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The 'Things of the Same Nature' Canon in State Tax Construction

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This installment of Interpretation Matters explores one of the most widely used canons of statutory construction: the *ejusdem generis* ("of the same kind or class") principle. "If general words follow the enumeration of particular classes of things, the rule of *ejusdem generis* provides that the general words will be construed as applicable only to things of the same general nature as the enumerated things."[1]

To take a simple example, a statute prohibited persons placing on the streets "dirt, rubbish, wood, timber, or other material of any kind" tending to obstruct the streets. The statute was held not to apply to an automobile left on the street. "Dirt, rubbish, wood, [and] timber" are of the same kind, class, or nature — a nature different from that of automobiles. Under the canon, the initial particular words of the same class impart a limiting connotation to the later language of an otherwise general nature "other material of any kind."[2]

The first section below gives examples of the operation of the "same kind" precept in state and local tax cases. The second section explores the rationales for the canon. The third section considers arguments by which the party opposing the precept can seek to counter it.

Examples in State and Local Tax Cases

The canon is of ancient standing, found in English law as early as the 16th century.[3] It exists in the United States principally as a result of case law, but it has statutory standing in some states.[4]

The canon is a gate that swings both ways. It can be invoked by either the taxpayer or the revenue authority, and its operation can benefit either party. Consider the following three examples.

The first involves a series of New Jersey income tax cases in which taxpayers attempted to take deductions for bad debts. The statute allowed the deduction of losses "derived from the sale, exchange or other disposition of property." Inability to collect on the debts was neither sale nor exchange, but the taxpayers contended that it was "other disposition." The New Jersey courts rejected the contention, reasoning, under *ejusdem generis*, that the preceding specific terms limited the meaning of the concluding general term.[5]

The second example is a property tax case. In Pennsylvania, localities are authorized to subject to tax "all real estate: to wit houses, house trailers and mobile homes, buildings . . . , lands, lots of ground . . . , trailer parks . . . , mills and manufactories of all kinds, . . . and all other real estate not exempt by law from taxation."[6]

The question was whether leasehold interests in oil and gas underlying tracts of land were included in that definition, particularly the specific term "lands" and the concluding general language "all other real estate." The lower courts held that they were. The Pennsylvania Supreme Court reversed on the basis of the "same kind" canon. It stated that all the specifically enumerated items in the statute "constitute either land, as in the typical layperson's understanding (that is, surface rights), or one of

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[1]*Daniels v. City of Commerce City*, 988 P.2d 648, 651 (Colo. App. 1999) (quoting *Board of County Commissioners v. Martin*, 856 P.2d 62, 66 (Colo. App. 1993)).

[2]*Hodgerney v. Baker*, 88 N.E.2d 625 (Mass. 1949).

[3]*See Archbishop of Canterbury's Case*, 2 Co. Rep. 46a, 76 E.R. 519 (1596).

[4]*See, e.g.*, 1 Pa. Consol. Stat. section 1903(b).

[5]*Walsh v. Director, Div. of Taxation*, 15 N.J. Tax 180, 182-183 (N.J. App. 1995) (per curiam); *see also Waksal v. Director, Div. of Taxation*, 2011 WL 5119066, at * 4 (N.J. Super. Oct. 31, 2011), *cert. granted*, 40 A.3d 58 (2012); *Vinnik v. Director, Div. of Taxation*, 12 N.J. Tax 450 (N.J. Tax Ct. 1992).

[6]7 Pa. Consol. Stat. section 5020-5201(a).

various types of physical improvements permanently affixed. . . . Oil and gas rights, by contrast, are quite unlike any of the other objects specifically identified." Accordingly, under the canon, "the dissimilarity between the nature of oil and gas and those items which the General Assembly saw fit to enumerate as the proper subject of taxation militates against the conclusion that such terms are encompassed within the general term."[7]

The *ejusdem generis* canon is a relative or a variety of another common canon: the *noscitur a sociis* principle that a word is known by its associates.[8] Sometimes, as illustrated by our third example, the courts confuse the two. The question was whether T-Mobile's accounting goodwill constituted tangible property subject to property tax or, instead, exempt intangible property. A 1988 statute included the following non-exhaustive enumeration of exempt intangibles: (i) money, (ii) credits, (iii) bonds; (iv) stocks, (v) representative property; (vi) franchises; (vii) licenses; (viii) trade names; (ix) copyrights; and (x) patents.[9]

Enlisting the *ejusdem generis* canon, the Utah Supreme Court found that goodwill is not exempt property under the 1998 statute. The court reasoned:

> All of these items [in the enumeration] are capable of being divided from the acquired entity and sold, transferred, licensed, rented, or exchanged. But goodwill is not capable of being separated and sold apart from the entity, and therefore is not of the same character as the intangible properties enumerated in this [statute].[10]

Right theory, wrong canon. There is some authority for the view that the *ejusdem generis* principle applies even if the general language precedes the specific items rather than succeeds them.[11] However, the idea that the general language can be omitted entirely — as in the Utah case above — is distinctly a minority view. The *noscitur a sociis* canon would have been the better choice as the rationale for the holding.[12]

Rationales for the Canon

The *ejusdem generis* canon is of ancient vintage, and its applications have been legion. Why did it come into existence, and why does it persist? There are at least three rationales for the precept.

