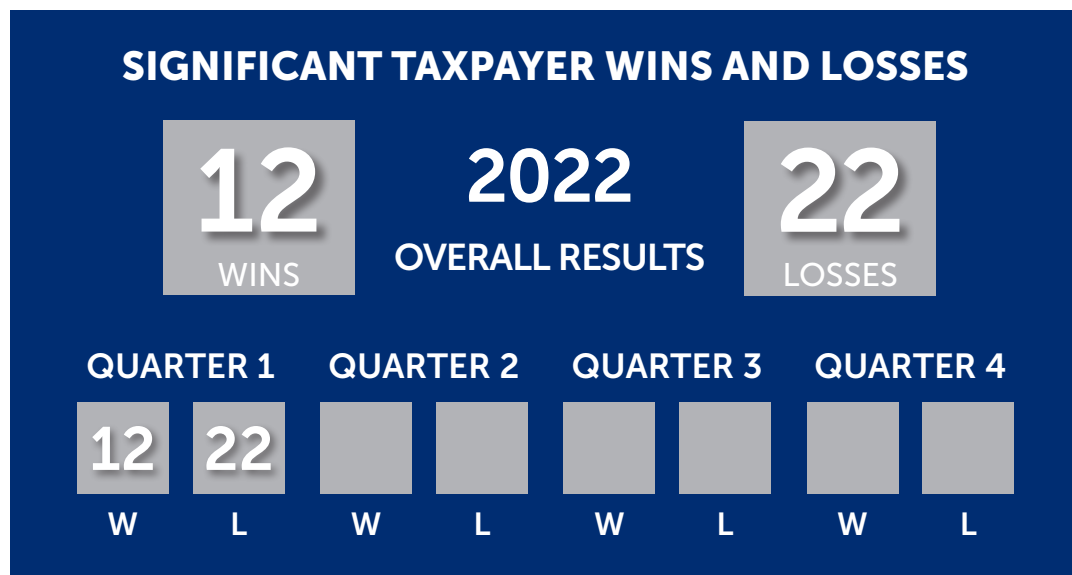


This is the first edition of the Eversheds Sutherland SALT Scoreboard for 2022. Since 2016, we have tallied the results of what we deem to be significant taxpayer wins and losses and analyzed those results. Our entire SALT team hopes that you have found the SALT Scoreboard's content useful. This edition includes a discussion of the Virginia Supreme Court's decision regarding how to calculate the property factor of Virginia's apportionment formula, a Minnesota Tax Court decision analyzing federal preemption under the Anti-Head Tax Act, and spotlight featuring a series of recent digital taxation cases.

### 1<sup>st</sup> quarter 2022

In the first quarter of 2022, taxpayers prevailed in 35.3% (12 out of 34) of the significant cases.\* Taxpayers won 44.4% (4 out of 9) of the significant corporate income tax cases and 38.1% (8 out of 21) 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 **4** out of 9 significant corporate income tax cases across the country

Taxpayers prevailed in **8** out of 21 significant sales and use tax cases across the country

### SIGNIFICANT MULTISTATE DEVELOPMENTS

#### Property Factor

**CASE:** *Virginia Department of Taxation v. R.J. Reynolds Tobacco Co.*, 868 S.E.2d 429 (Va. 2022).

**SUMMARY:** The Virginia Supreme Court ruled that because leaf tobacco stored in a tobacco producer and manufacturer's Virginia warehouse was not property "used" in Virginia, it could be excluded from its property factor. The taxpayer stored leaf products in its Virginia facilities (to allow tobacco to reach its target drying age) and later shipped the tobacco to its North Carolina production and manufacturing team. The Department of Taxation argued that the taxpayer's storage of the tobacco in Virginia constituted "use" for purposes of the property factor. The court disagreed, holding that the taxpayer was neither putting the tobacco "into action or service," nor "employ[ing] [the tobacco] for the accomplishment of a purpose" by storing the tobacco in Virginia. As a result, the leaf tobacco was properly excludable from the Virginia property factor. [View](#) more information.

#### Remote Work

**CASE:** *Schaad v. Alder*, 2022-Ohio-340 (Ohio Ct. App. 2022).

**SUMMARY:** The Ohio Court of Appeals rejected a taxpayer's constitutional challenge to a 2020 state law that allows an Ohio city to impose income tax on nonresidents for work performed outside the city—either during a stay-at-home order or the thirty days after the order expires—in the midst of the COVID-19 pandemic. The taxpayer, a Cincinnati resident, claimed the Due Process Clause prohibited Cincinnati from imposing its municipal income tax on the resident's wages for the days worked from home—outside of the city. The Ohio Court of Appeals disagreed, holding that: (1) cities may act extraterritorially where permitted by state law; (2) because the statute was passed by Ohio's legislature and the taxpayer is a citizen of Ohio, all due process requirements were met; and (3) there was a rational relationship between the statute and its purpose (i.e., an emergency measure designed to preserve the status quo of the tax code during a public-health crisis). [View](#) more information.

