the receipts from the taxpayer's sales of electricity cannot be sourced to the point of contractual delivery, i.e., the "hub." Rather, the hub is a contractual notion that allows contracting parties to allocate risk of loss and responsibility for transporting electricity to its final destination. The only sales includible in the Oregon sales factor numerator were those that both parties agreed were sales to purchasers in Oregon. [View](#) more information.

#### Sourcing

**CASE:** *Quest Diagnostics Clinical Labs., Inc. v. Barfield*, No. 2015-0926 (La. CT. App. Sept. 9, 2016).

**SUMMARY:** The Louisiana Court of Appeal held that income derived from diagnostic testing of Louisiana patients' blood samples and other

medical specimens performed in Texas must be sourced to Texas, rather than Louisiana, for corporate income tax apportionment purposes. The court held that because the taxpayer is a service business and not a manufacturer or a merchandiser the income it derives from performing services does not constitute "net sales" under the states' general apportionment formula. [View](#) more information.

#### Due Process

**CASE:** *Bernegger v. Thompson*, 884 N.W.2d 535 (Table) (Wis. Ct. App. 2016) (petition for review filed Aug. 19, 2016).

**SUMMARY:** The Wisconsin Court of Appeals held that Wisconsin courts lacked personal jurisdiction over the Mississippi Department of Revenue so as to subject it to a lawsuit in the state when the only contacts asserted involved the DOR sending letters and making phone calls to the taxpayer at his Wisconsin residence to collect on an alleged delinquent tax debt. [View](#) more information.

#### Jury Trial

**CASE:** *Riverboat Corp. of Miss. v. Harrison Cnty. Bd. of Supervisors*, No. 2014-IA-01358-SCT (Miss. July 28, 2016).

## SIGNIFICANT MULTISTATE DEVELOPMENTS *CONT'D*

**SUMMARY:** Relying on centuries-old customs, practices and decisions predating the state's 1890 Constitution, the Supreme Court of Mississippi held that a county had the right to a jury trial in an appeal of the county's ad valorem tax assessment. [View](#) more information.

### Telecommunications

**CASE:** *DIRECTV, Inc. v. Oregon Dep't of Revenue*, 377 P.3d 568 (Or. 2016).

**SUMMARY:** The Oregon Supreme Court held that property owned by a satellite television company was subject to central assessment because it was engaged in the business of providing "data transmission services," making it a "communications" business. The court concluded that the company provided such services because it was in the business of transmitting electronically coded data between computer-like devices, including set-top boxes. [View](#) more information.

### Fee vs. Tax

**CASE:** *First Baptist Church of St. Paul v. City of St. Paul*, 884 N.W.2d 355 (Minn. 2016).

**SUMMARY:** The Supreme Court of Minnesota held that St. Paul's

right-of-way assessment is not a fee imposed under the city's police powers but a tax because its primary purpose was to raise revenue for the city. Thus, the right-of-way assessment must satisfy the Minnesota Constitution's uniformity and special benefits requirements.

### Tax Injunction Act

**CASE:** *Cruise Lines Int'l Ass'n Alaska v. City and Borough of Juneau*, No. 1:16-cv-0008-HRH (D. Alaska Sept. 29, 2016).

**SUMMARY:** The U.S. District Court for the District of Alaska held that the Tax Injunction Act did not bar a taxpayer from challenging a locality's entry fees on cruise ship passengers. The entry fees were not taxes even though they were imposed by a municipal legislative governing body because the fees were intended to benefit a narrow class—out-of-state cruise ships rather than all citizens—and the funds generated by the fees were intended to be used for special purposes to benefit that narrow class.

**SUTHERLAND OBSERVATION:** Taxpayers rarely succeed in litigating state tax cases in federal court, but fee cases may provide a better chance to litigate in federal court. Challenges to fees, especially targeted ones, may not fall within the scope of the Tax Injunction Act.



## SPOTLIGHT ON FALSE CLAIMS ACT AND CLASS ACTION CASES

## SIGNIFICANT DEVELOPMENTS

**CASE:** *Illinois ex rel. Stephen B. Diamond, P.C. v. Lush Internet, Inc.*, No. 13 L 009147 (Cir. Ct. Cook Cnty. Ill. May 10, 2016).

**SUMMARY:** The Cook County Circuit Court held that a remote seller did not violate the False Claims Act because the relator failed to prove that the remote seller had substantial Illinois nexus under the U.S. Constitution's Commerce Clause. The relator also failed to prove that the taxpayer knowingly or recklessly disregarded its alleged obligation to collect and remit Illinois use tax.

**CASE:** *Knudsen v. Sprint Commc'ns Co.*, Nos. C13-04476, C13-04465, C13-04542, (N.D. Cal. Sept. 1, 2016).

**SUMMARY:** The U.S. District Court for the Northern District of California dismissed, with prejudice, a qui tam relator's complaints that alleged that multiple defendant telephone companies violated the False Claims Act by overcharging federal, state, and local agencies for cellphone services. In so holding, the court explained that the complaints failed to specify the specific surcharges or taxes that were allegedly charged.

**CASE:** *In re Petition of New Cingular Wireless PCS LLC*, DTA No. 825318 (N.Y. Tax App. Trib. Feb. 16, 2016).

**SUMMARY:** The New York State Tax Appeals Tribunal affirmed an Administrative Law Judge determination that a taxpayer must first refund erroneously collected sales tax on Internet access services to its

customers (pursuant to a class action settlement agreement) before it could receive a refund from the State.

**CASE:** *Frank Greek & Son, Inc. v. Verizon New Jersey, Inc.*, No. A-1928-14T4 (N.J. App. Div. Aug. 26, 2016).

**SUMMARY:** The New Jersey Superior Court, Appellate Division, dismissed a class action lawsuit against telecommunications taxpayers, alleging that they overcharged E911 fees. In dismissing the case, the court held that the State Uniform Tax Procedure Law requires the plaintiff to file an individual refund claim with the Division to recover its alleged overpayment and that the plaintiff had failed to exhaust this administrative remedy.

**OVERALL SUTHERLAND OBSERVATION:** The growth of False Claims Act and class action cases continues to trouble the business community. While taxpayers have been successful in defending against such non-traditional tax actions, the success has been hard fought. It is important for taxpayers to remember that False Claims Act matters shift the burden of proof to the private plaintiff bringing the action (unlike traditional tax audit defense) and that the False Claims Act requires the private plaintiff to prove the taxpayer "knowingly" violated the law. These key distinctions are to the taxpayers' advantage in defending against a False Claims Act lawsuit.

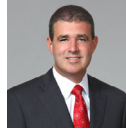
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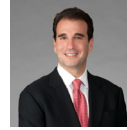
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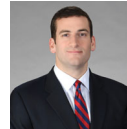
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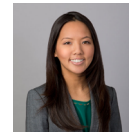
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