First, as we have seen in prior installments of this column, some canons of statutory construction are linguistic in nature. They describe how speakers and writers use the English language, deriving from those usages clues as to the legislative intent behind the statute at issue. The canon has that quality especially when the statute conforms to "the general follows the specific" form. "The drafter working down the list would keep [the particulars] in mind when writing the general term at the end. It can be deduced that the ending term was probably intended to be limited to the terms in the list by the legislature."[13] The canon "capture[s] our intuitions about legislators' linguistic decisions, namely, that people use lists to link similar concepts and to illustrate coherent patterns."[14]

Second, the immediately previous installment of this column explored the "no surplusage" principle of interpretation, the idea that if possible, courts will treat no portion of a statute as superfluous, but will instead find some work for each part of the statutory language to do.[15] The *ejusdem generis* canon is supported by the "no surplusage" principle. If the concluding general language were given literal, broad effect, it would swallow the preceding particulars. In contrast, when the particulars are held to inform the meaning of the general, the particulars are doing work.[16]

Third, the *ejusdem generis* canon operates as a kind of "plain statement" rule. General concluding language, if read broadly, could expand the reach of a taxing statute or of an exemption. Either could be

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[7]*Independent Oil & Gas Ass'n of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 814 A.2d 180, 184 (2002).

[8]*See, e.g.*, William N. Eskridge Jr., Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Statutory Interpretation* 333 (2012)(describing the two canons as "sibling[s]").

[9]Utah Code Ann. section 59-2-102(17)(b).

[10]*T-Mobile USA, Inc. v. State Tax Comm'n*, 254 P.3d 752, 761 (2011). However, the court held that the 1998 statute was inconsistent with the state constitution, and thus that the taxpayer's goodwill was not taxable. *Id.* at 762.

[11]*See, e.g., Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3d Cir. 1995); Gregory R. Englert, "The Other Side of *Ejusdem Generis*," 11 *Scribes J. Leg. Writing* 51, 54 (2007). *But see* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 204-205 (2012) (disagreeing with the foregoing authorities and maintaining that the canon applies only when the general term follows the specific enumeration).

[12]*See* Scalia and Garner, *supra* note 11, at 205.

[13]Ronald Benton Brown and Sharon Jacobs Brown, *Statutory Interpretation: The Search for Legislative Intent* 75 (2002).

[14]William N. Eskridge Jr., Philip P. Frickey, and Elizabeth Garrett, *Legislation and Statutory Interpretation* 262 (2d ed. 2006); *see also* William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 217 (5th ed. 2009) ("This canon is probably based on a genuine attempt to understand how authors use and audiences understand language").

[15]Steve R. Johnson, "The 'No Surplusage' Canon in State and Local Tax Cases," *State Tax Notes*, Sept. 17, 2012, p. 793, *Doc 2012-18192*, or *2012 STT 180-1*.

[16]*See, e.g.*, Eskridge, Frickey, and Garrett, *supra* note 8, at 333.

problematic. Taxation must be founded on a clear statutory command,[17] and ambiguities in taxing statutes usually are interpreted in favor of the taxpayer.[18] Exemptions typically are construed narrowly.[19] Thus, the legislature should not lightly be presumed to be imposing tax or creating an exemption. The *ejusdem generis* canon sees to it that those results are tethered to the strong pole of clear statutory language, not to the weak reed of general language not of like character to proximate specific language.[20]

Counterarguments

A party might seek to challenge assertion of the canon on any of three grounds: (1) the conditions necessary for application of the canon are not present in the case, (2) the canon has been misapplied because the opponent has identified the wrong level of generality, or (3) other interpretational principles trump the canon.

Predicate Conditions

There are times when the canon applies and times when it doesn't. For example, there typically must be two or more specific terms preceding the general term, there must be some common core of connection between or among the specific items, and the specifics must not exhaust the class.[21]

Lack of those conditions can preclude application of the canon. An illustration is a case involving a Tennessee privilege tax imposed on liquid carbonic acid gas "used in the preparation . . . of soft drinks or other beverages, or for any other purpose." The state relied on the "other purpose" language in asserting the tax against a taxpayer that used the gas in air conditioning its theater. The taxpayer sought to limit the "other purpose" language via the *ejusdem generis* principle. The Tennessee Supreme Court rejected the taxpayer's effort because of the third predicate above. "Soft drinks or other beverages" exhaust the class of potables; there is nothing else uncovered in that class. Thus, "or for any other purpose" cannot do work within unoccupied space within the class, so it must do the work of expanding the reach of the statute beyond that class. The canon did not apply; the tax did.[22]

> ***In some cases courts have failed to recognize the predicates and so have improperly applied the canon.***

In some cases, however, courts have failed to recognize the predicates and so have improperly applied the canon. In an old New York property tax case, the taxpayers contended that tax was improperly assessed on property they did not own or possess. The county did not contest that allegation. Nevertheless, New York's highest court agreed with the county that the county lacked the authority "to correct any manifest clerical, or other errors in any assessments." The court, invoking the *ejusdem generis* canon, held: "The words, 'or other,' following 'clerical,' do not enlarge the class of errors of which the [county has] jurisdiction under the statute, so as to include errors of substance."[23] That rationale was dubious under the first of the predicates above. Only one specific item ("clerical") appeared before the general "other errors." A pattern may be gleaned from a list of specific items; it cannot reliably be gleaned from only one specific item.

