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Tilted Versus Reasonable Interpretation of Tax Law

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by Steve R. Johnson

In part, Interpretation Matters is about the craft of advocacy, how statutory interpretation arguments can be effectively made — and effectively countered — in state and local tax cases. For example, when one's opponent in such a case invokes one or another of the canons of construction, how is that canon to be blunted?

One strategy we often have explored is fighting fire with fire — that is, identifying and asserting another recognized canon that leads to an opposite conclusion. One of the most famous articles on statutory interpretation arrayed dozens of pairs of canons that seemingly contradict each other.[1] Thus, we have noted the possibility of exploiting the following pairs of dueling canons:

- "plain meaning" versus legislative intent;[2]
- "construe exemptions and deductions narrowly" versus "remedial statutes should be liberally construed";[3]
- pro-taxpayer versus pro-government construction of ambiguous revenue laws;[4]
- statutory purpose versus "specific statutes control over general statutes";[5] and
- "clear meaning" versus the reenactment and inaction canons.[6]

What is the advocate to do, however, if he or she is opposed by a canon and the circumstances of the case do not allow a countering canon to be asserted? This installment of the column addresses that situation. The strategy it describes involves two competing approaches to statutory interpretation: so-called reasonable interpretation, in which the court operates on a level "playing field" without constructional precepts favoring any particular outcome, versus "tilted interpretation," in which the playing field is unbalanced by a values-laden canon. When an advocate can enlist no canon in support of his or her position, the natural strategy would be to attempt to persuade the court to engage in reasonable interpretation by dispensing with all canons (all of which, it just so happens, line up on the other side).

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The first part describes tilted interpretation — that is, interpretation influenced by one or more

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[1]Karl N. 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 (1950); *see also* Karl N. Llewellyn, *The Common Law Tradition* 521-535 (1960). However, more recent scholarship has called some of Llewellyn's data and conclusions into question. *See, e.g.*, Richard A. Posner, "Statutory Interpretation — In the Classroom and in the Courtroom," 50 *U. Chi. L. Rev.* 800, 806 (1983); 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); 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).

[2]Steve R. Johnson, "Use and Abuse of 'Plain Meaning,'" *State Tax Notes*, Sept. 22, 2008, p. 831, *Doc 2008-19121*, or *2008 STT 185-3*.

[3]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*.

[4]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*.

[5]Steve R. Johnson, "When General Statutes and Specific Statutes Conflict," *State Tax Notes*, July 12, 2010, p. 113, *Doc 2010-11554*, or *2010 STT 132-3*.

[6]Steve R. Johnson, "The Reenactment and Inaction Doctrines in State Tax Litigation," *State Tax Notes*, Dec. 8, 2008, p. 661, *Doc 2008-24362*, or *2008 STT 237-3*.

substantive canons. The second part discusses reasonable interpretation. The third part gives examples from federal and state tax cases of the clash between these two styles and of how those clashes were resolved.

Tilted Interpretation

Canons of statutory interpretation are not all of the same type. Some canons are designed to enable a court to better fathom the intention of the legislature. Other canons predispose courts toward particular outcomes, regardless of whether they steer the result closer to or farther away from what the legislature sought to achieve by enacting the statute at issue. It is canons of that second variety that can entail tilted interpretation.

A leading commentator on legislation and statutory interpretation has advanced a tripartite taxonomy of constructional canons.[7] One category consists of textual canons. These are precepts of grammar, syntax, and logical inference based on how users of English express meaning. If they are soundly based, textual canons should lead to judicial decisions more closely aligned with legislative intent. The consistent meaning canon — the idea that the same word appearing in different parts of a statute means the same thing in both places (unless there is a clear contrary indication)[8] — is an example of a textual canon.

