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The Reenactment and Inaction Doctrines in State Tax Litigation

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This installment of Interpretation Matters discusses two related canons of statutory interpretation and illustrates their use in state and local tax controversies. Assume that a state revenue agency or court construes a tax statute and that the construction is later challenged in another case. Between the two cases, the state legislature reenacts the provision without changing it or the legislature takes no action to amend the provision to overturn the construction in the first case. Some courts treat the reenactment without change, or even the inaction, as evidence that the legislature agreed with the construction in the first case, so that the construction should be followed in the second case as well.

Those canons are relatively weak, but they have had traction in some cases. Accordingly, it behooves state-local tax practitioners to be able to use the reenactment and inaction canons when they argue for their client's cause and to be able to defend against them when they are asserted by an opponent.

Part I addresses the reenactment and inaction doctrines in general terms. Part II considers in detail two state tax cases in which those doctrines were examined. Part III offers practical suggestions in advancing and opposing the reenactment and inaction canons in state and local tax controversies.

I. The Reenactment and Inaction Doctrines Generally

The reenactment doctrine has been around for generations and has been invoked by both federal and state judges.[1] Originally applied to judicial constructions of statutes, the doctrine was expanded to apply also to agency constructions. By 1939 the U.S. Supreme Court could refer to "the oft-repeated statement that administrative construction receives legislative approval by reenactment of a statutory provision, without material change."[2] There are two forms of the doctrine: One involves actual legislative knowledge and approval of the interpretation, and the other involves presumptive legislative knowledge and approval. The canon is at its strongest when there is reliable evidence that the legislature was actually aware of the construction and agreed with it. Indeed, many courts have refused to apply the doctrine when that evidence is absent.[3] Nonetheless, some decisions do not require evidence of actual knowledge and approval. In those decisions, the legislature "is *presumed* to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it [reenacts] a statute without change."[4]

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[1]*See, e.g., Massachusetts Mut. Life Ins. Co. v. United States*, 288 U.S. 269, 273 (1933); *People v. Hawkins*, 668 N.W.2d 602, 519 (Mich. 2003) (Cavanagh, J., dissenting).

[2]*Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 (1939). For discussion of this case, see Ellsworth C. Alvord, "Treasury Regulations and the Wilshire Oil Case," 40 *Colum. L. Rev.* 252 (1940).

[3]*See, e.g., Devillers v. Auto Club Ins. Ass'n*, 702 N.W.2d 539, 592 n.66 (Mich. 2005) (choosing not to apply the doctrine absent "a clear indication" that the Legislature intended to adopt the prior construction). *Devillers* is also interesting for the spirited (indeed testy and personal) clash between the majority and dissenting opinions regarding the extent judges may legitimately "interpret" statutes to promote the court's sense of equity.

[4]*Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (emphasis added).

If inferring legislative approval from reenactment can be problematic, inferring that approval from a legislature's failure to act is even more so. As the Alaska Supreme Court observed in a nontax case, "ascertaining the legislature's true motive [for enacting a measure] is a task which more often than not would be impossible. These considerations apply with even more force when the court is asked to evaluate why the legislature failed to take action. Such a question is fundamentally unanswerable."[5] Thus, "it is at best treacherous to find in [legislative] silence alone the adoption of a controlling rule of law . . . The silence of [the legislature] and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the [prior construction]."[6]

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Similarly, a Texas decision noted that the courts of that state had "long recognized" the reenactment and inaction canons but that more recent decisions had undercut them.[7] The opinion then ranked those canons.

> Certainly, when a court *reenacts* a law using the same terms that have been judicially construed in a particular manner, one may reasonably infer that the legislature approved of the judicial interpretation. There is considerably less force (though still some) to the argument that if a legislature does not agree with the judicial interpretation of the words or meaning of a statute, the legislature would surely have immediately changed the statute.[8]

There is an additional problem with the inaction canon. Even if inaction accurately registers the approval of the interpretation by a majority of the legislature, the preference of legislators is democratically irrelevant until that preference is embodied in a statute enacted through constitutionally prescribed procedures.[9] Legislators "may intend what they will; but it is only the laws that they enact which bind us."[10] Reenactment at least has a legislative moment embodying the legislative will. Inaction does not.[11]

Despite those criticisms, there are decisions that invoke the presumptive form of the reenactment canon and the inaction canon. What is to be made of those decisions? One possibility is that the court finds unusually compelling circumstances in the particular case that complement or confirm the inference of approval. For example, in a landmark federal tax case, the Supreme Court acknowledged that "ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation" and that "nonaction by Congress is not often a useful guide."[12] Nonetheless, it applied the inaction canon because it discerned a compelling pattern of collateral actions suggesting that Congress knew of and agreed with the IRS position challenged by the taxpayer.[13]

Another possibility is that some decisions deploy those canons rhetorically rather than substantively. That is, the court really was motivated by other considerations in deciding the case as it did and, rather than reveal or rest exclusively on its true reasons, the court paraded out a fictive inference of

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[5]*Department of Natural Resources v. Tongass Conservation Soc'y*, 931 P.2d 1016, 1019-20 (Alas. 1997) (citations and quotation marks omitted); *see also Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("Discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite").

