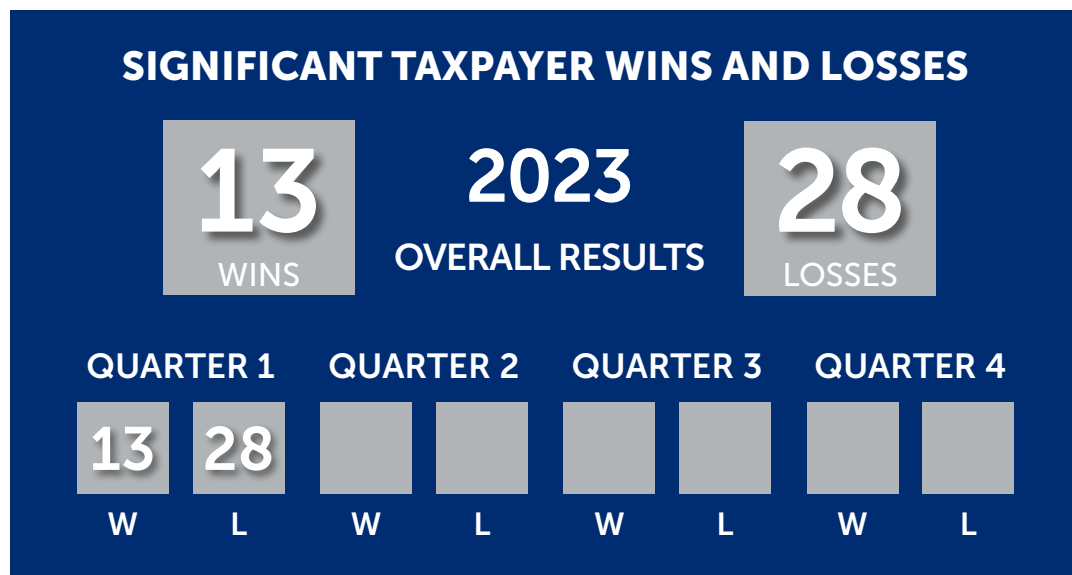


This is the first edition of the Eversheds Sutherland SALT Scoreboard for 2023. Since 2016, we have tallied the results of what we deem to be significant taxpayer wins and losses and analyzed those results. Our entire SALT team hopes that you have found the SALT Scoreboard's content useful. This edition includes discussions on costs of performance sourcing and credit utilization, as well as a spotlight on sales and use tax cases.

### 1<sup>st</sup> quarter 2023

In the first quarter of 2023, taxpayers prevailed in 31.7% (13 out of 41) of the significant cases.\* Taxpayers won 37.5% (3 out of 8) of the significant corporate income and franchise tax cases and 26.1% (6 out of 23) 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 **3** out of 8 significant corporate income and franchise tax cases across the country

Taxpayers prevailed in **6** out of 23 significant sales and use tax cases across the country

### SIGNIFICANT MULTISTATE DEVELOPMENTS

#### Costs of Performance

**CASE:** *Billmatrix Corporation et al. v. Florida Department of Revenue*, Case No. 2020 CA 000435 (Fla. Cir. Ct. Mar. 1, 2023).

**SUMMARY:** A Florida circuit court rejected the Department of Revenue's attempt to achieve a market-based sourcing result under Florida's costs of performance (COP) sourcing statute. The taxpayer sourced receipts from financial technology services based on the out-of-state location of the taxpayer's income-producing activities, determined based on its costs of performance. The Department contended that the receipts should instead be sourced to the location of the taxpayer's customers. The court disagreed, finding that the Department's focus on the locations and actions of customers contradicted the plain language of the COP statute. The court reasoned that the location of the taxpayer's income-producing activities must be determined based on the location of the transactions and activities in which the taxpayer engages in rendering its services, without regard to the actions or location of the customers. [View](#) more information.

#### Credits

**CASE:** *Matter of the Petition of GlobalFoundries U.S. Inc.*, DTA No. 829184 (N.Y. Tax App. Trib., Jan. 19, 2023).

**SUMMARY:** The New York Tax Appeals Tribunal ruled that a semiconductor manufacturer was eligible to use in the same tax year both a carryover refund from the Empire Zone investment tax credit for new businesses and a carryover refund from the qualified investment project/significant investment project tax credit. The Tribunal concluded that both credits could be taken together because of the statute's unambiguous plain language, which expressly provided that a qualifying taxpayer may receive both benefits. [View](#) more information.

## Loss Carryforwards

**CASE:** *International Automotive Components Group North America, Inc. v. Department of Treasury*, No. 360602 (Mich. Ct. App. Jan. 19, 2023) (unpublished).

