3-30-2009

The Two Kinds of Legislative Intent

Steve R. Johnson
Florida State University College of Law

The Two Kinds of Legislative Intent

by Steve R. Johnson

What is a court trying to do when it interprets or applies a statute?[1] This installment of my column looks at two different answers to that question, doing so through the lens of cases involving state and local tax statutes. Both approaches sometimes use the language of "intent," so it becomes important for the state-local tax practitioner to understand, and to accommodate his or her arguments to the kind of intent that actually controls in the particular jurisdiction.

The first part describes the two approaches: subjective intent and objectified intent. The second part describes a middle position that some courts have embraced between the two pure poles of subjective and objectified intent. The third part offers suggestions as to how an attorney, accountant, or other tax representative can adapt his or her arguments in light of the way "intent" is used in the interpretational law of the given jurisdiction.

I. The Two Senses of 'Intent'

The two approaches share a common starting point. The predominant form of lawmaking in the United States now is statutes and regulations derived from statutes.[2] But the roots of our system lie in the common law, which was heavily influenced by conceptions of natural law. Not so taxation. Judges of essentially all interpretational stripes would agree that:

> there is no natural law of . . . tax liability. No brooding omnipresence nor invisible hand informs our consideration of such cases. The amount of . . . tax a taxpayer owes to this state is determinable solely by reference to the positive provisions of the . . . tax laws of this state and the regulations of the State Tax Commission promulgated within the scope of its authority.[3]

But there company parts. Judges diverge as to what the positive tax law is. Some judges advert to what they perceive to be the actual, reconstructed, or imagined intent of the legislature in enacting the tax statute. We call that the subjective intent approach. Other judges take as the touchstone of interpretation not what the legislature was trying to say but what the legislature actually did say, that is, the meaning of the statute in an objectified way. Confusingly, many judges of the second persuasion still use the term "intent" in their opinions. But those references should be understood as meaning an objectified, rather than subjective, intent.

A. The Subjective Intent Approach

Courts and judges of the subjective intent school see themselves as the "faithful agents" of the legislature[4] and see their role as discerning and giving effect to the legislature's will or intent in enacting the tax statute. That approach has been around for a long time. For example, Justice Thomas Cooley's text on taxation was influential in many early state and local taxation cases. Cooley enjoined that a court's "construction without bias or prejudice should seek the real intent of the law."[5] More modernly, some courts have declared: "It is a fundamental rule of statutory construction to which all other

---

[1]I say "interpret or apply" to recognize a line of cases. Some courts say that there is room for judicial interpretation only when a statute is ambiguous. *E.g.*, *State ex rel. Foster v. Evatt*, 56 N.E.2d 265, 282 (Ohio 1944). For those courts, a judge interprets an ambiguous statute but applies a clear statute. Throughout this column, I use the words "interpret" and "construe" broadly to include both contexts.

[2]*See, e.g.*, Guido Calabresi, *A Common Law for the Age of Statutes* (1982).

[3]*General Motors Corp. v. Mississippi State Tax Comm'n*, 520 So. 2d 498, 500 (Miss. 1987) (income tax case).

[4]*See, e.g.*, John F. Manning, "Absurdity Doctrine," 116 *Harv. L. Rev.* 2387, 2393-2394 (2003) ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents."); *see also* Cass R. Sunstein, "Interpreting Statutes in the Regulatory State," 103 *Harv. L. Rev.* 405, 415 (1989).

[5]1 Thomas Cooley, *Taxation* 464 (3d ed. 1909), *quoted by Hackney v. Elliott*, 137 N.W. 433, 447 (N.D. 1912).

rules are subordinate that the intent of the legislature governs when that intent can be ascertained."[6]

> ***In difficult cases the legislature probably did not have a specific preference or intent regarding the precise issue in controversy.***

Intent, however, should probably be understood expansively. In difficult cases — the ones most likely to reach litigation — the legislature probably did not have a specific preference or intent regarding the precise issue in controversy. Sometimes the foresight of the legislators did not extend to the particular issue. Other times, the point was anticipated but no majority coalesced around a single solution, so the legislature left the matter ambiguous, for resolution by the tax agency or the courts. In any event, in the most challenging controversies, there often will be no specific intent of the legislature.[7] In those cases, a subjective intent court will broaden its angle of inquiry to encompass the perceived general purposes behind the enactment, from which the court may infer or imaginatively reconstruct what the legislature would have intended had it reached a preference on the point at issue.

