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Canons to Create Ties and Canons to Break Them

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by Steve R. Johnson

The human spirit can be deeply stirred by art for its own sake, but there is special magic when the esthetic combines with the practical. It was in this sense that Charles W. Elliot, for decades president of Harvard University, once declared that he found great beauty in the shape of the handle of an American ax. In the same fashion, beauty resides in well-made statutory interpretation arguments.

Over the millennia, scores of principles of construction have evolved, all of them useful in the right contexts.[1] Usually, more than one principle can plausibly be maintained to apply to the given case, and often those multiple guides appear to point in different directions.[2] Accordingly, almost every lawyer can make a journeyman-level statutory interpretation argument in a case. Fewer, however, are the advocates who can make a master-level argument, one in which multiple themes are combined to produce an explanation of the statute both pleasing to the artistic impulse and useful to the resolution of the controversy before the court.[3]

A recent Florida tax case — *Alachua County v. Expedia*[4] — illustrates the interplay of multiple constructional themes and the beauty that their nuanced harmonization can produce. I do not intend to engage all of the dimensions of *Expedia*. Instead, I will emphasize the interplay of several principles in the case, particularly how some canons were used to initially create a tie between the revenue authorities and the taxpayers and then how other canons were advanced — sometimes persuasively, sometimes not — to break that tie.

The first section below describes the controversy in *Expedia*. The second section explores how the "ordinary understanding" canon was used by the majority and the dissent, leaving the parties in essential equipoise at that level. The third section examines how the majority used the pro-taxpayer

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[1]*See*, *e.g.*, Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 *Colum. L. Rev.* 527, 544 (1947). ("Insofar as canons of construction are generalizations of experience, they all have worth.") Not all agree. *E.g.*, Richard A. Posner, "Statutory Interpretation — in the Classroom and in the Courtroom," 50 *U. Chi. L. Rev.* 800, 806 (1983) (opining that most canons "are just plain wrong"); James C. Thomas, "Statutory Construction When Legislation Is Viewed as a Legal Institution," 3 *Harv. J. Leg.* 191, 210 (1966) (urging that constructional canons "be abolished and eliminated from the legal vocabulary").

[2]Every law student has heard of Professor Llewellyn's "dueling canons" article. Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," 3 *Vand. L. Rev.* 395, 401 (1950) ("there are two opposing canons on almost every point"). However, more recent scholarship has challenged the fairness of Llewellyn's comparisons. *E.g.*, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 59-60 (2012); Michael Sinclair, "'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons,' Pairs Thirteen to Sixteen," 53 *N.Y. L. Sch. L. Rev.* 953 (2008/2009); Michael Sinclair, "'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons,' Eight to Twelve," 51 *N.Y. L. Sch. L. Rev.* 1003 (2006-2007); Michael Sinclair, "'Only a Sith Thinks Like That': Llewellyn's 'Dueling Canons,' One to Seven," 50 *N.Y. L. Sch. L. Rev.* 919 (2005-2006).

(Footnote continued in next column.)

[3]Scalia and Garner, *supra* note 2, at 59, "It is a rare case in which each side does *not* appeal to a different canon to suggest its desired outcome. The skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies." (emphasis in original); *see also* Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making of Law* 1191 (William N. Eskridge Jr. and Philip P. Frickey eds. 1994) ("Of course there are pairs of maxims susceptible of being invoked for opposing conclusions. Once it is understood that meaning depends upon context, and that context varies, how could it be otherwise?").

[4]*Alachua County v. Expedia, Inc.*, __ So. 3d __, 2013 WL 709561 (Fla. App. Feb. 28, 2013). The *Expedia* opinion has not yet been released for publication in the permanent law reports. Until so released, it remains subject to revision or withdrawal. I am grateful to Mark E. Holcomb, Esq., for bringing *Expedia* to my attention. Holcomb represented some of the companies in the case.

canon to break that equipoise in favor of the taxpayer. It also compares *Expedia* to a federal case in which the court chose not to follow the same path. The fourth section considers how the dissent advanced a different principle — the "substance over form" rule — to attempt to resolve the equipoise in favor of the government units.

The Expedia Controversy

New technology spawns new business opportunities — and, for perennially cash-strapped governments, new revenue opportunities. As everyone exposed to television commercials knows, a profusion of companies now offer discounted hotel prices. Can the tax man fail to follow that scent?

Expedia is among the most recent of a long line of cases involving the determination of tax liability in the new travel industry.[5] The case involves Florida's tourist development tax, levied by localities under the state's Local Option Tourist Development Act.[6] It presents the question of the proper base on which the tax applies.

