



SALT's Critical Role in Transaction Advisory Services ("TAS")



SALT TAS Practice Overview



Understanding the Landscape:

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- Have a TAS Practice

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- Specialize in Financial Due Diligence (EBITDA analysis <-> QOE Studies)

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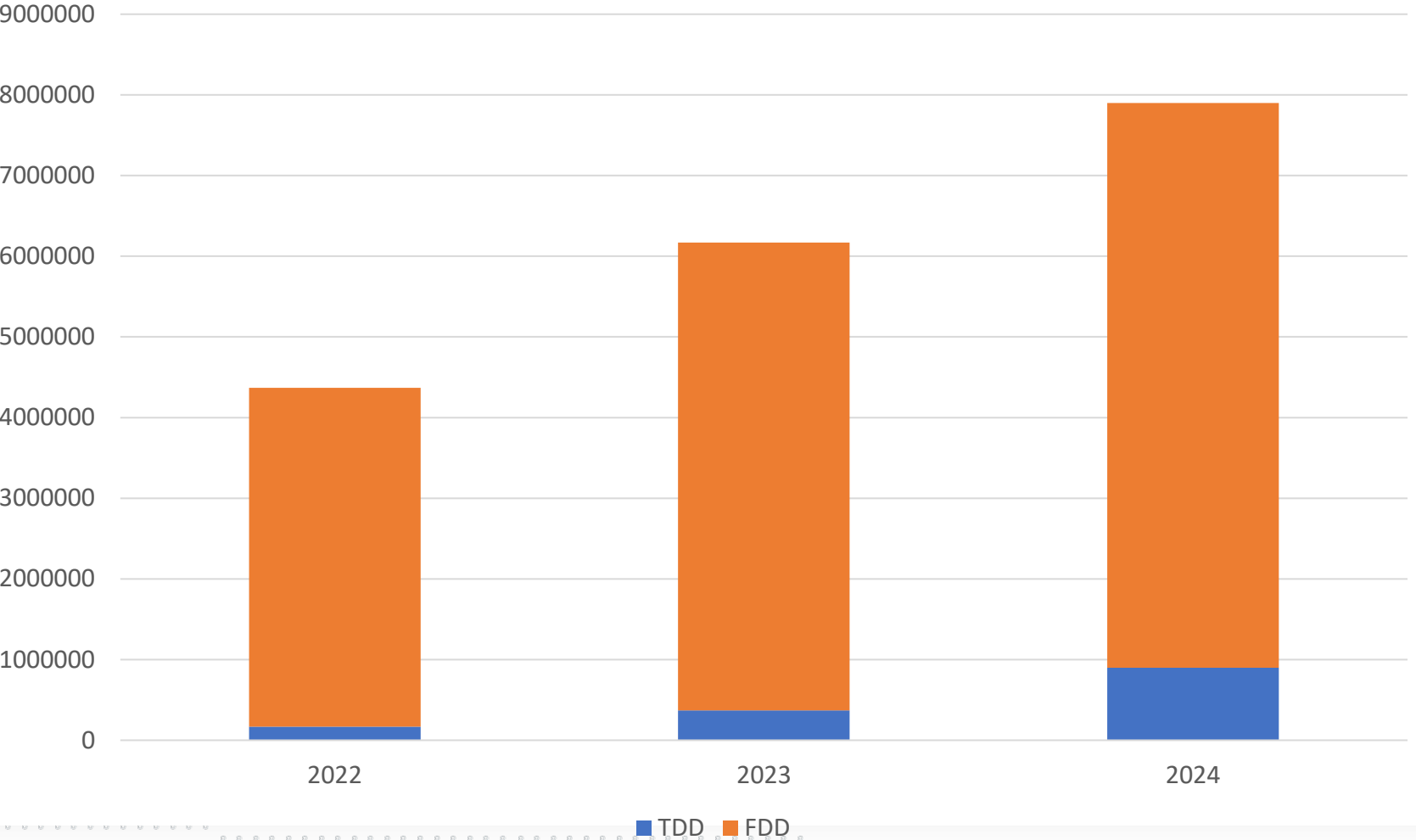
How many firms...

