



MAY 2026

THE BR STATE + LOCAL TAX SPOTLIGHT **BLANKROME**



CONTENTS

1. Note from the Editors
2. Unfair Apportionment Wins Even When State Doesn't Like It
3. Plain Meaning Wins the Day in Pennsylvania
4. Opera Ghost Victorious Before New York City Tax Appeals Tribunal
5. What's Shaking: Blank Rome State + Local Tax Roundup

STATE + LOCAL TAX TEAM:

Craig B. Fields | craig.fields@blankrome.com
Eugene J. Gibilaro | eugene.gibilaro@blankrome.com
Nicole L. Johnson | nicole.johnson@blankrome.com
Mitchell A. Newmark | mitchell.newmark@blankrome.com
Irwin M. Slomka | irwin.slomka@blankrome.com

Joshua M. Sivin | joshua.sivin@blankrome.com
Philip M. Tatarowicz | phil.tatarowicz@blankrome.com
Christopher M. Lash | christopher.lash@blankrome.com
Melanie L. Lee | melanie.lee@blankrome.com

Note from the Editors

By Joshua M. Sivin and Melanie L. Lee

Welcome to the May 2026 edition of *The BR State + Local Tax Spotlight*. We know the importance of remaining up-to-date on State + Local Tax developments, which appear often and across numerous jurisdictions. Staying informed on significant developments and decisions helps tax departments function more efficiently, along with improving strategy as well as planning. That is where *The BR State + Local Tax Spotlight* can help. In each edition, we will highlight important State + Local Tax developments that could impact your business. In this issue, we will be covering:

- Unfair Apportionment Wins Even When State Doesn't Like It
- Plain Meaning Wins the Day in Pennsylvania
- Opera Ghost Victorious Before New York City Tax Appeals Tribunal

We invite you to share *The BR State + Local Tax Spotlight* with your colleagues and visit Blank Rome's State + Local Tax [webpage](#) for more information about our [team](#). Click [here](#) to add State + Local Tax to your subscription preferences.

Update from previous edition. In the [May 2025](#) edition of *The BR State + Local Tax Spotlight*, Mitchell A. Newmark authored an article titled "New York State Court Chops Retroactivity of Recent P.L. 86-272 Regulation," in which he discussed the New York State Supreme Court's decision in *American Catalog Mailers Association v. Dep't of Taxation & Finance*. On May 7, 2026, the New York State Supreme Court, Appellate Division, Third Department affirmed the lower court's decision that the State's internet activities rule does not violate federal Public Law 86-272 protections. The portion of the lower court's decision favorable to the taxpayer—which held that the internet activities rule could not be applied retroactively—was not appealed and therefore remains unchanged.

Co-Editors, *The BR State + Local Tax Spotlight*



JOSHUA M. SIVIN

Of Counsel

212.885.5025

joshua.sivin@blankrome.com



MELANIE L. LEE

Associate

212.885.5371

melanie.lee@blankrome.com



MITCHELL A. NEWMARK

PARTNER

Unfair Apportionment Wins Even When State Doesn't Like It

By Mitchell A. Newmark

When a taxpayer arguing for its appropriate apportionment can present solid testimony regarding how and where its business is conducted and the economics attributable to the parts of the business, the taxpayer wins – even when the state asks a Court to rewrite its 33-page proposed decision that ruled in the taxpayer's favor. *Smithfield Packaged Meats Corp. v. California Franchise Tax Board*, Case No. 21STCV39637 (CA Sup. Ct. LA Cty. Apr. 28, 2026) (statement of decision).

We previously reported that a corporate taxpayer won a proposed decision that concluded it could use a special-industry normal apportionment formula and had the right to use an alternative apportionment formula in California (even if the special-industry normal apportionment formula did not apply). *Smithfield*, Case No. 21STCV39637 (CA Sup. Ct. LA Cty. Feb. 26, 2026) (proposed statement of decision). The FTB took exception to the proposed decision, but the Court had none of it in its recent final decision.

The taxpayer company, here, is in animal production and harvesting with three separate business segments. It asserted entitlement to use an industry-specific, equally weighted, three-factor formula for agricultural businesses (one need only have more than 50% of gross business receipts from “qualified activities”). Rev. & Tax. Code § 25128(b). California regulations added requirements that were not contained in the applicable statutes. 18 Cal. Code of Regs. 25128-2. That is, the regulations applied a “final product” test, notwithstanding that the statute mandated a “50% of gross receipts” test. In addition to claiming the statutory industry-specific formula, the company claimed a right to the three-factor formula by asserting that the single sales factor formula unfairly reflects and distorts its actual income and activity attributable to California under Rev. & Tax. Code § 25137 (statutory alternative apportionment).

The Court found the company's witnesses' testimony was credible as to the three business segments and their economics and found that the testimony proved that the company was entitled to use the three-factor apportionment formula as an agricultural business. Further, the Court ruled that: (1) the regulation was contrary to, and exceeded the scope of, the statute; and (2) the company proved unfair reflection of activities giving rise to its income and distortion arising from use of the single sales factor formula (aka, alternative apportionment). See our prior [article](#) for analysis of the proposed decision.

