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THE BR STATE + LOCAL TAX SPOTLIGHT

BLANKROME



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Note from the Editors

By Joshua M. Sivin and Melanie L. Lee

Welcome to the November 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:

- California's Attempt to Narrow Use of Tax Credits Fails – Again!
- Kentucky Appeals Court Dismisses Tax Lawsuits on Procedural Grounds
- The Wealth Tax Wave: States Chart Different Courses
- Stick to Taxes: Florida DOAH Strikes Department's "Game of Skill" Attestation on Amusement Machine Forms

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MITCHELL A. NEWMARK
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California's Attempt to Narrow Use of Tax Credits Fails – Again!

By Mitchell A. Newmark

The California Franchise Tax Board ("FTB") failed in its attempt to re-litigate an issue that it lost in 2010, which is the use of tax credits against the Alternative Minimum Tax ("AMT"). In a decision released recently by the Office of Tax Appeals ("OTA"), the FTB lost its attempt to defend its adjustment to eliminate use of the research credit against the AMT. *In re Medivation, Inc.*, 2026-OTA-532P (Office of Tax App. Jan. 27, 2026) (Pending Precedential).

In the year at issue, 2015, Medivation, Inc. ("Medivation") was a corporation that was headquartered in California and filed a world-wide combined report that included subsidiary Medivation Prostate Therapeutics, Inc. ("MPT"). MPT computed its tentative minimum tax and then subtracted the minimum tax, resulting in its computed AMT amount. It then fully offset the AMT amount by research credits to which it was entitled, resulting in Medivation reporting zero AMT. The FTB audited and made adjustments to eliminate the offset of AMT by research credits.

It was undisputed on appeal that Medivation correctly calculated its AMT and that the world-wide group and MPT properly computed the research credits and were able to so claim the research credits under R&TC Section 23609. The only dispute was whether MPT correctly claimed an offset of the AMT liability with the research credits.

The Board of Equalization ("BOE") (a tribunal that existed prior to the OTA's operation) previously held, in a precedential decision, that a taxpayer could use its properly earned enterprise zone hiring credits and manufacturer's investment credits to offset its corporate AMT liability. *NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976 (2010). The FTB attempted to have the OTA overturn the BOE's *NASSCO* decision and, short of overturning *NASSCO* outright, to distinguish *NASSCO* as inapplicable to research credits such that Medivation could not use its subsidiary's research credits to offset AMT liability. The OTA disagreed with the FTB's positions, upheld *NASSCO*, declined to distinguish *NASSCO* as applying only to enterprise zone hiring credits and manufacturer's investment credits, and allowed Medivation to offset AMT with the research credits.

The FTB claimed that the term "tax" as defined in the statutes does not include the AMT. The FTB asserted that the term "tax" was unambiguous in R&TC 23036(d) (the paragraph that addresses research credits). The OTA found that the term "tax" is defined to include the corporation income tax and the alternative minimum tax under R&TC 23036(a) & (b), but the BOE in *NASSCO* had found that definition ambiguous. Slip Op. at 4-6. The OTA also found that the *NASSCO* decision addressed and rejected the FTB's ambiguity argument. The FTB requested that the OTA overturn *NASSCO* as purportedly "wrongly decided and … 'bad law.'" Slip Op. at 6. The OTA concluded that a "precedential opinion of the [BOE] that was adopted prior to January 1, 2018 [such as *NASSCO*], may be cited as precedential authority to the OTA unless the OTA removes, in whole or in part, the precedential status of that opinion …." Slip Op. at 6 (citing and quoting 18 CCR 30504). The OTA analyzed whether the BOE's decision in *NASSCO* was still good law, noted that the legislature amended the relevant statute section eight times after *NASSCO* was decided and did not modify the law to change the future outcome of the issue of credits used against the AMT. Thus, the OTA held that *NASSCO* is still good law.

Next, the FTB asserted that *NASSCO* is distinguishable because *NASSCO* did not address use of the research credits against the AMT and for Medivation, the issue is the AMT offset by research credits. The OTA observed that the FTB did not explain why *NASSCO* is distinguishable and instead reiterated its initial argument that *NASSCO* should be overturned. Inasmuch as the FTB raised no compelling

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California's Attempt to Narrow Use of Tax Credits Fails – Again!

argument to distinguish *NASSCO*, the OTA declined to now distinguish *NASSCO* and, as a result, allowed Medivation to use the research credits against the AMT.