- Have a TAS Practice
- Specialize in Financial Due Diligence (EBITDA analysis <-> QOE Studies)
- Offer Tax Due Diligence

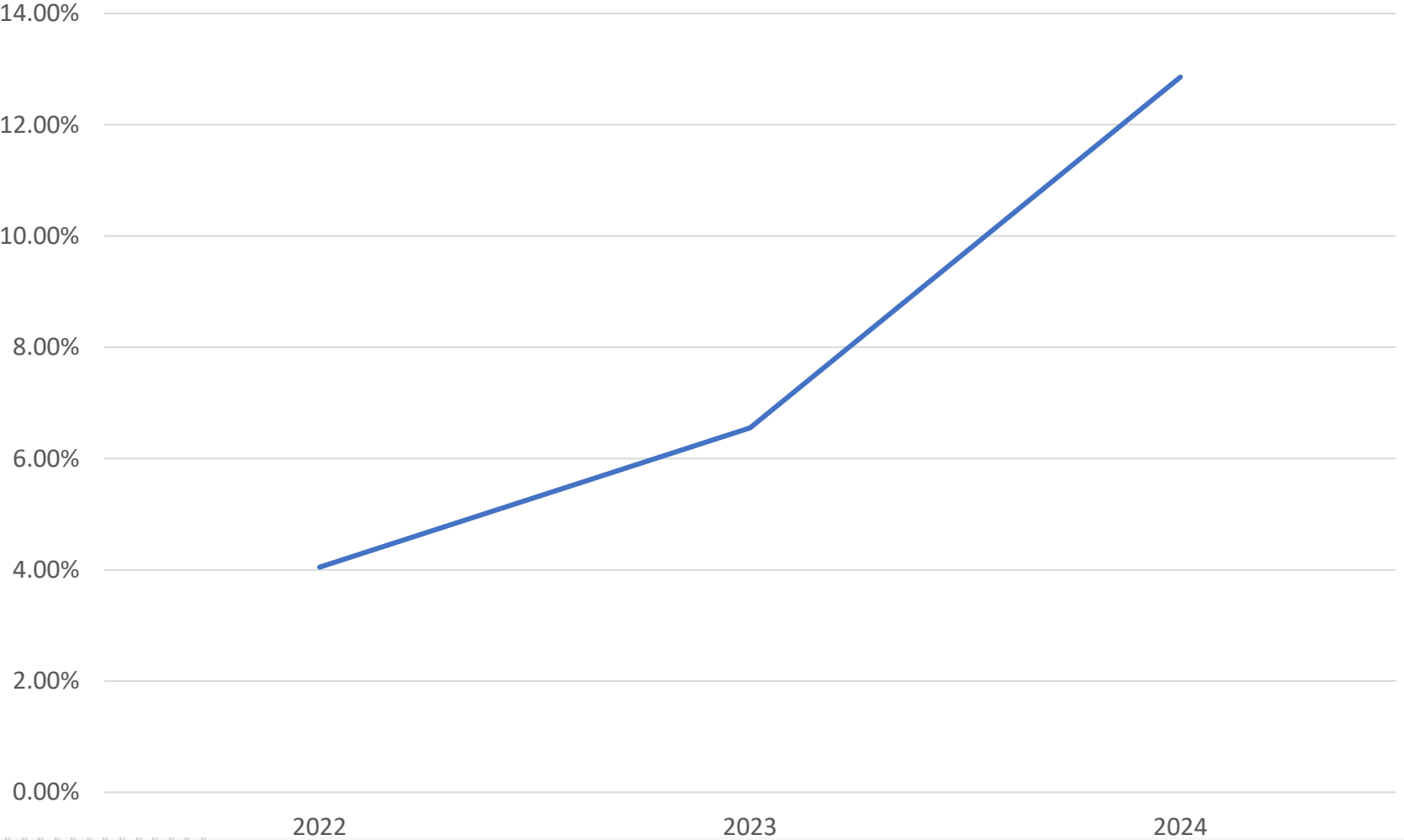
Why Are We Here?

SALT advisors should be aware of how we can contribute to an emerging market that offers significant downstream revenue potential.

Transaction Advisory Revenue Breakout



Tax TAS Revenue Ratio



Challenges/Contributions to Growth

- Scalability
- Degree of Expertise (pre- and post-close)
 - Income
 - Sales/Use (including transfer taxes)
 - Payroll
 - Property
 - Unclaimed Property
 - Tax structuring
- Industry specialization (oil/gas; telecom)



Reoccurring Themes Advising Buyers



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- Successor Liability
- Transfer Taxes
- Post-Transaction Impact

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Common Misconception of Successor Liability

- Stock vs. Asset Purchase
- Enforcement via State Law
- Administrative Convenience

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- Stock vs. Asset Purchase

Common understanding: stock purchases will inherit all of the known and unknown liabilities of that business along with its ownership interests.

For asset deals, there generally is not continued liability for federal income tax purposes.

However, simply buying the assets instead of the ownership interest will not necessarily relieve the buyer of all of its historical or transactional exposure.

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Common Misconception of Successor Liability

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What constitutes a stock sale vs. asset sale?