The final decision, following the FTB's exceptions to the proposed decision, is noteworthy for three reasons:

First, the bulk of the Court's changes from the 33-page proposed decision to the 33-page final decision were found in two new and short paragraphs. The FTB did not convince the Court to scrap its 33-page analysis.

Second, the completeness of the company's multiple witnesses' testimony, including the breadth of the three separate business segments and the depth of the explanation of the segments and the economics attributable to the segments of the business, demonstrated that the Court's decision was supported by the “greater weight” of the evidence offered by the company. Slip Op. at 31.

Third, the FTB had argued that the company should have first litigated all issues at the audit level and that, because there was new information at trial, the new information was precluded from the Court's consideration. The Court noted that if the FTB heard anything new at trial such that it believed it had been subject to “unfair surprise,” its purported “surprise” “can be attributed solely to the fact they failed to follow up” on timely discovery (discovery is

(continued on page 3)

(continued from page 2)

Unfair Apportionment Wins Even When State Doesn't Like It

the name for the court-level information-sharing process). Slip Op. at 33. The Court, in essence, concluded that the company was not required to litigate its challenge at audit and then relitigate it in court.

The Takeaway:

The Superior Court of California-level appeal from the denial of a refund claim is not limited by the documents and information reviewed at audit.

Further, complete testimony regarding the breadth, locations, and methods of the business segments, as well as the economics of the segments, can win on both the special-industry normal apportionment formula and a fair reflection or unconstitutional distortion challenge!



EUGENE J. GIBILARO

PARTNER

Plain Meaning Wins the Day in Pennsylvania

By Eugene J. Gibilaro

There are times when a state taxing authority interprets a tax statute to not mean what it says, but instead to mean what the state taxing authority wishes it would say. In these situations, taxpayers who are willing to stand up and defend themselves for following the plain meaning of a statute will often find themselves on the winning side of an appeal. A recent example is the decision by the Commonwealth Court of Pennsylvania in *East Coast Vapor LLC v. Commonwealth of Pennsylvania*, No. 487 F.R. 2022 (Pa. Commw. Ct. April 24, 2026). At issue in the case was the proper interpretation of certain provisions of Pennsylvania’s Tobacco Products Tax Act (“TPTA”). While the TPTA is a taxing scheme with limited applicability, the Commonwealth Court’s decision giving effect to the plain meaning of the applicable statute in ruling for the taxpayer and against the Department of Revenue (the “Department”) is a noteworthy development for all Pennsylvania taxpayers.

East Coast Vapor LLC (“East Coast”) operates a retail vaping store in Harrisburg, Pennsylvania. It buys e-cigarettes from licensed wholesalers for resale and the licensed wholesaler collects the TPTA tax on those purchases. Additionally, East Coast purchases other ingredients free of TPTA tax that it mixes in its store for the creation of custom-blend e-liquids that are sold in-store to ultimate consumers. The Department of Revenue issued assessments to East Coast imposing TPTA tax on the sales price of the custom-blend e-liquids that East Coast sold in-store to ultimate consumers.

The applicable TPTA provision states that “[a] tobacco products tax is imposed on the dealer or manufacturer at the time the electronic cigarette is *first sold to a retailer.*” 72 P.S. § 8202-A(a.1) (emphasis added.) East Coast argued that under the plain meaning of the statute, TPTA tax did not apply to its sales of custom-blend e-liquids *because it did not sell them to retailers*, as is plainly required by the statute, and instead sold them in-store to ultimate

consumers. The Department argued that East Coast’s position undermined the legislative intent of the TPTA, which the Department asserted was enacted to ensure that someone would be responsible for paying the TPTA tax with respect to all tobacco products sold in the Commonwealth. The Department further argued that East Coast’s customers were “retailers” as defined in the TPTA because, according to the Department, the definition of “retailer” was broad enough to include any purchaser of a tobacco product who is not a licensed wholesaler.

The Commonwealth Court ruled for East Coast, finding the Department’s position in the case “strained and impracticable.”

Quoting the Pennsylvania Supreme Court, the Court explained that the best indication of legislative intent “is the plain language of the statute” and, here, the statutory language “is unambiguous: the tax applies upon the first sale to a retailer and *not to individual, in-store customers*” (emphasis in original). With respect to the Department’s argument that in-store ultimate consumers were “retailers” under the TPTA, the Court concluded that “this argument is absurd,” finding that the definition of “retailer” plainly includes only those who purchase for resale and East Coast’s customers were purchasing for personal use, not for resale. Finally, with respect to the outcome in favor of the taxpayer, the Court explained that the “proper way for the Commonwealth to address this is by the General Assembly amending the Act, not by asking this Court to adopt a distorted reading of its plain and unambiguous language.”