The Takeaways: It is important, when briefing arguments, to ensure that each argument is clear, concise, and distinguishable from the other argument points. Further, even when you correctly follow the statute and the caselaw, new administrations will occasionally attempt to re-litigate old issues when they disagree with prior case law, particularly when they have been unsuccessful pressing for a law change in the legislature.

> **Here, the OTA did the right thing, and this is a prime example of why legislatures should allow attorneys' fees against states at 100% of the amount of the fees expended.**



EUGENE J. GIBILARO
PARTNER

Kentucky Appeals Court Dismisses Tax Lawsuits on Procedural Grounds

By Eugene J. Gibilaro

When seeking relief from an action taken by a state or local taxing authority, it is critical to follow the appeal procedure provided for in the law. No matter how right a taxpayer may be on the merits of its appeal, if the proper appeal procedure is not followed, a court is likely to find that it lacks jurisdiction to grant the relief that the taxpayer is seeking in the case. A recent decision by an intermediate appellate court in Kentucky demonstrates this point. In *Huston v. Commonwealth of Kentucky*, No. 2025-CA-1034-MR (Ky. Ct. App. Oct. 30, 2026), the Kentucky Court of Appeals affirmed the dismissal on procedural grounds of lawsuits brought by a retailer and individuals seeking sales tax refunds. The Court found that the parties had not followed the procedure prescribed by law for seeking refunds for sales tax paid and had failed to exhaust their administrative remedies before bringing their claims to court.

> **This case is a reminder to taxpayers that correctly following tax appeal procedures is just as important to winning a tax case as being correct on the substantive tax question.**

The case here arose from unusual facts. The Kentucky General Assembly enacted legislation exempting "currency and bullion" from sales tax, and the Governor subsequently issued a line-item veto of the provision. The General Assembly did not vote to override the Governor's veto but instead obtained an opinion from the Attorney General designating the veto as invalid. Based on the Attorney General's opinion, the Kentucky House ruled that the Governor's veto was invalid and delivered the legislation to the Secretary of State, and the Kentucky statutes were amended to reflect the new exemption. However, at the direction of the Governor, the Kentucky Department of Revenue continued to require collection of sales tax on sales of currency and bullion. In response, the General Assembly passed new legislation allowing any person who paid sales tax on currency or bullion after the effective date of the exemption to bring a lawsuit seeking a refund of those paid taxes. The Governor eventually acquiesced, and the Department of Revenue issued guidance on its website for taxpayers to seek refunds for sales tax paid on currency and bullion currency after the effective date of the exemption.

Three individuals brought lawsuits in Kentucky Circuit Court seeking refunds of sales tax that they paid on their purchase of silver bullion from a retailer after the effective date of the exemption. They did not attempt to obtain a refund directly from the Department of Revenue. Money Metals, an Idaho limited liability company and one of the largest online retailers of gold and silver bullion in the U.S., also filed a lawsuit on its own behalf and on behalf of its Kentucky customers from whom it had collected and remitted sales tax after the effective date of the exemption. Like the individuals, Money Metals did not seek to obtain a refund directly from the Department of Revenue before bringing its lawsuit.

With respect to Money Metals, the Court of Appeals affirmed the lower court's decision dismissing the case for lack of jurisdiction due to Money Metals' failure to exhaust its administrative remedies. Finding Money Metals was neither challenging the constitutionality of the relevant tax provisions nor arguing that seeking a refund directly from the Department of Revenue would be futile, the Court of Appeals agreed that the lower court "had no jurisdiction to hear the case." The Court explained that it "will not take jurisdiction to render a declaratory judgment. . . where the purpose is to affect proceedings which may be taken or pending before a public board which is vested with full power to act in the premises." Here, the Department of Revenue was such a public board vested with full power to act on the refund claims.

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Kentucky Appeals Court Dismisses Tax Lawsuits on Procedural Grounds

The individuals, however, argued that their seeking a refund from the Department of Revenue would be futile because the relevant statute only permitted a refund to be issued to the person who paid the tax to the state, which in this case would have been the retailer who sold the silver bullion to the individuals. While the Court agreed that it would be futile for the individuals to seek a refund, it nonetheless affirmed the dismissal of their case as well, explaining "[t]he appropriate and statutorily permissible means by which [the individuals] may obtain a tax refund is to request a refund from. . . the retailer permitted to request a refund on their behalf and obligated to then return those monies to their customers."