Level of Generality

What is the common thread in the enumerated items — that is, the limitation — that can be read in the general language? There may be several common threads, and the outcome of the case may therefore hinge on which thread — the most general connection, the most specific, or one in between — the court chooses to identify.

Imagine, for example, a statute that imposes sales tax on "limes, grapefruits, oranges, and other items." Some calls would be easy. The tax clearly would not apply to bicycles; the tax clearly would apply to tangerines. It would be harder to say whether it would apply to beef, corn, or tomatoes. It all depends on the level of generality selected. If the common thread is food, all three of the items would be taxable. If the common thread is botanical (but not zoological), beef would be out but corn and tomatoes would be in. If the common thread is fruit,

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[17]*E.g.*, *Appeal of H.K. Power Co.*, 219 A.2d 653, 654 (Pa. 1966).

[18]*See* Steve R. Johnson, "Pro-Taxpayer Interpretation of State-Local Tax Laws," *State Tax Notes*, Feb. 9, 2009, p. 441, *Doc 2009-1826*, or *2009 STT 25-2*.

[19]*See* Steve R. Johnson, "Interpreting State Tax Exemptions, Deductions, and Credits," *State Tax Notes*, Feb. 23, 2009, p. 607, *Doc 2009-2323*, or *2009 STT 34-7*.

[20]*See, e.g.*, Eskridge, Frickey, and Garrett, *supra* note 14, at 262 (the canon "presume[s] that broad regulatory duties or deregulatory exemptions should not be inferred without a relatively clear indication from the legislature").

[21]*E.g.*, Scalia and Garner, *supra* note 11, at 206-210.

[22]*Knoxtenn Theatres, Inc. v. McCanless*, 151 S.W.2d 164, 165-166 (Tenn. 1941) ("the general words . . . , by necessity, show an intent to go beyond the whole field of soft drinks and beverages. The final general words have a sweeping, all-inclusive effect, otherwise these final general words have no purpose whatever").

[23]*Hermance v. Board of Supervisors of Ulster Cty.*, 71 N.Y. 481, 487 (1877), *limited by In re New York Catholic Protectory*, 77 N.Y. 342 (1879).

beef and corn would be out. Tomatoes might or might not be in — scientists classify tomatoes as fruit but most people consider them to be vegetables. If the common thread is citrus fruit, all three would be out.[24]

Thus, even when the conditions necessary for its application exist, the direction in which the canon points may be ambiguous, depending on "a judgment — often a debatable one — about what it is that makes the items in the series 'similar.'"[25] Thus, the opponent of the canon should seek to persuade the court that the proponent has identified the wrong level of generality in interpreting the specifically enumerated items.

Competing Principles

Even if its predicates are satisfied and the right level of generality has been identified, the canon does not necessarily determine the outcome. Like other canons, *ejusdem generis* is an interpretational aid, not a rule of law.[26] It "is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained."[27]

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Thus, the opponent of the canon should enlist contrary principles, preferably ones of higher status. For instance, a recent Arizona case tested whether customer-paid late charges were included in a telecommunications provider's transaction privilege tax base. The taxpayer advanced arguments based on *ejusdem generis* and other constructional canons. The court held against the taxpayer, however. It found the statutory language to be clear on its face, thus not in need of construction.[28]

Although not dispositive, the canon can, as shown by decisions above, be significant to the outcome of cases. A leading recent treatise assesses the canon's significance thusly: "It does not always predominate, but neither is it a mere tie-breaker."[29] ☆

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[24]I have adapted this example from Brown and Brown, *supra* note 13, at 74-77.

[25]Eskridge, Frickey, and Garrett, *supra* note 8, at 334.

[26]*E.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 138 (2001) (Souter, J. dissenting) ("Like many interpretive canons . . . *ejusdem generis* is a fallback, and if there are good reasons not to apply it, it is put aside"); *United States v. Turkette*, 452 U.S. 576, 581 (1981); *United States v. Alpers*, 338 U.S. 680, 682-683 (1950).

[27]*Texas v. United States*, 292 U.S. 522, 534 (1934).

[28]*Sprint Spectrum LP v. Department of Revenue*, 2011 WL 6057995, at *3 (Ariz. App. Dec. 6, 2011); *see also Paging Network of Arizona, Inc. v. Department of Revenue*, 970 P.2d 450, 452 (Ariz. App. 1998) ("We will not venture outside the language of an unambiguous statute to explore whether it might be construed to provide something different from the meaning that clearly appears on its face"); *Knoxtenn Theatres*, *supra* note 22, at 166.

[29]Scalia and Garner, *supra* note 11, at 213.