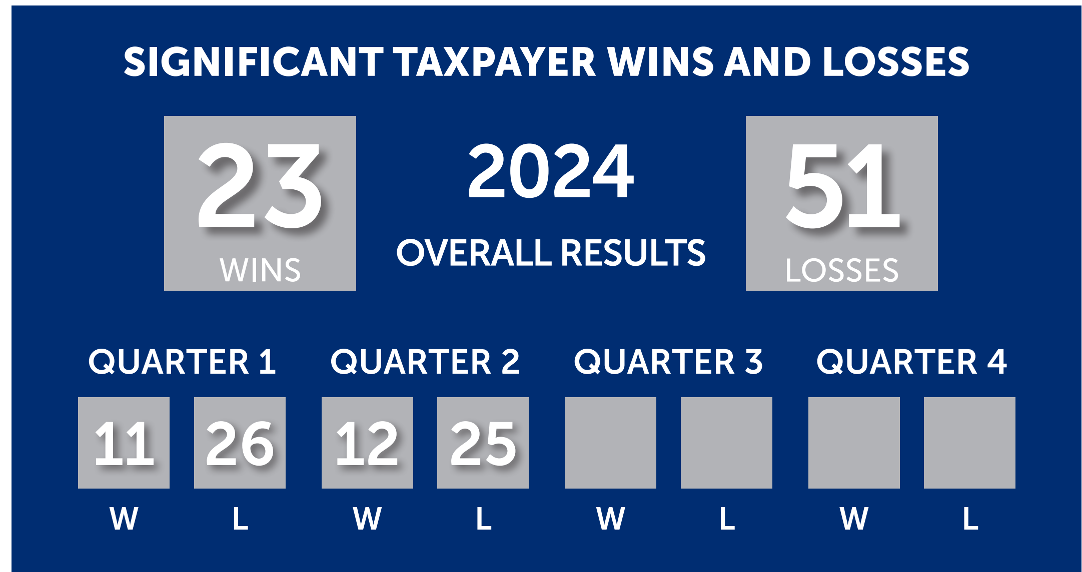
EVERSHEDS SUTHERLAND

SALT SCOREBOARD Q2 2024

This is the second edition of the Eversheds Sutherland SALT Scoreboard for 2024. 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 manufacturing exemptions and consolidated returns, as well as a spotlight on federal limitations on state and local taxation.

2nd quarter 2024

In the second quarter of 2024, taxpayers prevailed in 32.4% (12 out of 37) of the significant cases.* Taxpayers won 35.7% (5 out of 14) of the significant corporate income and franchise tax cases and 28.6% (4 out of 14) 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 **11** out of 28 significant corporate income and franchise tax cases across the country

Taxpayers prevailed in **7** out of 29 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Pre-Paid Telephone Airtime

CASE: *TracFone, Inc. v. City of Reston,* 547 P.3d 902 (Wash. Ct. App. 2024).

SUMMARY: The Washington Court of Appeals held that sales of pre-paid telephone airtime purchased by a business from third-party cellular networks and later resold to individual customers and retailers were subject to the City of Renton's municipal utility tax. The tax is imposed on the privilege of conducting a "telephone business" within city limits; however, charges to "another telecommunications company" are not taxable. The taxpayer, which was not a telecommunications company because it had no physical network facilities of its own, argued that the tax did not apply because (1) the tax applies only to telecommunication companies, (2) the exemption presumes that the first entity must also be a telecommunication company for the tax to apply, and (3) even if the sales are taxable, wholesale business sales are exempt as sales for resale. The court rejected the taxpayer's interpretation of the ordinance, holding that "if the legislature intended for the statute to apply exclusively to 'telecommunications companies,' it would have used only that term." With respect to the third argument, the court held that for the exemption to apply, it is the *access* to a network that must be purchased for resale. In this case, the court explained, no resale occurred because the taxpayer — not the retailers — retained control over the end user's *access* to a telephone network. View more here.

Software

CASE: *Matter of Beeline.com Inc.,* DTA No. 829516 (N.Y. Tax App. Trib. May 2, 2024).

SUMMARY: The New York Tax Appeals Tribunal held that sales of a company's labor procurement system were taxable sales of pre-written software. The taxpayer provided services to assist customers in managing their labor force, and also granted its customers licenses to use its web-based application as part of the service. The taxpayer argued that the platform was non-taxable because it was customizable for each customer's needs and preferences. The Tribunal concluded that the platform was taxable software because

the customization was limited, and the taxpayer's customer agreements provided for licenses to use the software. View more here.

Online Travel Companies

CASE: *Robinson v. Priceline.com*, Dkt. No. 2023 CA 0069 (La. Ct. App. Apr. 17, 2024).

SUMMARY: The Louisiana Court of Appeal held that online travel booking companies were not "dealers" required to collect sales taxes. The Louisiana Department of Revenue and various localities argued that the booking companies were required to collect tax based on the wholesale rate applicable to hotels (as opposed to collecting tax on the retail rate and service fee). The court disagreed. Louisiana statutes defined a hotel as an establishment that consists of sleeping rooms that are furnished "by hotels." The booking companies are not "hotels," and, thus, not liable for sales tax collection. View more here.

Manufacturing

CASE: *N.C. Dep't of Revenue v. FSC II LLC*, 900 S.E.2d 637 (N.C. 2024).