MELANIE L. LEE
ASSOCIATE

The Wealth Tax Wave: States Chart Different Courses

By Melanie L. Lee

> **"The statesman shears the sheep; the politician skins them."**
>
> **– Austin O'Malley**

The recent proliferation of wealth, millionaire, and pied-à-terre taxes across the country may leave some wondering whether they are being led by statesmen or politicians. Regardless of the answer, these measures merit the attention of practitioners and taxpayers alike. The following discussion surveys recent developments across the country, highlighting jurisdictions in which such taxes have been proposed or enacted, as well as those in which similar proposals have failed.

California Wealth Tax

Proposition 40, a proposed one-time 5 percent tax on the net worth of California billionaires, was rejected by voters. Had it passed, the measure was expected to raise approximately $100 billion, 90 percent of which would have been directed to healthcare costs and 10 percent to K-12 public education. Advocates maintained that the new revenue was necessary to help close significant budget gaps, including those arising from federal spending cuts under President Trump's One Big Beautiful Bill. The proposal drew fierce opposition from some of the state's wealthiest residents, who reportedly spent nearly $400 million to defeat it.

Colorado Graduated Tax Rates

Colorado voters approved Amendment 87, replacing the state's 4.4 percent flat income tax with a graduated rate structure. Effective for tax years beginning on or after January 1, 2027, rates will range from 3.7 percent for taxpayers earning $25,000 or less to 8.4 percent for those earning $1 million or more. While lower earners will see their tax rates decrease, the higher rates imposed on other taxpayers are expected to generate approximately $2 billion in additional annual revenue.

District of Columbia Pied-à-Terre Property Tax

On September 16, 2026, Councilmember Matthew Frumin introduced legislation in the Council of the District of Columbia proposing a pied-à-terre tax in the District. If adopted, the legislation would create a new property tax class on residential properties with no more than two units, an assessed value greater than $2.558 million, and an owner who does not qualify for the homestead deduction. The property tax rate applicable to such properties would be $2.50 per $100 of assessed value.

The Councilmember argues that the tax targets wealthy homeowners who benefit from District services without paying their "fair share," while ignoring that frequently absent homeowners may derive less benefit from those services. He did not, however, overlook federal appointees and members of Congress (perhaps the most prominent part-time District residents), who receive an exemption. Together with other exemptions, the tax is expected to reach only approximately 600 properties.

Maine Millionaires Surcharge Tax

On April 9, 2026, Maine adopted L.D. 2212, a 2 percent surcharge on individuals earning more than $1 million and joint filers earning more than $1.5 million. Retroactive to January 1, 2026, the measure is projected to raise $96 million in additional revenue in fiscal year 2027.

New York City Pied-à-Terre Tax

Applicable to certain City properties not used as a primary residence, the New York City pied-à-terre tax rate for the first two years ranges from 0.8 percent on 1-3 family homes valued between $5 million and $15 million to 6.5 percent on condos and co-ops valued over $5 million. The tax does not apply if the property is the primary residence of the owner of the property, a tenant or subtenant, a majority interest holder of an entity owning the property, an immediate family member of the majority interest holder of the property, or beneficiary(ies) of a trust holding the property.

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The Wealth Tax Wave: States Chart Different Courses

Adopted May 28, 2026, the City's tax has already been the subject of several challenges. On September 29, 2026, the Supreme Court of New York, County of Richmond, issued a Decision and Order criticizing the City's rollout of the tax and cancelling the notices of tax due issued by the City so far. *O'Brien v. City of New York*, No. 85217/2026 (Sup. Ct. Sept. 29, 2026). The City appealed the court's ruling, and on November 4, 2026, the New York Supreme Court Appellate Division, Second Department reversed the lower court's decision and dismissed the challenge due to a lack of standing. Additional challenges to the tax were filed in the Supreme Court of New York, County of Suffolk. *Ross and Wynn v. New York*, N.Y. Sup. Ct. (complaint filed Sept. 28, 2026). Argument in those cases is scheduled for December 1, 2026.