## Residency

**CASE:** *Buck v. Utah State Tax Commission*, 2022 UT 11 (Utah 2022).

**SUMMARY:** The Utah Supreme Court ruled that a couple was not domiciled in Utah during the 2012 tax year, overcoming a rebuttable presumption that a taxpayer claiming a property tax exemption for primary residences is domiciled in the state. The State Tax Commission previously limited the evidence to the taxpayers' actions—or inactions—related to the residential property tax exemption itself. The court ruled that the Commission effectively precluded the taxpayers from overcoming the presumption, and that taxpayers should have a meaningful opportunity to produce evidence of the totality of the circumstances relevant to their domicile. Specifically, the court found that the taxpayers' evidence—showing that their children attended primary school in Florida, that they were involved in a Florida church, and that neither the husband nor the wife spent more than 22 days in Utah during that year—was sufficient to overcome the presumption. [View](#) more information.

## Federal Preemption

**CASE:** *Alaska Airlines, Inc. v. Commissioner of Revenue*, Dkt. No. 9433-R (Minn. Tax Ct. Mar. 16, 2022).

**SUMMARY:** The Minnesota Tax Court ruled that the federal Anti-Head Tax Act (the "Act") preempts Minnesota from using an airline's gross receipts to calculate the state's Franchise Tax minimum fee. The Act prohibits states from taxing gross receipts produced by air commerce or transportation. Minnesota's minimum fee—imposed on taxpayers exercising a corporate

franchise in the state—is calculated based on the taxpayer's total Minnesota property, payroll, and "sales or receipts." The court held that the Act preempted Minnesota from including the airline's gross receipts from air commerce and transportation in the basis of the minimum fee. The tax court, however, declined to strike the entire minimum fee statute and rejected the airline's contention that the Act preempts including wages of certain nonresident employees in Minnesota "payroll." [View](#) more information.

## Bad Debt

**CASE:** *Capital One, N.A., v. Colorado Department of Revenue*, 2022 COA 16 (Colo. Ct. App. Feb. 10, 2022).

**SUMMARY:** The Colorado Court of Appeals held that sales tax bad debt credits may not be claimed by a financial company that issued private label credit cards. Colorado provides a bad debt credit to taxpayers for sales tax previously paid on defaulted financing transactions. As a private label retail credit card issuer, the taxpayer financed purchases made by its cardholders (including sales tax). The taxpayer argued that it was a taxpayer for Colorado sales tax purposes—and thus entitled to the bad debt credit—because the definition of "taxpayer" includes "any group or combination" of persons "acting as a unit." But the court held that the taxpayer and the retailers did not constitute a group or unit, and were therefore two distinct legal entities. Accordingly, because the retailers were obligated to pay the sales tax, only the retailers were entitled to the credit (or refund). [View](#) more information.

**CASE:** *Cincinnati Federal Savings & Loan Co. v. McClain, Tax Commissioner*, Slip Op. No. 2022-Ohio-725 (Ohio Mar. 15, 2022).

## Spotlight on digital taxation



**SUMMARY:** The Ohio Supreme Court determined that the Ohio Board of Tax Appeals must—on remand—apply the true object test when determining whether a bank purchased nontaxable custom software or taxable services. The bank purchased computerized services that allowed it to run transactions on a daily basis and maintain the bank's accounting and financial records. The Board found that the software was taxable because it was only somewhat—and not fully—customized. The Supreme Court concluded that a transaction is taxable only when the true object is to obtain the work performed by the computer system, but not where the true object is obtaining personal and professional services that are coupled with work that the computer system performs. [View](#) more information.

**CASE:** *Akamai Technologies, Inc. v. Board of Assessors of the City*, Dkt. Nos. F 334706 et al. (Mass. App. Tax Bd. Mar. 10, 2022).

**SUMMARY:** The Massachusetts Appellate Tax Board ruled that a SaaS products developer and seller is allowed a property tax exemption for the machinery it uses in its development process. The Board previously ruled that the company was a manufacturing corporation. As such, it was entitled to use the single sales factor apportionment formula specific to manufacturing companies, instead of the standard three-factor apportionment formula. Because the Board had already classified the company as a manufacturing corporation, it concluded that the company was also entitled to the attendant property tax exemption for the machinery used in conducting its manufacturing business. [View](#) more information.

**CASE:** *In re Secureworks, Inc.*, DTA Dec. Nos. 828328, 828329 (N.Y. Tax App. Trib. Feb. 17, 2022).

**SUMMARY:** The New York Tax Appeals Tribunal concluded that an information technology security company's sales of monitoring and firewall management services are taxable as protective services. The taxpayer provides computer monitoring and firewall management services by configuring its customers' software and devices to prevent malicious activity. The Tribunal found that the taxpayer's services qualified as protective services because they prevented outside threats to customers' networks (which it considered to be the relevant protected property). [View](#) more information.

**CASE:** *Hegar v. Black, Mann, & Graham, L.L.P.*, Dkt. No. 03-20-00391-CV (Tex. Ct. App. Feb. 25, 2022).

**SUMMARY:** The Texas Court of Appeals ruled that a law firm's purchases of loan packages for lending institution clients were taxable purchases of data processing services. The court disagreed with the law firm's contention that the "essence of the transaction" was the conveyance of the loan package (which included paralegal and mortgage expert services). Instead, the court concluded that the transactions were data processing services because, pursuant to the contracts, the firm's vendors collect and manipulate data. [View](#) more information.

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