EVERSHEDS SUTHERLAND SALT SCOREBOARD Q3 2024

This is the third 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 class action lawsuits and like-kind exchanges, as well as a spotlight on the Massachusetts Appellate Tax Board.

3rd quarter 2024

In the third quarter of 2024, taxpayers prevailed in 33.3% (7 out of 21) of the significant cases.* In comparison, taxpayers have won 31.6% (30 out of 95) of the significant cases for the year-to-date.

*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 **13** out of 35 significant corporate income and franchise tax cases across the country

Taxpayers prevailed in **7** out of 32 significant sales and use tax cases across the country

SIGNIFICANT MULTISTATE DEVELOPMENTS

Class Action

CASE: *Caneer v. Kroger,* No. 85009-1-I (Wash. Ct. App. Jul. 8, 2024) (unpublished).

SUMMARY: The Washington Court of Appeals upheld the dismissal of a putative class action against grocery store chains that collected sales tax on sales of 100 percent juice beverages. An individual asserted that the grocers wrongfully collected sales tax on exempt beverages. The court held that the taxpayer's allegations were tantamount to a tax refund claim that could only be brought against the state Department of Revenue. Washington's regulations provide that a taxpayer aggrieved by the amount of tax paid could not maintain "any action or proceeding" to recover paid taxes except against the state, and therefore the individual could not bring an action against the grocers. View more here.

Coal Severance Tax

CASE: *Foresight Coal Sales LLC v. Chandler,* Civil No. 3:21-cv-00016-GFVT (E.D. Ky. Sept. 24, 2024).

SUMMARY: A Kentucky federal district court held that Kentucky legislation requiring the subtraction of any coal severance tax imposed by any jurisdiction when analyzing the reasonableness of the rates that utilities charge consumers violated the dormant Commerce Clause because it discriminated against interstate commerce. The court found that the practical effect of the subtraction was that "a Kentucky coal producer receives an artificial 4.5% deduction in the cost it submits to utilities during the bid process." In contrast, a producer from a state without a severance tax would not be granted the deduction. The district court rejected the Public Service Commission's argument that the decision of the Sixth Circuit Court of Appeals, finding that the legislation discriminated against interstate commerce, was inapplicable. The district court found that the Sixth Circuit's decision was the law of the case and held that the legislation discriminated against interstate commerce in violation of the Commerce Clause.

Restricted Stock Units

CASE: *In the Matter of the Petition of Adams,* Det'n DTA No. 850026 (N.Y. Div. of Tax App. Aug. 8, 2024).

SUMMARY: The New York State Division of Tax Appeals determined that income from the vesting of a nonresident taxpayer's restricted stock units were subject to New York State personal income tax based on the taxpayer's performance of services in New York during the restricted stock units' vesting

period. Relying on a Department of Taxation regulation (20 NYCRR 132.24), the Division rejected the taxpayer's argument that the income from the vesting of the restricted stock units was New York source income only to the extent that the taxpayer worked in New York (i.e., a workday allocation method). Rather, the Division concluded that income from compensation received from stock appreciation rights or restricted stock is New York source income if at any time during the "allocation period" a nonresident individual performed services in New York State for the corporation granting such options. The Division also determined that dividends on stock paid out of a deferred compensation plan were not New York source income because the stock on which the dividends were paid had vested before the dividends were issued. View more here.

Sourcing

CASE: *U.S. Bank National Association v. South Carolina Department of Revenue,* No. 20-ALJ-17-0168-CC (S.C. Admin. Law Ct. Jun. 25, 2024, motion for reconsideration partially granted Aug. 19, 2024).