Despite these challenges, the City continues to push forward with implementation of the tax. Assuming the tax as a whole is not overturned, anyone subject to it will see the surcharge on their property tax bills, due January 1, 2027, which may be appealed.

Rhode Island's Taylor Swift Tax

Effective July 1, 2026, Rhode Island adopted H.B. 5076, its so-called "Taylor Swift Tax," imposing an additional $2.50 charge on every $500 of value that a non-owner occupied home is assessed above $1 million. A non-owner occupied property is a residential property that does not serve as the owner's primary residence and is not occupied by the owner for 183 days or more of the year. Properties rented for at least 183 days of the year are exempt from the tax if the owner of the property applies for and receives a Certificate of No Tax Due.

On August 19, 2026, over 40 owners subject to the tax filed a complaint challenging it in Rhode Island's Superior Court. *Adams v. Rhode Island*, R.I. Super. Ct. (complaint filed Aug. 19, 2026). Among their complaints, the homeowners argue that the tax unfairly targets second homeowners and violates the dormant Commerce Clause by disproportionately falling on nonresidents.

Washington Millionaires Tax Preserved

A new 9.9 percent tax on income over $1 million is set to take effect in Washington in 2028. In November, voters declined to pass Initiative 645, which would have repealed the tax and prohibited similar future taxes. The tax is still subject to constitutional challenge. *Petter et al. v. State of Washington* (complaint filed Apr. 9, 2026).

> **The trend toward new and increased taxes was not universal in 2026.**

Florida voters approved a substantial increase in the state's homestead exemption, North Carolina voters cut the constitutional cap on the state income tax rate from 7 percent to 3.5 percent, and Tennessee voters prohibited the state from imposing a statewide property tax. These developments illustrate the divergent approaches states are taking in response to evolving fiscal pressures. With state budgets facing continued uncertainty, including from reduced federal funding, practitioners and taxpayers would be well advised to keep a close eye on further tax developments in 2027.



SEAN W. MURPHY
ASSOCIATE

Stick to Taxes: Florida DOAH Strikes Department's "Game of Skill" Attestation on Amusement Machine Forms

By Sean W. Murphy

The Florida Division of Administrative Hearings (the "DOAH") recently struck down a revision to a regulation issued by the Florida Department of Revenue (the "Department"). *Amusement Machine Owners' Ass'n of Florida v. Fla. Dep't of Rev.*, Case No. 26-4757RX (Fla. Div. Admin. Hearings Oct. 27, 2026). The revised rule modified the forms that amusement machine operators used to register for sales tax. The DOAH found the revision was an invalid exercise of delegated legislative authority.

> **The DOAH's decision exemplifies the principle that the Department's rulemaking power exists to administer Florida's taxes, not to enforce laws entrusted to other agencies.**

It matters beyond the amusement machine industry as an illustrative application of Florida's Administrative Procedure Act ("APA") and its core principle that every rule be authorized by a specific grant of authority. It also shows how even seemingly clerical matters, such as the text of an agency form, can constitute a challengeable rule.

The Revision: Florida Statutes section 212.05(1)(h) imposes a sales tax on charges for the use of any "coin-operated amusement machine," defined as any machine operated by coin, token, or similar device "for the purposes of entertainment or amusement," including pinball machines, arcade games, billiard tables, "and all other similar amusement devices." Operators must complete certain forms to obtain an Amusement Machine Certificate for each location, which the Department uses to identify taxable machines.

Effective September 3, 2026, the Department amended Rule 12A-1.097(8)(a)–(d) to add language to the attestations on the forms completed by the operators (the "Revision"). Applicants now had to certify, under penalty of perjury, that each machine is a "game of skill" and not a slot-type machine, a game of chance, video poker, or a federal gambling device. The language appears to be borrowed from the Family Amusement Games Act, section 546.10, which the Department does not administer.

The Challenge: The Amusement Machine Owners' Association challenged the Revision as an invalid exercise of delegated legislative authority. The Department responded, arguing that the rule was valid because it addressed the general subject matter of the laws purportedly authorizing it.

The DOAH confirmed that the revised forms are themselves a "rule," because the APA defines a rule to include any form that solicits information not specifically required by statute or an existing rule.

The Decision: The DOAH began its analysis with Florida Statutes Section 120.52(8), which states that a rule constitutes an invalid exercise of delegated legislative authority when "the agency has exceeded its grant of rulemaking authority.... the rule enlarges, modifies or contravenes the specific provisions of law implemented... [or] the rule is arbitrary and capricious."