**SUMMARY:** The Michigan Court of Appeals held that a taxpayer transitioning from the Michigan Business Tax (MBT) to the Corporate Income Tax (CIT) cannot claim prior MBT business losses on its first CIT return. Michigan replaced the MBT with the CIT in 2012, allowing businesses to continue filing MBT returns until they had exhausted their credits, so long as the taxpayer paid the greater of the MBT or CIT amount. The taxpayer exhausted its MBT credits in 2018 and filed its first CIT return in 2019, claiming an MBT business loss carryforward as a deduction. The Department of Treasury denied the deduction. The court held that the CIT did not allow a deduction for MBT business losses because it defines "business loss" specifically with respect to the CIT base, which was not the base for the taxpayer's MBT business loss carryforward. [View](#) more information.

## Spotlight on sales and use tax cases

**CASE:** *U.S. Auto Parts Network, Inc. v. Commissioner of Revenue*, 199 N.E.3d 840 (Mass. 2022).

**SUMMARY:** The Massachusetts Supreme Judicial Court held that a taxpayer's use of computer cookies did not constitute physical presence nexus. Thus, the taxpayer was not required to collect sales tax in tax years prior to the United States Supreme Court's decision in *South Dakota v. Wayfair, Inc.* The taxpayer sold auto parts through its website and mobile device applications. It utilized cookies to track customers visiting its website. The Department promulgated a regulation that required certain nondomiciliary vendors that employed cookies to collect Massachusetts sales or use tax prior to *Wayfair's* abolition of the physical presence nexus rules. The court held the Department could not retroactively apply the new nexus rules applicable after *Wayfair*. [View](#) more information.

**CASE:** *Myers v. Pennsylvania*, 289 A.3d 915 (Pa. 2023).

**SUMMARY:** The Pennsylvania Supreme Court held that a taxpayer was not entitled to a sales tax refund on purchases made using coupons because the receipts did not sufficiently describe the coupons and did not clearly indicate which items the coupon related to. Pennsylvania's sales tax does not apply to discounts unless (1) the amount of the item and coupon are separately stated and identified and (2) both the item and the coupon are described in the invoice or receipt. The court found that even though the coupons were separately identified in each of the customer receipts, the coupons were not sufficiently described. Thus, the taxpayer was not entitled to a sales tax refund of the amount of the coupons. [View](#) more information.

## Data Processing Services

**CASE:** *Landis+GYR Midwest, Inc. v. Washington Department of Revenue*, Case No. 56877-2-II (Wash. Ct. App. Mar. 28, 2023).

**SUMMARY:** The Washington Court of Appeals held that a company's collection of data from electric and natural gas meters constituted data processing services exempt from the retail sales tax. The taxpayer collected data from meters and converted and transmitted the data into a form usable by its customers. Washington law exempts data processing services from tax when the primary object of the service lies in the conversion of the data (as opposed to just its transmission). The Department contended that the taxpayer's services focused mostly on transmission of data. The Court of Appeals disagreed with the Department. The court concluded that the company was primarily providing exempt data processing services because the taxpayer (1) converted the data into an appropriate form in a process that took several hours, (2) quantified the information, and (3) identified patterns in the information. Further, without the company's conversion, the data was useless to the customer. [View](#) more information.



**CASE:** *In the Matter of the Appeal of Olympus America, Inc.*, 2023-OTA-087 (Cal. OTA Dec. 20, 2022).

**SUMMARY:** The California Office of Tax Appeals held that a taxpayer was liable for use tax on parts used to repair equipment that was later shipped back to out-of-state customers. As part of its optional lump-sum maintenance contracts, the taxpayer performed repairs free of charge in its California facility. The taxpayer purchased repair parts without paying sales tax, stored them in California, used them to perform the repairs, and then shipped the equipment to its customers. The taxpayer contended that the out-of-state customers were the ultimate consumers of the repair parts. The OTA disagreed, holding that the taxpayer's performance of the repairs in California constituted taxable use of the parts because California tax regulations provide that a person obligated under an optional warranty contract to furnish parts, materials and labor necessary to maintain property is deemed to be the consumer of such items. [View](#) more information.

**CASE:** *Caneer v. The Kroger Co.*, No. 22-2-08219-4-KNT (Wash. Super. Ct. Jan. 20, 2023).

**SUMMARY:** The King County Superior Court dismissed a class action lawsuit filed against several supermarkets for improper collection of sales tax on exempt items. In dismissing the claim, the court found that the exclusive remedy for pursuing a claim for wrongfully collected sales tax is to file a civil action in the Thurston County Superior Court, but only *after* seeking a refund from either the retailer or the Department of Revenue. The class argued that it was contesting the legality of the tax itself, as opposed to only seeking a tax refund. The court disagreed, holding that the procedural process was the same nonetheless. Thus, the court dismissed the action without prejudice, allowing the class to file a refund claim with the Department. [View](#) more information.

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