MELANIE L. LEE

ASSOCIATE

Opera Ghost Victorious Before New York City Tax Appeals Tribunal

By Melanie L. Lee

While much attention lately has been on New York City's budget and the potential imposition of a pied-à-terre tax, a recent decision of the New York City Tax Appeals Tribunal (the "Tribunal") shines a light on another troublesome, longstanding City tax—the Commercial Rent Tax ("CRT"). [Matter of the Petition of The Phantom Company, LP et al., TAT\(H\) 20-15, 20-16, 20-17 \(CR\) et al.](#) (N.Y.C. Tax App. Trib. April 22, 2026). The decision serves as an important reminder of the limitations to the scope of the CRT—a bizarre tax imposed on an expense rather than on income.

The Facts: The Phantom Company, LP and other entities associated with Broadway productions (including *Kinky Boots* and *Mamma Mia*) (collectively, the "Broadway entities") entered into contracts with outdoor advertising companies (collectively, the "Billboard entities"). The contracts provided that the Broadway entities would provide advertising content to the Billboard entities. Upon content approval by the Billboard entities, the advertising would be displayed on billboards throughout the City. Importantly, the Broadway entities did not directly place the advertising themselves, nor did they have access (physically or virtually) to the billboards.

The New York City Department of Finance (the "Department") audited the Broadway entities and determined that each was liable for CRT on the use of the billboards.

The Law: The CRT is a tax on an expense. It is imposed on every tenant of a taxable premises. N.Y.C. Admin. Code § 11-702. A tenant includes a person paying or required to pay rent, and rent is consideration paid for the *use or occupancy* of a premises. N.Y.C. Admin. Code § 11-701(3), (6). Taxable premises are defined as any premises in Manhattan below the center line of 96th Street that are *occupied or used* for the purpose of carrying on or exercising a trade, business, profession, or commercial activity. *Id.* at (5). Advertising signs on the tops of buildings or structures (*i.e.*, billboards) are included within the definition of taxable premises. 19 R.C.N.Y. § 7-01.

The Decision: The Tribunal found that the issue before it distilled to whether the contracts that the Broadway entities entered into with the Billboard entities were for advertising services or whether the contracts granted the Broadway entities use of taxable premises.

Focusing on the facts at hand, the Tribunal found it difficult to see how the Broadway entities could be the users of the billboards because to use property, one must have access to the property. Here, the contracts did not grant the Broadway entities access, either physically or virtually, to the billboards. The Billboard entities placed the advertisements on the billboards, and if there were any issues or problems with the displays, the Broadway entities' only recourse was through the Billboard entities.

Instead, the Tribunal concluded that a more accurate description of the situation was that the Billboard entities "were the users of those billboards and they used those billboards to provide advertising services" to the Broadway entities. Finding no basis in legislative history, City policy, or the case law relied upon by the Department to support the Department's position that the CRT applies to a tenant with no access to the space or premises of which they are allegedly a tenant, the Tribunal concluded that the payments at issue were not subject to the CRT.

The Takeaway: This case serves as a reminder that there are important limitations to the scope of the CRT. Notably, the CRT should not apply where there is no access to the taxable premises. In addition, this case serves as a reminder that courts must adhere to the plain language of the law, including the definitions adopted by the legislature.

While a taxing authority may want to broaden the scope of a tax, the plain letter of the law should always prevail!

What's Shaking: Blank Rome's State + Local Tax Roundup

Blank Rome's nationally prominent State + Local Tax attorneys are thought leaders in the community as frequent guest speakers at various local and national conferences throughout the year. Our State + Local Tax attorneys believe it is necessary to educate and inform their clients and contacts about topics that will impact their businesses. We invite you to attend, listen, and learn as our State + Local Tax attorneys interpret and discuss key legal issues companies are facing and how you can put together a plan of action to mitigate risk and advance your business in accordance with state and local tax laws.

Orange County TEI SALT Day

- ▶ Blank Rome State + Local Tax partners [Nicole L. Johnson](#), [Craig B. Fields](#), and associate [Melanie L. Lee](#) will be speaking at the Orange County TEI SALT Day event in Orange County, California on June 4, 2026. Nicole and Craig's two speeches are titled "Litigation Updates: State of the States" and "Alternative Apportionment: Curing the Disease of Distortion," Craig and Melanie's speech is titled "All in the Family: Foreign Source Income, Combined Reporting and Intercompany Addbacks," and Nicole and Melanie's speech is titled "The 31st State: Updates on California Taxes."

Paul J. Hartman SALT Forum

- ▶ Blank Rome State + Local Tax partner [Nicole L. Johnson](#) will be speaking at the Paul J. Hartman SALT Forum in Nashville, Tennessee on October 27, 2026. Nicole's speech is titled "That's Just Stupid." To learn more, please click [here](#).

New England State and Local Tax Forum

- ▶ Blank Rome State + Local Tax partner [Nicole L. Johnson](#) will be speaking at the New England State and Local Tax Forum in Boston, Massachusetts on November 18, 2026. Nicole's speech is titled "Hot Topics in Apportionment." To learn more, please click [here](#).