The DOAH also emphasized the "flush left" paragraph of section 120.52(8), which requires a rule to actually implement the specific powers granted by the enabling statute. It is insufficient that the rule be only "reasonably related" to the enabling statute or fall within the agency's general class of powers.

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Stick to Taxes: Florida DOAH Strikes Department's "Game of Skill" Attestation on Amusement Machine Forms

The DOAH examined each of the statutes purportedly authorizing the rule and found that none authorized requiring taxpayers to comply with laws enforced by other agencies:

- Section 212.05(1)(h)6. authorizes the adoption of rules necessary to "administer" the tax on coin-operated machines. However, redefining which machines are lawful under the gambling statutes, the DOAH wrote, "does not administer a tax."

- Section 212.12(1)(b)2. authorizes rules requesting from taxpayers information necessary to properly collect, review, compile, report, and enforce the taxes levied, including sales data, tax collected or due, refunds, etc. It does not, however, include information regarding the nature of coin-operated amusement machines.

- Section 212.18(3)(a) directs dealers, in general, to register for sales tax with the Department, and likewise says nothing about the nature or operation of the machines.

In its review, the DOAH compared the case to *State, Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, which struck a proposed rule barring "cruises to nowhere" gambling ships from mooring on certain state-owned land because the agency, whose purpose was to hold title to and manage state-owned lands, had no specific power to regulate gambling.

The DOAH found that the Revision also impermissibly modified the statutory definition of "coin-operated amusement machine" under section 212.02(24) by requiring that operators certify that machines meet the narrower definition of an "amusement game or machine" (*i.e.*, games of skill only) provided under the Family Amusement Games Act.

The Department admitted that the Revision "largely address[es]" Florida's gambling laws, but argued that it should not be required to register machines for sales tax that might be unlawful under those laws. In the Department's view, borrowing the gambling laws' definition was justified. However, the DOAH concluded, had the legislature wanted to exclude from tax the receipts from certain machines (*e.g.*, illegal ones), it could have done so. Its failure to do so "suggests that the Legislature intended [to] tax receipts from *all* coin-operated amusement machines." (emphasis preserved.)

What's Shaking: Blank Rome 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.

TEI Cincinnati/Columbus Chapter Conference

- Blank Rome State + Local Tax partner Eugene J. Gibilaro, of counsel Joshua M. Sivin and associate Christopher M. Lash will be speaking at the TEI Cincinnati/Columbus Chapter Conference in Cincinnati, Ohio on December 3, 2026. Their session is titled "SALT (Direct) Update." To learn more, please click here.

MyLawCLE Webinar

- Blank Rome State + Local Tax partner Eugene J. Gibilaro, of counsel Joshua M. Sivin and associate Christopher M. Lash will be hosting a MyLawCLE webinar on December 7, 2026. Their session is titled "SALT Considerations for Remote Sellers: Nexus, P.L. 86-272, Apportionment, and Sales Tax in the Digital Economy." To learn more, please click here.

NYU SALT Institute

- Blank Rome State + Local Tax partners Mitchell A. Newmark and Eugene J. Gibilaro will be speaking at the NYU SALT Institute conference in New York, New York on December 14, 2026. Mitchell's speech is titled "Smithfield: A Case Study" and Eugene's speech is titled "Apportionment – Focus on the Numerator and the Denominator." To learn more, please click here.

COST Webinar

- Blank Rome State + Local Tax partner Eugene J. Gibilaro will be hosting a COST webinar on December 16, 2026. His session is titled "Unclaimed Property Legal, M&A, and Litigation Updates." To learn more, please click here.

2027 National Multistate Tax Symposium

- Blank Rome State + Local Tax partner Craig B. Fields will be speaking at the 2027 National Multistate Tax Symposium in Orlando, Florida on February 4, 2027. His speech is titled "Rethinking Apportionment & Sourcing: Proactive Measures for Now."

TEI Webinar

- Blank Rome State + Local Tax partner Mitchell A. Newmark, of counsel Joshua M. Sivin and associate Christopher M. Lash will be hosting a TEI webinar on May 25, 2027. Their session is titled "SALT Essentials Course – Program SALT Mergers & Acquisitions: Key Considerations."