[6]*Girouard v. United States*, 328 U.S. 61, 69-70 (1946); *see also Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (tax case).

[7]*State v. Colyandro*, 233 S.W.3d 870, 877-888 (Tex. Crim. App. 2007).

[8]*Id.* at 878 (emphasis in original).

[9]In general, state constitutions prescribe similar requirements to the presentment clause of the federal Constitution. U.S. Const. Art. I, section 7, cl. 2.

[10]Justice Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation: Federal Courts and the Law* 17 (1997); *see also Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) ("The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself").

[11]*See* William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 643 (4th ed. 2005).

[12]*Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). To similar effect, see *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000); *Flood v. Kuhn*, 407 U.S. 258, 283-284 (1972) (in which Justice Harry A. Blackmun's opinion for the Court gave birth to the oxymoron of a legislature's "positive inaction"). Justice Blackmun himself later seemed to want to limit *Flood* as a precedent. *See Ankenbrandt v. Richards*, 504 U.S. 689, 712-713 (1992) (Blackmun, J., concurring).

[13]*Bob Jones*, *supra*, 461 U.S. at 600-602.

legislative intent, so that the court would not be accused of making law rather than merely interpreting it.[14]

II. State Tax Case Examples

The reenactment and inaction doctrines have been considered in many state and local tax cases. The courts have displayed varying levels of sophistication in those cases. By way of illustration, this part discusses two cases: the Idaho Supreme Court's 1991 *Simplot* decision[15] and the North Dakota Supreme Court's 2002 *American West* decision.[16]

Simplot was a state income tax case. The question was whether the worldwide unitary income of a foreign subsidiary — which did not constitute taxable income under the Internal Revenue Code — could be combined with a domestic corporation's unitary business income in computing the apportionable extent of Idaho taxable income. The court answered the question in the negative and held for the taxpayer.

As part of its analysis, the *Simplot* court considered whether the strength of the state tax commission's position was buttressed by the reenactment canon. The court noted, "Idaho's tax statutes are periodically reenacted by the legislature, thus presenting the classic situation in which the presumption of legislative acquiescence is present."[17] The court, however, rejected the presumption. Of particular interest here is that the court appeared to equate reenactment and inaction and to reject the former by rejecting the latter. The court remarked that "legislative inaction is a weak reed upon which to lean in determining legislative intent. Something more than mere silence is required [to find] implied legislation . . . We require something more to determine *actual* legislative intent than merely reenacting the statute after it has received an agency construction."[18] Interestingly, the court took that view despite its acknowledgment of the presumption "that the legislature is charged with knowledge of how its statutes are interpreted."[19]

Simplot has been an influential decision. *American West* is among the cases to cite *Simplot*. *American West* was a sales tax case. An advertising and marketing firm challenged the North Dakota state tax commissioner's determination that the firm's coupon books were tangible personal property, the sales of which were taxable events. The North Dakota Supreme Court held for the taxpayer.

The legislature had amended the statute four times after the tax commissioner promulgated a regulation providing that sale of such coupon books was taxable.[20] Thus, the *American West* dissent urged decision for the tax commissioner on the ground of the reenactment canon:

> The legislature's reenactment of the statute after the adoption of [the Commissioner's regulation] must be regarded as an approval of the interpretation . . . The legislature, through the Administrative Rules Committee, was aware of and did not object to the Tax Commissioner's adoption of [the regulation]. The legislature's failure to amend [the statute] or to object to [the regulation] demonstrates its acquiescence in the Tax Commissioner's interpretation.[21]

The majority, however, countered that neither the legislative history nor the record indicated that the legislature had considered the regulation, thus the reenactment doctrine did not apply.[22] The majority also addressed the inaction doctrine, saying that "even inaction on the part of the Legislature subsequent to an agency interpretation of a statute entitles the agency's interpretation to additional weight."[23] Nonetheless, the majority held that the reenactment and inaction doctrines "are merely aids in statutory interpretation and can be overridden by more compelling considerations,"[24] which the majority found to be present for several reasons, including the fact that, in the majority's view, the regulation was inconsistent with the statute.[25]

III. Practical Considerations

Myriad strategic wrinkles can appear in advancing or opposing reenactment and inaction arguments in actual cases. Here, I list four of them. First, advocates sometimes find themselves with cases that are strong on equity or policy grounds but weak on technical merit. The judge may want to hold for the party with such a case but needs a basis in law

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[14]As a leading scholar of statutory interpretation remarked, those canons "give courts a way of claiming a legislative pedigree for a prior interpretation that might not stand up on its own." Popkin, *supra* note 11, at 649.