The second category consists of extrinsic source or referential canons. They look not to clues within the text of the given statute, but rather to clues outside the statute. Nonetheless, they may lead the court to a firmer grasp of the legislature's purpose. For instance, many extrinsic source canons involve the degree of deference a court will accord to the way the relevant agency — in our context, the state or local revenue authority — interprets the statute.[9] One justification for deference is that the agency often was involved in the process leading to enactment of the statute, and the agency thus has special insight as to what the legislature was attempting to achieve.[10]

Canons in the third cluster are substantive. They involve policy rules and presumptions rooted in broader value judgments. An example is the doctrine — widespread in state and local cases — that tax statutes are construed strictly against the government.[11] This principle is not an aid in determining legislative intent. Indeed, it likely has led to tax not being imposed in situations in which the legislature would have preferred tax to be imposed. Instead, the rule reflects substantive values about the relationship between citizens and their government.[12]

It is canons of this third type, the substantive canons, that can entail tilted interpretation. Substantive canons do not mark the path of a neutral search for the meaning the legislature sought to infuse into the statute. Instead, those canons incline the path in one or another direction.

Reasonable Interpretation

Judges sometimes reject use of substantive canons, either generally or in particular situations. U.S. Supreme Court Justice Antonin Scalia has urged caution regarding:

> the use of certain presumptions and rules of construction that load the dice for or against a particular result. . . . To the honest textualist, all of these preferential rules and presumptions are a lot of trouble. It is hard enough to provide a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing or another. But it is virtually impossible . . . when there is added, on one or the other side of the balance, a thumb of indeterminate weight . . . [Whether these dice-loading rules are bad or good], there is also the question of where the courts get the authority to impose them.[13]

The alternative to tilted interpretation is often called reasonable interpretation, in the sense that the job of the court is to seek the reason behind the statute and thereby to gauge the statute's meaning. A leading treatise on statutory interpretation suggests that tax statutes should:

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[7]William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 276, 323-333 (1994).

[8]*See* Steve R. Johnson, "Supertext and Consistent Meaning," *State Tax Notes*, May 25, 2009, p. 675, *Doc 2009-9545*, or *2009 STT 99-4*.

[9]The states vary widely in the degree of deference their courts accord to interpretations by revenue agencies. *See, e.g., J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 820 P.2d 1206, 1212-1213 (1991) (surveying states' case law). Future installments of "Interpretation Matters" will address this topic. Divergence as to deference to state revenue agencies mirrors divergence as to deference to state agencies generally. *See, e.g.*, William R. Andersen, "*Chevron* in the States: An Assessment and a Proposal," 58 *Admin. L. Rev.* 1017 (2006); Ann Graham, "*Chevron* Lite: How Much Deference Should Courts Give to State Agency Interpretation?" 68 *La. L. Rev.* 1105 (2008); Michael Pappas, "No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the *Chevron* Doctrine," 39 *McGeorge L. Rev.* 977 (2008); "Project: State Judicial Review of Administrative Action," 43 *Admin. L. Rev.* 571 (1991).

[10]*See e.g., National Transp., Inc. v. Howlett*, 345 N.E.2d 767, 770-771 (Ill. App. 1976).

[11]*See e.g., State Tax Comm'n v. Edmondson*, 196 So. 2d 873, 876 (1967) (calling this a "well-established rule"); *Atlantic Gulf Communities Corp. v. City of Port St. Lucie*, 764 So. 2d 14, 19 (Fla. App. 1999).

[12]*See* Johnson, *supra* note 4, at 441-442 (setting out the rationales given in case law for the rule).

[13]Antonin Scalia, *A Matter of Interpretation* 27-29 (1997).

be reasonably construed so that their underlying purpose is not destroyed. Where [as a result of a substantive canon] an interpretation places undue importance on words subordinate to the plainly apparent objective of a statute . . . the court should not accept that interpretation.[14]

Examples of the Clash

When the only applicable substantive canons lie all on the same side of the case, the advocate on the other side may attempt to defuse them by urging the court to eschew those canons and pursue reasonable interpretation instead. Here are some instances of the clash:

Example 1: One canon often invoked by federal, state, and local revenue authorities is that exemptions from tax are strictly construed and that doubts as to their applicability are resolved in favor of taxation.[15] However, application of that canon sometimes has been moderated on "reasonable interpretation" grounds. As one recent Kansas decision noted: "Lest [a prior case] be considered a strict ruling requiring that we deny an exemption any time there is an arguable ambiguity in the statute, . . . our Supreme Court has cautioned in recent years that the strict construction of an exemption statute should not lead to an unreasonable interpretation."[16]

