

# BLANKROME

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Tax

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Mitchell defends audits and litigates U.S. state and local tax matters before judicial courts and administrative tribunals around the country. He has successfully argued cutting edge, precedential tax matters before state high courts, intermediate appellate courts, and trial courts on behalf of clients obtaining favorable outcomes across a wide range of industries.

He advises clients on all state and local income, gross-receipts, franchise, sales, use, excise, and miscellaneous taxes as well as myriad fees and unclaimed property obligations. He counsels clients on state and local aspects of sophisticated planning and transactional matters, such as acquisitions; dispositions; restructurings; and asset-based financing transactions, including inventory and off-take financing agreements. He has also successfully counseled individuals and estates regarding residency, domicile, and multistate taxability in audits and appeals.

Mitchell was named a *Law360* Tax MVP in 2019. He routinely publishes articles on U.S. state and local taxation, which have appeared in leading industry publications such as *Tax Executive*, *The Professional Journal of the Tax Executives Institute*; *Deal Lawyers*; *Law360 Tax*; the New Jersey Bar Association Taxation Law Section Newsletter; the *DealLawyers.com* blog; *State Tax Notes*; *COST State Tax Report*; Association of Corporate Counsel; and Tax Management's *Multistate Tax Report*.

He also frequently delivers lectures on state and local tax issues and has spoken before numerous organizations, including the New York University's ("NYU") Institute on State and Local Taxation; Georgetown University Law Center's Advanced State and Local Tax Institute; New York University's School of Professional Studies Tax Conferences in July; Vanderbilt University Law School's

Paul J. Hartman State and Local Tax Forum; The Tax Executives Institute; The Council on State Taxation; The Energy Tax Association; STARTUP; North Eastern States Tax Officials Association; New Jersey CPA Society; New Jersey Bar Association; New Jersey Society of Enrolled Agents; and the Chicago Tax Club.

*Chambers USA* notes that clients say Mitchell “is client-focused, knowledgeable and responsive,” and share that they are “highly appreciative of Mitchell’s awareness of organizational issues and ability to address them.”

Prior to joining Blank Rome, Mitchell was a partner at a leading Am Law 100 firm and spent six years as a deputy attorney general at the New Jersey Attorney General’s Office, where he represented the Division of Taxation, among other agencies and bodies, in court. He also counseled the Division of Taxation and other agencies on regulatory matters. From 1996–1997, he served as a law clerk for the Honorable Irwin I. Kimmelman, New Jersey Superior Court, Appellate Division.

## Select Engagements

- Represented an industrial gas turbine manufacturing subsidiary of the world’s largest construction equipment manufacturing company in its state and local tax appeals, including at:
  - The Louisiana Fifth Circuit Court of Appeal in successfully opposing the Louisiana Department of Revenue’s writ for supervisory review. The Court of Appeal affirmed the team’s prior win at the Louisiana Board of Tax Appeals that the company’s corporate income tax refund claims for 2001 through 2006 were timely filed (*i.e.*, not prescribed) after a federal income tax audit.
  - The Louisiana Board of Tax Appeals, which overruled the Louisiana Department of Revenue’s denial of a request for an income tax refund. The Board found that the company had timely filed corporate income tax refund claims for the tax years 2001 through 2006 because those tax years were kept open by a federal waiver while the company was under an Internal Revenue Service audit. In addition, the Board agreed that the company had relied on the Department of Revenue’s statements that it made adjustments and issued assessments based on the existence of an audit.
- Represented an American manufacturing and distribution company in its state and local tax appeals, including at:
  - The Virginia Supreme Court, which held in a unanimous decision that the company was entitled to an income tax refund of \$11 million before interest is added. The court agreed that for purposes of attributing income to Virginia for taxation, aging leaf tobacco raw materials do not get counted in the property factor ratio that includes property that is owned and used in the taxable year. It stated that the leaf tobacco stored in the Virginia facilities is not “used” within the intendment of Code § 58.1-409 simply because it is aging while it is in storage. Thus, the Virginia Supreme Court ruled that the trial court correctly held that the Department of Taxation’s corporation income