Online travel companies (OTCs) have websites that permit potential customers to glean information comparing competing hotels, airlines, and auto rental companies. The OTC submits the customer's reservation request to the hotel or other service provider. If the hotel chooses to accept the reservation, it makes the reservation in the customer's name.

Two models are used in the industry. Under the "merchant model," the OTC collects the payment from the customer and sends part of it to the hotel. The customer does not pay the hotel directly. In contrast, under the "agency model," the customer pays the hotel for the room. The hotel then pays a commission to the OTC.[7] The eight companies that were parties in *Expedia* used the merchant model.

The tourist development tax, enacted in 1977, allows counties to assess a "bed tax" regarding hotel stays in their jurisdictions. It states:

> It is declared to be the intent of the Legislature that every person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel, resort motel . . . for a term of 6 months or less is exercising a privilege which is subject to taxation under this section, unless such person rents, leases, or lets for consideration any living quarters or accommodations which are exempt according to the provisions of chapter 212.[8]

The chapter 212 reference is to the transients rentals tax enacted in 1949. That measure provides:

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license to use any living quarters or sleeping or housekeeping accommodations in, from, or a part of, or in connection with any hotel.[9]

It is clear that the OTCs are responsible for collecting the tax and remitting it to the revenue authorities.[10] But fixing the duty to collect does not fix the incidence of the tax and does not resolve the extent of the tax base.

Many counties brought suit seeking judicial declaration that the tourist development tax applies to the full amounts that the OTCs collect from the customers. The OTCs countered that the tax applies only to the amounts paid by the OTCs, on the customers' behalf, to the hotels, and does not apply to the additional amounts collected by the OTCs but retained by them as their compensation.

The trial court ruled in favor of the OTCs. On appeal, the district court identified "the crux of this dispute [as] determining what is the privileged activity which the Tourist Development Tax taxes — renting a room *to* a tourist, or a tourist renting a room *from* a hotel?" In other words, "did the Legislature declare that it is a privilege to rent a hotel room in Florida, or did it declare that it is a privilege to operate a hotel in this state?"[11] If the taxable privilege is the act by the tourists, the whole amounts paid by them would be taxable and the counties would prevail. However, if the taxable privilege is the act by the hotels, only the amount paid to the hotels (not the amount retained by the OTCs) would be taxable and the OTCs would prevail.[12]

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[5]Other such cases include *Mayor & City Council of Baltimore v. Priceline.com Inc.*, 2012 WL 3043062 (D. Md. 2012); *Village of Rosemont v. Priceline.com Inc.*, 2011 WL 4913262 (W.D. Ill. 2011); *City of San Antonio v. Hotels.com*, 2008 WL 2486043 (W.D. Tex. 2008); *City of Charleston v. Hotels.com, LP*, 586 F. Supp. 2d 538 (D.S.C. 2008); *Expedia, Inc. v. City of Columbus*, 681 S.E.2d 122 (Ga. 2009); *Travelscape, LLC v. South Carolina Dep't of Revenue*, 705 S.E.2d 28 (S.C. 2011).

[6]Fla. Stat. section 125.0104.

[7]2013 WL 709561, at *1 and n.2.

[8]Fla. Stat. section 125.0104(3)(a)(1).

[9]Fla. Stat. section 212.03(1)(a).

[10]Fla. Stat. sections 125.0104(3)(f) (tourist development tax) and 212.03(2) (transient rentals tax).

[11]2013 WL 709561, at *2 (emphasis in original).

[12]Plainly, that dispute could have been avoided by more precise legislative drafting. Also, the "It is hereby declared to be the legislative intent" language is curious. What the Legislature *does* — what tax it enacts — matters more than what the Legislature intends. *See*, *e.g.*, *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989); Lawrence H. Tribe, "Comment," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 65, 66 (1997) ("it is the *text's* meaning, and not the content of anyone's expectation or intentions, that binds us as law") (emphasis in original).

'Ordinary Understanding' and Equipose

There were many aspects of *Expedia*. For instance, both the district court majority and the dissent entertained "plain meaning of the statute" arguments,[13] both tussled about the significance of an earlier case,[14] and both probed the relationship of the tourist development tax and the earlier transient rentals tax as statutes *in pari materia*.[15]

This column will not engage all the arguments in the case, in part because their ilk have been explored in previous installments.[16] Instead, we will selectively treat several aspects of the case.