Example 2: Many federal, state, and local tax decisions have stated that tax penalties should be construed narrowly.[17] However, other courts have rejected that canon as being inconsistent with reasonable interpretation.[18]

Example 3: We have noted the canon that tax statutes are construed strictly in favor of taxpayers. That canon has been largely discarded at the federal level,[19] in part because of a preference for reasonable interpretation. As the U.S. Supreme Court remarked in one case:

> We are not impressed by the argument that . . . all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.[20]

However, the canon retains greater vitality at the state and local levels. The interplay of this canon with reasonable interpretation is illustrated by a case pitting a giant oil corporation against Wyoming's Department of Revenue.[21] The case tested whether the corporation was liable for state severance taxes on the extraction of natural gas. The state supreme court held for the corporation, in part because of the pro-taxpayer canon of construction.[22] The dissent discounted the importance of that canon, finding it incompatible with reasonable interpretation,[23] but was unable to persuade the majority.

In short, the lessons of the authorities reviewed in this installment are the same for both taxpayers and revenue authorities. If one is opposed by a substantive canon of statutory interpretation and can plausibly assert a counter canon, one should do so. If no such counter canon is available, a potentially viable strategy may be to argue that the court should dispense with all substantive canons and instead focus without policy distraction on fairly and reasonably ascertaining the intent of the legislature in enacting the statute at issue. ☆

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[14]3A Norman J. Singer, *Statutes and Statutory Construction* section 66:2 (6th ed. 2003); *see also* David L. Shapiro, "Continuity and Change in Statutory Interpretation," 67 *NYU L. Rev.* 921 (1992) ("The canons of statutory interpretation are often criticized as result-oriented and obstructive in the search for legislative purpose.").

[15]*See, e.g., Commissioner v. Schleier*, 515 U.S. 323, 328 (1995); *Zebra Technologies Corp. v. Topinka*, 799 N.E.2d 725, 733 (Ill. App. 2003); *Shetakis v. Department of Tax'n*, 839 P.2d 1315, 1319 (Nev. 1992).

[16]*In re Application for Tax Exemption of Kouri Place, L.L.C.*, 2010 WL 3447781, at *4 (Kan. App. Sept. 3, 2010) (citing *In re Tax Exemption Application of Mental Health Ass'n of the Heartland*, 221 P.3d 580 (Kan. 2009); *In re Tax Application of Lietz Constr. Co.*, 47 P.3d 1275 (Kan. 2002)).

[17]*See, e.g., Commissioner v. Acker*, 361 U.S. 87, 91 (1959). *See generally* Steve R. Johnson, "The Canon that Tax Penalties Should Be Strictly Construed," 3 *Nev. L.J.* 495 (2003).

[18]*See, e.g., United States v. Stowell*, 133 U.S. 1, 12 (1890); *Hubbard v. Brainard*, 35 Conn. 563, 1869 WL 149, at *4 (Conn. Super. Ct. 1869), *rev'd on other grounds sub nom. Collector v. Hubbard*, 79 U.S. 1 (1870).

[19]*See* Steve R. Johnson, "Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?" *Nev. Lawyer*, Apr. 2002, p. 15.

[20]*White v. Stone*, 305 U.S. 281, 292 (1938).

[21]*Exxon Mobil Corp. v. State Dep't of Revenue*, 219 P.3d 128 (Wyo. 2009). This case is one of nearly a score of cases between these parties. As the court noted in an earlier case of the line, "[i]n addition to being a prolific source of various valuable gases, [Exxon Mobile's Wyoming] wells . . . have also been a prolific source of tax litigation." *Wyoming Dep't of Revenue v. Exxon Mobile Corp.*, 162 P.3d 515, 519 (Wyo. 2007).

[22]219 P.3d at 142.

[23]*Id.* at 150 (Hill, J., dissenting) (citing Singer, *supra* note 14).