- tax refund claim denials for the years in issue were erroneous because the value of the leaf tobacco stored in the Virginia facilities should not have been included in the company's property factor.
- The Virginia Circuit Court, which reversed the Virginia Department of Taxation's denial of refund claims and favorably concluded that leaf tobacco that is stored and aging in Virginia and ultimately manufactured into cigarettes outside of Virginia, is not used to produce Virginia taxable income while stored in Virginia and is properly removed from the company's Virginia property factor for apportionment purposes. The court agreed that the property factor regulation was inconsistent with the property factor statute and as the court ruled for the company on statutory grounds, it did not address our constitutional arguments.
  - Represented an American manufacturing and distribution company in the New Jersey Tax Court, which reversed the taxation director's denial of refund claims and found that, when considering the "unreasonable" exception to the related-party royalty expense addback, the relevant consideration is whether the recipient of the royalty payment paid tax in New Jersey on the income and, if it does pay tax, the payor's and the recipient's relative apportionment factors are irrelevant and cannot be the basis for a refund denial.
  - Represented an investment corporation in the New Jersey Tax Court, which held under the state tax addback that, when related parties are included in combined or consolidated state income tax filings and agree to adjust liabilities among them under a tax sharing agreement, the amounts settled under the agreement are intercompany liabilities and are not state taxes for the potential addback.
  - Represented an American department store retail chain before the Virginia Supreme Court, which held in a 4-3 decision that the subject-to-tax safe harbor to the royalty addback was ambiguous and applies only to the extent that the royalties are actually taxed by another state. In addition, the court agreed with the company's alternative argument that a portion of the royalties qualify for the safe harbor when 1) the royalties are taxed by states that require the royalty payor to add back the royalty payments, or 2) the royalties are taxed by states that require combined or consolidated reporting.
  - Represented an innovation, consumer and market insights, and competitive assessment service company before the Massachusetts Appellate Tax Board, which reversed the Commissioner of Revenue's assessment of penalties, noting that the imputation of penalties was improper because the company had reasonably relied on written statements and actions of the Department of Revenue's auditors and supervisors during two prior audits.
  - Represented an affiliate company of an American manufacturing and distribution company before the New Jersey Supreme Court, which declined the state's request to review the company's prior win in the New Jersey Superior Court, Appellate Division, which affirmed the Tax Court's decision and held that New Jersey may not apply dual nexus standards for throwout purposes in computing apportionment. The court held that because New Jersey successfully asserted an economic nexus-based standard for

constitutional subjectivity purposes, when applying the throwout to increase the portion of income that is taxed in New Jersey, that same economic nexus-based standard must also apply when considering other states' subjectivity.

- Represented an affiliate of the world's largest package delivery, specialized transportation, and logistics services company before the New Jersey Supreme Court, which affirmed the company's prior win in the New Jersey Superior Court, Appellate Division, and held that the director abused his discretion and should have abated late payment penalties on a good faith issue and that the amnesty penalty did not apply to a good faith issue found on audit when the assessment was issued after the close of the amnesty.
- Represented an American electric power holding company before the New Jersey Tax Court, which held that electric utilities taxes paid to North Carolina and South Carolina are not taxes "on or measured by profits or income, or business presence or business activity" and therefore are not required to be added back to the taxpayer's federal taxable income for Corporation Business Tax purposes.
- Represented a manufacturer and marketer of home appliances and related products before the New Jersey Supreme Court, which significantly narrowed the throwout statute to survive a facial constitutionality challenge and held that, to operate constitutionally, the throwout could only be applied to untaxed receipts due to a lack of jurisdiction to tax arising from an insufficient connection with the corporation or from congressional prohibition, such as Public Law 86-272.
- Represented a multinational gambling company before the New Jersey Tax Court, which held that inasmuch as after an assessment is protested, a refund claim is not permitted until after the appeal is completed, refund interest accrues in favor of the taxpayer starting at the time the taxpayer filed its protest.
- Represented an American privately held multinational corporation, and manufacturer and distributor of audiovisual automation and integration equipment, before the New Jersey Tax Court, which held that the corporation business tax expresses a clear intent on the part of the legislature to couple entire net income with federal taxable income with limited explicit exceptions, thereby precluding the director's attempt to require that the exclusion of extraterritorial income for federal purposes be added back to income for computing corporation business tax liability.
- Represented an American global manufacturer and marketer of consumer and professional products before the New Jersey Superior Court, Appellate Division, which affirmed the company's prior win in the New Jersey Tax Court and held that a transferor in a tax-free IRC Section 351 contribution of property was not required to take an excess depreciation deduction that would have resulted in lower basis and depreciation by the recipient because New Jersey had decoupled from federal accelerated depreciation during those years (requiring straight-line depreciation) and a transferred basis continued in the hands of the transferee.

## Admissions

- New Jersey
- Florida
- New York

## Memberships

- Florida Bar Association
- New Jersey State Bar Association

## Education

- Widener University School of Law, JD
- Georgetown University Law Center, LLM
- Rutgers University, BA
- Rutgers University, MBA

## Recognitions

- 2023–2024, New York: State and Local Tax, listed in *Chambers USA*
- 2019, “MVP of the Year,” listed in *Law360*
- 2017–2019, 2021–2024, U.S. Taxes: Contentious, listed in *The Legal 500 United States*
- 2016, Tax Controversy, listed in *The Legal 500 United States*
- 2016, “Outstanding Contribution to the Taxation Law Section,” awarded by the New Jersey State Bar Association Tax Section
- 2014, Tax Controversy and Domestic Tax: East Coast, listed in *The Legal 500 United States*

Mitchell has also received two attorney general recognition awards, including for his work in response to the September 11, 2001, terrorist attack on the World Trade Center.

## Professional Activities

Mitchell serves as Co-Chair of the State Practice, Procedure and Liaison Committee of the Tax Section of the New Jersey Bar Association. He is also a member of the Tax Section of the New Jersey Bar Association Executive Committee and Executive Council, which he previously chaired. Mitchell was a member of the New Jersey Supreme Court Committee on the Tax Court for 11 years until he termed out in 2018.

In 2021 and 2022, Mitchell was appointed to *Law360 Tax Authority's* State & Local Editorial Board, whose purpose is to get feedback on *Law360's* coverage and to gain insight from leaders in the field on how best to shape future coverage.

In 2022, Mitchell was appointed to the NYU Institute on State and Local Taxation Advisory Board.