Example: Texas law would likely deem the purchase of a SMLLC's membership interest as a stock sale for purposes of successor liability of Texas Franchise Tax.

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Common Misconception of Successor Liability

- Enforcement via State Law

Many states have laws in place that transfer the liabilities of the seller to the buyer when substantially all the assets of a business are sold. This may be limited to sales tax, but some states take a broader approach.

Common Misconception of Successor Liability

- Enforcement via State Law

Even if a state doesn't have a successor liability statute in place, they still often aggressively pursue the collection of historical or transactional liabilities from the buyer by using other equity-based legal doctrines:

Mere Continuation. Successor liability may apply where there has been effectively no change in identity. However, some states only impose this doctrine if the transaction does not appear to be at arm's length (e.g., California) or if the buyer knew of the liability before the sale (e.g., New York).

Common Misconception of Successor Liability

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De Facto Merger. Successor liability may apply where the transaction (or series of transactions) resemble a statutory merger. States often look to continuity of ownership and enterprise, whether the seller leaves the industry post-sale, and where assumption of the liabilities is required for an uninterrupted continuation of the acquired business.

Common Misconception of Successor Liability

- Administrative Convenience

States would rather seek payment from the current operations of the business than attempting collection from a former owner who is no longer doing business in the jurisdiction or even in existence.



Buyer Remedies for Known & Unknown Sales Tax Exposure

- Reduction to Purchase Price
- Escrow
- Reps and Warranties Insurance Policy
- Tax Indemnities
- Voluntary Disclosure Agreements



Reoccurring Themes Advising Buyers

- Successor Liability
- **Transfer Taxes**
 - Real estate transfer taxes (sale of title or controlling/beneficial interest)
 - Occasional/isolated sales tax exemptions
- Post-Transaction Impact



CASE STUDY

- Multi-stepped real estate acquisition strategy (partial reorganization) for New York property.
- NY offers exemptions where transfer does not present “economic substance” (see *CBS Corp.* case distinction).



CASE STUDY

- Manufacturer and distributor of home building products held a material amount of non-inventory business personal property (equipment, and tools).
- The home state where the property was stored did not offer a casual or isolated sales tax exemption.
- Buyer ultimately had to pay ~9% sales tax on the acquisition of the property (asset purchase).



Reoccurring Themes Advising Buyers

- Successor Liability
- Transfer Taxes
- **Post-Transaction Impact**
 - Short periods returns
 - Nexus
 - Tainting 86-272 protections
 - Unitariness/combined reporting
 - Net worth taxes (high apportionment and newly established goodwill/intangibles as a result of purchase accounting)



Reoccurring Themes Advising Sellers



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- Differentiating Sales/Use from State Income Tax
- Bulk Seller Notices
- Gain on Sale Treatment
- Gap Periods/Account Closure

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CASE STUDY

- Steel fabricator historically sourcing sales to customers' headquarters. Sales were spread nation-wide and limited sales tax nexus.
- The parties' intent and the contracts read that customers were taking title to the fabricated goods at the shipping dock in the fabricator's main location.
- State regulations defined the sale as taking place where title transferred. Taxability rules clearly deemed the sale as taxable, absent exemption certificates.

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- Resulting exposure of \$2.1m, excluding penalties and interest



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Reoccurring Themes Advising Sellers

– Bulk Seller Notices

- A buyer may be subject to successor liability of pre-transaction tax liabilities if the seller fails to file a bulk sale notice and issue a tax clearance certificate from the DOR to the buyer.

Reoccurring Themes Advising Sellers

– Bulk Seller Notices

- New Jersey. In addition to general bulk sale rules, the state also requires buyers to hold some proceeds in escrow based on the projected gain on sale for the sellers.
- Massachusetts
 - Automatically attaches a lien to purchased assets where all or substantially all of the assets are acquired (3 year period).
 - Buyers must file a notice to the DOR at least 5 days prior to the transaction for a lien waiver.

Reoccurring Themes Advising Sellers

– Bulk Seller Notices

○ Texas

- Certificate of “No Tax Due”
- Texas is one of the states that limits successor liability to the purchase price, but Texas can challenge the valuation to increase the imposed liability.
- There is no “all or substantially all” language with successor liability, so the state may impose successor liability if only a few of the assets are transferred.
- Texas has a “jeopardy determination” that allows the state to transfer an outstanding tax liability to any other party.

Reoccurring Themes Advising Sellers

- Differentiating Sales/Use from State Income Tax
- Bulk Seller Notices
- **Gain on Sale Treatment**
 - Constitutional question whether states can deem the gain apportionable (unitary business principle)
 - State law on business/non-business income
 - Impact to states' apportionment factors
- Gap Periods/Account Closure

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