"When the words of a statute are unambiguous, [the] first canon is also the last: 'judicial inquiry is complete.'"[17] Thus, construction of the critical statutory terms — such as "rents, leases, or lets for consideration" — was central to both the majority and dissenting opinions. The general rule, and the rule in Florida, is that statutory terms are understood in their ordinary, everyday senses, unless context reveals that they have technical, term-of-art meanings.[18]

Both the *Expedia* majority and dissent accepted that the critical terms of the tourist development tax had to be taken in their ordinary, everyday signification, but they went in different directions starting from that common origin. For the majority:

> To "rent, lease or let" in ordinary meaning denotes the granting of possessory or use rights in property. Inherent in that idea is the notion that one actually has sufficient control of the property to be entitled to grant possessory or use rights. Thus, the consideration received for the "lease or rental" is that amount received by the hotels for the use of their room, and not the mark-up profit retained by the [OTCs] for facilitating the room reservation.[19]

The majority fortified that with citation to *Black's Law Dictionary* and concluded that the OTCs "are simply conduits through which consumers can compare hotels and rates and book a reservation at the chosen hotel. They do not grant possessory or use rights in hotel properties owned or operated by third-party hoteliers."[20]

> ***If the terms of the tourist development tax, taken in their ordinary sense, could point either in favor of or against the OTCs, the pro-taxpayer canon breaks the tie in their favor.***

The *Expedia* dissent countered with its own dictionaries and its own "ordinary, everyday meaning" definition of the critical statutory language. According to the dissent, "the problem with [the majority's] argument is that the terms 'rent' and 'lease' are also used to describe an action taken by the person who pays for the right to occupy the property."[21] In other words, "because these terms can be used interchangeably to describe the action by either party in the making of a lease or rental agreement, we cannot say for certain that they are used in the statute to describe the act of providing a hotel room. . . . We could just as well read the phrase . . . to mean any person who pays money to a hotel for the privilege of staying there."[22]

The sides' arguments are not free of doubt, but assume arguendo their central thrusts. By using the same canon — the everyday meaning principle — but reversing the direction of the verbs, the parties (and the majority and dissent) arrived at opposite positions. At that level, they are in equipoise. To break that tie, the sides resorted — with different levels of success — to secondary canons. It is to them that we now turn.

Majority's Canon to Disturb Equipoise

A court's first resort should be to discover the better outcome through fair and reasonable application of neutral constructional principles.[23] Should that effort lead to no clear result — as arguably was the case in *Expedia* — the court must turn to background constructional principles. The *Expedia* trial court and appellate majority found that principle: the pro-taxpayer canon.

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[13]2013 WL 709561, at *2 (Thomas, J., writing for the court); *id.* at *8 (Padovano, J., dissenting).

[14]*Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So. 2d 981 (Fla. 1981); *see* 2013 WL 709561, at *3 (majority opinion), *id.* at *6 (dissenting opinion).

[15]2013 WL 709561, at *3 (majority opinion); *id.* at *9 (dissenting opinion).

[16]*E.g.*, Steve R. Johnson, "Supertext and Consistent Meaning," *State Tax Notes*, May 25, 2009, p. 675; Johnson, "Use and Abuse of 'Plain Meaning,'" *State Tax Notes*, Sept. 22, 2008, p. 831.

[17]*Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). *But see Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

[18]*E.g., Gibbons v. Ogden*, 22 U.S. 1, 71 (1824); *Fla. Dep't of Revenue v. New Seas Escape Cruises, Ltd.*, 894 So. 2d 954, 961 (Fla. 2005).

[19]2013 WL 709561, at *4.

[20]*Id.* at *5 (citing *Black's Law Dictionary* 1300 (7th ed. 1999)). Also, the OTCs cited other dictionaries in their briefs, including Dictionary.com based on *Random House Dictionary*, and *Collins English Dictionary*. *See* 2013 WL 709561, at *7 (dissenting opinion).

[21]2013 WL 709561, at *7-*8 (citing over a half dozen dictionaries).

[22]*Id.* at *8.

[23]*See generally* Johnson, "Tilted Versus Reasonable Interpretation of Tax Laws," *State Tax Notes*, Oct. 25, 2010, p. 277.

