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Conditional Deference to Tax Authorities

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by Steve R. Johnson

Recent installments of this column have explored an important point of intersection between administrative law and tax law: the degree of deference that courts accord to rules, regulations, and statutory interpretation positions of state and local revenue agencies.[1] This column continues that exploration. It examines what I call "conditional deference," that is, according deference to the agency only when particular, defined conditions are present.

The first part below sets the context by describing *Skidmore*[2] and *Mead*,[3] two leading federal conditional deference cases. The second part contrasts state conditional deference doctrines, with particular emphasis on the operation of those doctrines in tax cases. The third part asks what effect the U.S. Supreme Court's recent *Mayo* decision[4] may have on situational deference.

Federal Conditional Deference Cases

Since 1984, the polestar of deference doctrine at the federal level has been the *Chevron* decision.[5] But the U.S. Supreme Court considered deference to agencies in many prior cases, cases that are not always easy to reconcile. One of those was the 1944 *Skidmore* case.

In *Skidmore* the Court took a conditional approach to deference. It remarked that agency rulings, interpretations, and opinions do not authoritatively bind the courts, but they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." The weight to be accorded to an agency's judgment in a given case depends on a number of conditions. Specifically, that weight "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[6]

> ***Courts sustain agencies between 60 and 81.3 percent of the time when* Chevron *is applied, compared with between 55.1 and 73.5 percent of the time when* Skidmore *is applied.***

In the ensuing decades, many thought that *Skidmore* had faded into oblivion, especially after *Chevron*. In the 2001 *Mead* decision, however, the Supreme Court resurrected *Skidmore*. The *Mead* Court said that *Chevron* does not apply to all cases in which agency positions are challenged. *Chevron* applies only when the legislature delegated lawmaking power to an agency and the agency's action at issue was taken as an exercise of that delegated power.[7]

When *Chevron* does not apply, the *Mead* Court reasoned, "the fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have

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[1]Prior installments in this series were "Judicial Deference to State Tax Agencies — An Overview," *State Tax Notes*, Nov. 29, 2010, p. 633, *Doc 2010-24563*, or *2010 STT 228-2*; "*Chevron* Deference to State Tax Agencies," *State Tax Notes*, Jan. 24, 2011, p. 285, *Doc 2010-27202*, or *2011 STT 15-2*; and "Deference — Questions of Fact Versus Issues of Law," *State Tax Notes*, Mar. 21, 2011, p. 883, *Doc 2011-3129*, or *2011 STT 54-2*.

[2]*Skidmore v. Swift*, 323 U.S. 134 (1944).

[3]*United States v. Mead Corp.*, 533 U.S. 218 (2001).

[4]*Mayo Foundation for Medical Education & Research v. United States*, 131 S.Ct. 704 (2011).

[5]*Chevron, U.S.A., Inc. v. Natural Resources Defence Council, Inc.*, 467 U.S. 837 (1984).

[6]323 U.S. at 140.

[7]533 U.S. at 227 and 229-231.

- the position was developed through established rulemaking procedures.[20]

Those conditions are not universally accepted, of course. For example, the legislative acquiescence notion has frequently been rejected.[21] Similarly, many empirical studies have concluded that agency positions adopted by rulemaking are not upheld by the courts with notably greater frequency than agency positions promulgated or announced through other means, such as agency adjudication, briefs, and informal guidance documents.[22]

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Perhaps the most highly articulated conditional deference doctrine found in state and local tax cases was set out by the Idaho Supreme Court in the *Simplot* case.[23] *Simplot* established a four-prong test. If all four parts are satisfied, the agency's position is entitled to "considerable weight."[24] If any of the four are not met, a lesser degree of deference — down to none at all — is appropriate.[25]

The four *Simplot* prongs are:

- whether "the agency has been entrusted with the responsibility to administer the statute at issue";
- whether the agency's statutory construction is reasonable;
- whether the statutory language leaves room for the agency's interpretation; and
- "whether any of the rationales underlying the rule of deference are present."[26]

Conditional deference comes into play at the fourth prong. The *Simplot* court identified five "rationales underlying the rule of deference":

- the need for a practical interpretation of the underlying statute (implicating issues of administrability);
- acquiescence by the legislature to the agency's interpretation;
- the applicability of the agency's expertise;
- the desirability of interpretational respose; and
- the contemporaneity of the agency's interpretation with enactment of the statute.[27]

If all of the rationales are satisfied in a given case, great deference would be indicated. If none of them are satisfied, "their absence may present cogent reasons justifying the court in adopting a statutory construction which differs from that of the agency."[28] What about the cases that satisfy only some of the conditions (which presumably constitute the bulk of the decisions)? According to the *Simplot* court:

> When some of the rationales . . . exist but other rationales are absent, a balancing is necessary because all of the supporting rationales may not be weighted equally. Therefore, the absence of one rationale in the presence of others could, in an appropriate case, still present a cogent reason for departing from the agency's statutory construction. . . . If one or more of the rationales . . . are present and no cogent reason exists for denying the agency some deference, the court should afford considerable weight to the agency's statutory interpretation.[29]

Results under this standard have been mixed. On its facts, the *Simplot* court itself found none of the five rationales to be satisfied, and it denied deference.[30] Several later Idaho tax cases found the rationales to be satisfied and accorded deference.[31]

Possible Effects of *Mayo*

Many of the above state cases liberally cite the federal deference cases.[32] That being so, it is appropriate to ask whether *Mayo*, the Supreme Court's

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[20]*Id.* Another important situation or condition of deference involves what is often called "*Auer* deference," that is, deference to an agency's interpretation of its own (possibly ambiguous) regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Auer* deference will be explored in a future installment of this column.

[21]*See, e.g., ABC Rentals v. Comm'r*, 142 F.3d 1200, 1205 (10th Cir. 1998) ("reenactment without change in relevant statutory language and mere [legislative] inaction are at best unreliable indications of [legislative] intent to adopt an administrative construction of a statute"). *See generally* 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*.

[22]*See* Pierce, *supra* note 10, at 86-87 (reviewing the studies).

[23]*J.R. Simplot Co. v. State Tax Comm'r*, 820 P.2d 1206 (Idaho 1991).

[24]*Id.* at 1219.

[25]*Id.* at 1220; *see also Mason v. Donnelly Club*, 21 P.3d 903, 907 (Idaho 2001).

[26]820 P.2d at 1219.

[27]*Preston v. State Tax Comm'r*, 960 P.2d 185, 188 (Idaho 1998) (summarizing *Simplot*, 820 P.2d at 1215-1216).

[28]*Preston, supra*, 960 P.2d at 188 (punctuation omitted).

[29]*Simplot, supra*, 820 P.2d at 1219 (punctuation omitted).

[30]*Id.* at 1220-1223.

[31]*See, e.g., Canty v. State Tax Comm'r*, 59 P.3d 983 (Idaho 2002); *Preston, supra*. *See generally* Michael Pappas, "No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the *Chevron* Doctrine," 39 *McGeorge L. Rev.* 977, 999-1001 (2008) (discussing the current status of *Simplot*).

[32]*Simplot*, for example, drew heavily on *Chevron*. *See* 820 P.2d at 1218-1219.