[15]*J.R. Simplot Co., Inc. v. Idaho State Tax Comm.*, 820 P.2d 1206 (Id. 1991).

[16]*State v. American West Community Promotions, Inc.*, 645 N.W.2d 196 (N.D. 2002). (For the decision, see *Doc 2002-13559* or *2002 STT 111-37*.)

[17]820 P.2d at 1221.

[18]*Id.* (quotation marks and citations omitted, emphasis in original). Also, the court noted a point of more limited significance. One of the reenactments included a declaration of intent disclaiming any expression as to the validity of prior judicial and administrative interpretations.

[19]*Id.* at 1216.

[20]645 N.W.2d at 202.

[21]*Id.* at 221 (Sandstrom, J., dissenting).

[22]*Id.* at 202-203 and note 4 (*citing Simplot* and other authorities). As is evident from these dueling opinions, judges can disagree about whether there is sufficient credible evidence of actual legislative knowledge.

[23]*Id.* at 203.

[24]*Id.*

[25]*Id.* at 204-213.

for doing so. If they are plausibly available on the facts, reenactment or inaction arguments might supply that needed basis. As noted in Part I, those arguments can make it seem like the decision is rooted in legislative will, not judicial lawmaking, and so can provide the cover that emboldens a judge to promote fairness or good policy.

Second, reenactment arguments typically are stronger than inaction arguments, but, as cases like *Simplot* suggest, courts sometimes conflate the two. Thus, if the advocate has a solid reenactment argument, she might do well on brief and in oral argument to stress that her argument is reenactment, not inaction, so that the stronger is not confused with and diluted to the weaker.

Third, in some cases, the taxpayer does not have to defeat the revenue authority's regulation or interpretation for all time but only to defeat its retroactive application. If the regulation or interpretation entails a change of position, the reenactment and inaction doctrines can be natural ways to attack that retroactivity.

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The classic case in that regard is *R.J. Reynolds*, an early federal income tax case.[26] In that case, the taxpayer's position was correct under an older version of the applicable regulation. That older position had been uniformly applied for many years. However, Treasury changed the regulation in a way adverse to the taxpayer and attempted to apply the change retroactively. The Supreme Court rejected that attempt, holding that "by repeated reenactments of the statute, Congress has given its sanction to the [older position]."[27] Although rejecting the retroactivity, the Court left open the question whether Treasury could change the regulation on a prospective basis.[28]

Fourth, it will be the rare case in which reenactment or inaction is the only constructional device that can be brought to bear. Usually, both parties will be able to deploy one or more interpretational arguments. In those cases, courts must decide which indicators will control and which will yield. One fairly well-established ordering principle is that the statutory language, if clear, will control over both the reenactment and inaction canons.[29]

Other aspects of the constructional hierarchy are less clear. If the earlier interpretation was by a court, the principles of *stare decisis* would have to be considered.[30] If the earlier interpretation was by an agency, the whole train of considerations bearing on the extent, if any, of deference that courts should accord to agency interpretations would be in motion. For example, the *American West* court discussed reenactment as part of its deference analysis, but that analysis also included the following factors:

- whether the issue was complex and technical;
- whether the agency's interpretation was substantially contemporaneous with the statute's enactment;
- whether the agency adhered to the interpretation continuously and consistently; and
- whether the interpretation was of long standing.[31]

In such multifactorial environments, advocates must be prepared to engage on many fronts rather than focusing on one to the exclusion of all others.

In short, the reenactment and inaction doctrines, although not the most powerful canons, appear frequently in litigated cases, including state and local tax cases. They are worth asserting when plausibly presented by the facts of the case. ☆

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[26] *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939).

[27] *Id.* at 116.

[28] *R.J. Reynolds* sparked commentary by some of the finest tax minds of their — or any other — generation, and their thoughts remain rewarding reading today. *See* Erwin N. Griswold, "A Summary of the Regulations Problem," 54 *Harv. L. Rev.* 398 (1941); Randolph Paul, "Use and Abuse of Tax Regulations in Statutory Construction," 49 *Yale L.J.* 660 (1940); Stanley S. Surrey, "The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes," 88 *U. Pa. L. Rev.* 556 (1940).

[29] *See, e.g.*, *People v. Hawkins*, 668 N.W.2d 602, 613 (Mich. 2003).

[30] As to the role of precedent generally, see *Neal v. United States*, 516 U.S. 284, 295 (1996); *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). There is a vast literature on *stare decisis*, of course. For a recent argument that *stare decisis* should apply to statutory construction techniques as well as to substantive rules, see Sydney Foster, "Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?" 96 *Geo. L.J.* 1863 (2008).

[31] 645 N.W.2d at 200-203. A future installment of this column will explore deference issues in state taxation.