

Insights: Publications

5 Key Takeaways | Standing and Retroactivity in State Tax Litigation: Access, Authority, and Constitutional Limits

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Kilpatrick's [David Hughes](#) joined other thought leaders who presented on the topic of “**Standing and Retroactivity in State Tax Litigation: Access, Authority, and Constitutional Limits**” at the [Council for State Taxation 56th Annual Meeting](#) in Memphis.

This session examined critical and often intersecting issues in state tax litigation: who has the right to sue, and how far back the state can reach. The speakers discussed the evolving doctrine of associational standing, analyzing when trade groups, nonprofits, and other associations may litigate on behalf of their members, and how courts balance access to justice with judicial efficiency and standing limitations. The session delved into the constitutional and statutory limits of retroactive taxation, with a focus on due process concerns and key cases.

David's key takeaways from the presentation include:

1. The Supreme Court's *Carlton* framework sets constitutional limits on retroactive tax legislation, requiring a legitimate legislative purpose achieved by rational means and a modest period of retroactivity. States and courts have stretched “modest,” with decisions upholding retroactive periods of six years or more (e.g., IBM in Michigan) and even a technical 27-year reach (Dot Foods in Washington), while others like California generally limit retroactivity to the current tax year. Since *Carlton*, over 40 cases have addressed retroactive tax laws, with roughly 85% upholding constitutionality, at least 20 states enacting retroactive legislation, and about half of decisions approving four or more years—raising separation-of-powers concerns where legislatures revisit adjudicated matters.
2. California's SB 167 (RTC § 25128.9) effectively reverses the OTA's Microsoft decision by excluding from the sales factor any receipts tied to income not included in net income, and it applies to taxable years before, on, or after its effective date. Two lawsuits—National Taxpayers Union v. FTB and California Taxpayers Association v. FTB—challenge the law's retroactive effective date as a change (not a clarification) under *Carlton*'s Due Process test.
3. Retroactive regulations and guidance face distinct hurdles because courts first ask whether an agency interpretation merits deference at all; some guidance is nonbinding, and many states have curtailed deference to tax departments, particularly post-*Loper Bright*. The Supreme Court's *Bowen v. Georgetown*

University Hospital presumption against retroactive rulemaking requires clear statutory authorization for retroactive rules, making retroactive shifts in interpretive tax regulations especially vulnerable.

4. New York's recent cases show mixed outcomes for retroactive rules. For example, in *ACMA v. DTF*, the Court generally upheld a regulation interpreting P.L. 86-272 but struck down its retroactive application as unconstitutional, while in *Paychex* the court upheld both the regulation and its retroactive application.
5. Associational standing enables trade associations to sue on behalf of members when members would have standing, the interests are germane to the association's purpose, and the claims/relief don't require individual member participation, per *Hunt*. It is a growing tool in state tax disputes—e.g., *Chamber of Commerce v. Lierman* (Maryland Digital Ad Tax) and the pending *NTU* and *CalTax* cases in California—and states like Oregon have codified the three-prong test, making associations effective vehicles to challenge retroactive tax measures.

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