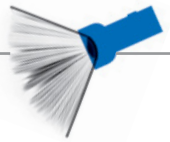
SUMMARY: The South Carolina Administrative Law Court upheld an assessment of bank taxes issued against a national bank because the Department of Revenue correctly sourced the bank's income streams, including mortgage interest and servicing fees, credit card interest and fees, and interchange (merchant) fees. The court determined that mortgages are intangible property, and thus mortgage receipts must be sourced to the location of the real property securing the mortgage or the borrower's location. Similarly, the court determined that the bank's receipts from credit cards, including interest, late fees and annual fees, constituted receipts from intangibles (account receivables) that must be sourced to South Carolina when the amounts are paid by cardholders in South Carolina. Further, the court concluded that interchange fees are from the performance of services, but, because the income-producing activity for such fees was the approval/disapproval of transactions, the fees are sourced to South Carolina if the merchants are located in South Carolina. Finally, on reconsideration, the court held that the taxpayer's sale of stock in a credit card company was not connected to the bank's trade or business, and thus was excluded from its apportionable base. View more here.

Like-Kind Exchanges

CASE: *Pearlstein v. Pennsylvania,* No. 21 MAP 2023 (Pa. Sept. 26, 2024).

SUMMARY: The Pennsylvania Supreme Court determined that a group of real estate partnerships were properly assessed personal income tax on the net gain from like-kind exchanges of real property pursuant to IRC § 1031 because Pennsylvania did not follow the same gain deferral rules as the IRS under IRC § 1031 prior to 2022. The Pennsylvania code treated net capital gains from the sale of real property as income, with no exception for like-kind exchanges under IRC § 1031. However, Pennsylvania Personal Income Tax Bulletin 2006-07 provided that, ". . . gain or loss on like-kind exchanges does not have to be recognized at the time of the exchange if a taxpayer's method of accounting permits the deferral of gain from a like-kind exchange." Regardless of the Bulletin, the court held that the taxpayer's method of accounting did not satisfy the Bulletin because it did not clearly reflect income with regard to the like-kind exchange.

Spotlight on the Massachusetts Appellate Tax Board



CASE: *State Street Corp. v. Commissioner of Revenue,* Dkt. No. C344139 (Mass. App. Tax Bd. Aug. 15, 2024).

SUMMARY: The Massachusetts Appellate Tax Board (ATB) held that a bank holding company was entitled to Massachusetts research tax credits because the state tax provisions did not bar financial institutions from claiming the credits. The Board rejected the Department of Revenue's argument that because financial institutions were taxed under a different provision than general business corporations, they were ineligible for the research credits. The ATB reasoned that the statute did not limit credit eligibility based on the type of business corporation claiming the credit. View more here.

CASE: *Sakowski v. Commissioner of Revenue,* Dkt. No. C347594 (Mass. App Tax Bd. July 8, 2024).

SUMMARY: The Massachusetts Appellate Tax Board determined that a New Hampshire resident attorney who was employed by a Massachusetts-based federal agency was not entitled to a personal income tax refund for days he did not physically work in Massachusetts during the coronavirus pandemic. In April 2020, Massachusetts implemented emergency regulation 830 CMR 62.5A.3, which required nonresident employees who worked remotely from March 10, 2020, to September 13, 2021, to compute their apportionment percentage in one of two ways, whichever resulted in less tax: 1) nonresident employees could apportion their income based on the percentage of work performed in Massachusetts in January and February of 2020; or 2) nonresident employees could apportion income based on their 2019 (pre-COVID-19) apportionment percentage, if they worked for the same employer. The ATB held that the regulation did not violate the Due Process and Commerce Clauses of the U.S. Constitution. In agreeing with the Commissioner's determination, the ATB concluded that several states implemented similar rules during the pandemic (e.g., New York), the taxpayer's employer did not change his duties or adjust his withholding, and the taxpayer did not question Massachusetts' taxation of his income prior to the pandemic when he worked remotely two days per week. Notably, the ATB cited *South Dakota v. Wayfair*, stating that physical presence is no longer a touchstone of constitutionality, and as such, where there is sufficient nexus, the Due Process and Commerce clauses do not prevent Massachusetts from imposing an income tax on non-resident remote workers. View more here.

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