As we saw in an earlier installment of this column, that canon has been largely discounted at the federal level, but it retains utility in many states.[24] Florida is one of those states.[25]

Thus, if the terms of the tourist development tax, taken in their ordinary sense, could point either in favor of or against the OTCs, the pro-taxpayer canon breaks the tie in their favor.[26] The dissenting judge acknowledged that, in Florida, "an ambiguity in a tax statute must be resolved in favor of the taxpayer" but added that "the statute at issue here does not strike me as ambiguous at all."[27] That is unpersuasive. We have seen that the statute at issue can be read in favor of either party, depending on the directionality imparted to its verbs. It is hard to call that sort of statute unambiguous.

In potential, though not in result, the approach of the *Expedia* majority reminds one of a much earlier federal case. *Nix v. Hedden* involved how imported tomatoes should be classified for tariff purposes: as fruit (lower tariff) or vegetables (higher tariff). Scientists classify tomatoes as fruit; lay persons think of them as vegetables. With little discussion, the U.S. Supreme Court held that the ordinary meaning, not the scientific meaning, should govern and upheld the higher tariff.[28] The Court did not mention the pro-taxpayer canon, which was in full vigor at the federal level when *Nix* was litigated and which applies to revenue through tariffs as well as revenue through taxes.[29] Had the Court thought more about the case, it might have taken the approach of the *Expedia* majority by declaring that the canon should resolve any conflict between competing definitions of the critical statutory term.

Dissent's Canon to Disturb Equipoise

The *Expedia* dissent invoked a different canon: the "substance over form" rule.[30] The dissent maintained that "the merchant model is merely a different method of completing the same transaction [as the agency model;] it cannot have the effect of changing the tax liability on the transaction. . . . By this basic [substance over form] principle, a taxpayer cannot avoid a tax merely by characterizing a transaction as something other than what it truly is."[31]

That is an overexpansive application of the principle. Taxpayers *are* allowed to plan, to structure their otherwise legitimate transactions in the most tax-efficient ways. Long ago, Judge Learned Hand observed that "a transaction, otherwise [legal], does not lose its immunity because it is actuated by a desire to avoid . . . taxation. Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury."[32]

"Substance over form" is an important antiabuse doctrine. But the facts of *Expedia* do not reveal abuse. The merchant model and the agency model appear to be legitimate, alternative economic arrangements, and companies' choices between those alternatives should be respected by the tax system.[33]

Conclusion

The OTC tax controversies probably aren't over in Florida, and there doubtless will be many more cases in other jurisdictions as well. Taxpayers will win or lose those future cases depending on how the state legislature writes the tax at issue.

Apart from who wins those high-stakes games, however, is the light that cases like *Expedia* cast on interpretive methods. *Expedia* reveals the interesting dynamic of the application of one canon of construction leading to essential equipoise, prompting the need to identify appropriate secondary canons to resolve the deadlock. The craft of statutory interpretation constantly brings to the fore new and interesting combinations of rules and principles. ☆

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[24]*See* Johnson, "Pro-Taxpayer Interpretation of State-Local Tax Laws," *State Tax Notes*, Feb. 9, 2009, p. 441; *see also, State ex rel. Arizona Dep't of Revenue v. Capitol Castings, Inc.*, 88 P.3d 159, 161 (Ariz. 2004); *Goodman Oil Co. v. State Tax Comm'n*, 28 P.3d 996, 998 (Idaho 2001); *American Healthcare Management, Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999); *Skepton v. Borough of Wilson*; 755 A.2d 1267, 1270 (Pa. 2000); *Sane Transit v. Sound Transit*, 85 P.3d 346, 364 (Wash. 2004).

[25]*E.g., Department of Revenue v. Brookwood Assoc., Inc.*, 324 So. 2d 184, 186 (Fla. 1975); *Maas Bros., Inc. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967).

[26]So held the trial court, 2013 WL 709561, at *2, and the appellate majority, *id.* at *4 (calling the pro-taxpayer canon "well-established law in Florida").

[27]*Id.* at *9 (Padovano, J., dissenting).

[28]149 U.S. 304 (1893).

[29]*E.g., American Net & Twine Co. v. Washington*, 141 U.S. 468, 474 (1891).

[30]We explored this rule in Johnson, "Substance and Form in State Taxation," *State Tax Notes*, Oct. 27, 2008, p. 239.

[31]2013 WL 709561, at *10 (dissenting opinion).

[32]*Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

[33]*E.g., Frank Lyon Co. v. United States*, 435 U.S. 561, 583-584 (1978); *United Parcel Serv. of Am., Inc. v. Comm'r*, 254 F.3d 1014 (11th Cir. 2001); *Chamberlin v. Comm'r*, 207 F.2d 462 (6th Cir. 1953), *cert. denied*, 347 U.S. 918 (1954).