SUMMARY: The North Carolina Supreme Court held that taxpayer was a manufacturer for purposes of the state's Mill Machinery Exemption, and was therefore entitled to a sales and use tax exemption on its purchase of materials used to produce hot mixed asphalt. During the years at issue, the taxpayer used approximately between 79% and 85% of the hot mixed asphalt it produced for various construction projects and sold the remaining materials to customers. The Department asserted that the taxpayer was a contractor — and not a manufacturer — because it was "primarily engaged" in construction and used the majority of the hot mixed asphalt produced. The court rejected the Department's argument and affirmed the lower court's finding that (1) there is no requirement that the items produced are sold to third parties to qualify for the exemption, and (2) the taxpayer was engaged in manufacturing high volumes of hot mixed asphalt. View more here.

Entity Ownership Guidelines

CASE: *Prang v. Los Angeles Cnty. Assessment Appeals Bd.*, 548 P.3d 1002 (Cal. 2024).

SUMMARY: The California Supreme Court ruled that a corporation's transferred ownership of a pair of supermarkets to one of its shareholders, a revocable trust that already owned 92.8% of the corporation's stock, was nonetheless a "change in ownership" permitting the revaluation of the supermarkets' real property. Proposition 13 strictly limits increases in the assessed value of real property unless the property undergoes a "change in ownership," which excludes transfers in which proportional ownership interests remain the same after the transfer. The taxpayers argued that, in this case, there was no change in ownership because the trust to whom the real property was transferred already held all the corporation's voting stock. Because the transfer resulted in nonvoting stockholders losing any interest in real property, the court rejected the taxpayer's argument, holding that a change to nonvoting stock ownership means the proportional ownership interests had been affected, and revaluation was therefore permissible. View more here.

Consolidated Returns

CASE: *Ally Financial & Subsidiaries et al. v. Alabama Department of Revenue,* Dkt. Nos. INC. 20-659-LP, MISC. 21-380-LP, FIET. 22-1113-LP, FIET. 22-1124-LP (Ala. Tax Trib. May 13, 2024).

SUMMARY: The Alabama Tax Tribunal held that a parent company could not use its losses to offset the income of a bank that it owned through an intermediate holding company for the purposes of the state's Financial Institution Excise Tax. The applicable law allows financial institution members of a commonly owned controlled group to file a consolidated return if each entity is a financial institution required to file an excise tax return in the state. In this case, the intermediate holding company did not do business in the state and was therefore not eligible to file a consolidated return with the bank. Further, the intermediate holding company did not qualify under the alternative definition of a "financial institution" because it only owned the bank and was therefore not the parent of a "controlled group of corporations eligible to elect file a consolidated excise tax return." View more here.

Spotlight on Federal Limitations

CASE: *Santa Fe Natural Tobacco Company v. Oregon Department of Revenue,* 372 Or. 509 (2024) (en banc).

SUMMARY: The Oregon Supreme Court held that an out-of-state tobacco manufacturer's acceptance of prebook orders precluded it from availing itself of Public Law 86-272 protection against the imposition of the state's corporate excise tax. In 1959, the U.S. Congress passed P.L. 86-272, which prohibits states from imposing a net income tax when the business' only activity in the state is the solicitation of orders of tangible personal property. During the prebook order process, the taxpayer's in-state sales representatives persuaded Oregon retailers to order the taxpayer's products from wholesalers. The taxpayer's representatives then delivered the signed orders to wholesalers who had already agreed, in advance, to "accept and process" orders transmitted by the taxpayer's employees. Pursuant to incentive agreements, if a wholesaler fails to accept and process the prebook orders, it loses future incentive agreement payments and is required to repay any payments already received. Because the wholesalers were contractually required to accept and process the prebook orders, the court viewed the actions of the sales representatives as akin to the unprotected making of direct sales in the state. View more here.

CASE: *Energy Transfer L.P. v. Ficara,* No. 22-3347 (3d Cir. Jun. 7, 2024).

SUMMARY: The Third Circuit Court of Appeals dismissed a taxpayer's challenge to New Jersey's partnership filing fee under the tax comity doctrine. The taxpayer alleged that the fee unfairly burdens companies with significant out-of-state operations in violation of the Commerce Clause. The court declined to decide whether the Tax Injunction Act barred the lawsuit from being held in federal court. Rather, the court held that the doctrine of comity barred the lawsuit because the fee was embodied in a "revenue affecting statute" involving matters of "state tax administration," and did not involve any fundamental right or classification that attracts heightened judicial scrutiny. The court also concluded that state courts were "better positioned" to craft a remedy in the event the fee is found to be unconstitutional. View more here.

Meet your SALT team

Todd Betor

Michele Borens

Elizabeth Cha

Jonathan Feldman

Jeffrey Friedman

Ted Friedman

Tim Gustafson

Charles Kearns

Daniel Schlueter

Maria Todorova

Eric Tresh

W. Scott Wright

Eric Coffill

Charles Capouet

Jeremy Gove

Chelsea Marmor

Laurin McDonald

John Ormonde

Alla Raykin

Cyavash Ahmadi

Madison Ball

Catalina Baron

Periklis Fokaidis

Sebastian Iagrossi

Dennis Jansen

Sharon Kaur

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