B. The Objective Intent Approach

Justice Antonin Scalia, the country's leading current exponent of textualism, has described this approach thusly:

> You will find it frequently said in judicial opinions of my court and others that the judge's objective in interpreting a statute is to give effect to "the intent of the legislature. . . . [Yet] despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of "objectified" intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.[8]

That approach found particularly forceful expression in some earlier state tax cases. For example:

> The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. The question is not so much, What did the legislature intend to enact? as What did it mean by what it did enact?
>
> . . . .
>
> What the legislative intention was, can be derived only from the words they have used, and we cannot speculate beyond the reasonable import of these words. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*.[9]

The objectified intent approach is far from a historical relic, however. It continues to be invoked in modern state and local tax cases. Thus, judges of that persuasion "are not nearly so concerned with what the tax lawmakers and regulators have intended as . . . with what they have said."[10]

> ***The words of the statute are relevant, of course, but it is dangerous to zero in on words in isolation. Arguments based only on a dictionary are rarely persuasive.***

From what materials is the legislature's objectified intent to be ascertained? The words of the statute are relevant, of course, but it is dangerous to zero in on words in isolation. Arguments based only on a dictionary are rarely persuasive.[11] Modern textualism emphasizes words in context, so other parts of the same act and even other statutes *in pari*

---

[6]*National Collegiate Athletic Ass'n v. Kansas Dep't of Revenue*, 781 P.2d 726, 729 (Kan. 1989).

[7]Justice Antonin Scalia has asserted that point at a level of quantification with which not all would agree. "[W]ith respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 32 (1997) (emphasis in original); *see also* Frank Easterbrook, "Legal Interpretation and the Power of the Judiciary," 7 *Harv. J.L. & Pub. Pol'y* 87 (1984); Max Radin, "Statutory Interpretation," 43 *Harv. L. Rev.* 863, 870-871 (1930).

[8]Scalia, *supra* note 7, at 16-17.

[9]*State ex rel. Seymour v. Gilfillan*, 1905 WL 824, at *7 (Ohio Com. Pl. 1905) (*quoting Brower v. Hunt*, 18 Ohio St. 311, 341 (1868), and *Slingluff v. Weaver*, 66 Ohio St. 621, 628 (1902)) (internal quotation marks omitted). To similar effect, see *Ratterman v. Ingalls*, 48 Ohio St. 468, 483 (1891); *Topliff v. Shields*, 1894 WL 1395, at *2 (Ohio Com. Pl. 1894).

[10]*General Motors Corp. v. Mississippi State Tax Comm'n*, 510 So. 2d 498, 500 (Miss. 1987); *see also State ex rel. Foster v. Evatt*, 56 N.E.2d 265, 282 (Ohio 1944).

[11]As Judge Learned Hand wrote, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945).

There is a large literature on the use of dictionaries in statutory interpretation. *E.g.*, Ellen P. Aprill, "The Law of the Word: Dictionary Shopping in the Supreme Court," 30 *Ariz. St. L.J.* 275 (1998); Samuel A. Thumma and Jeffrey L. Kirchmeier, "The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries," 47 *Buff. L. Rev.* 227 (1999).

materia must be considered.[12] Moreover, textualists will not cleave to their normal sources when doing so would lead to absurd results (although the line between absurd results and merely unwise results is not always easy to draw).[13]

II. In-Between Position

Intermediate positions are possible, of course, between purely subjective and purely objectified interpretations. Many courts start with the text — and end with text if it is deemed clear.[14] But if there is no plain meaning[15] revealing an objectified intent, those courts may "resort to general principles of statutory construction to determine the legislature's intent," presumably the legislature's actual, subjective intent.[16]

For example, the court in an Illinois tax malpractice case evinced objectified intent leanings but left open the possibility of resorting to other tools should no objectified meaning be apparent from the statutory text. The court stated:

> The primary objective of statutory construction is to ascertain and give effect to the intent of the legislature, and all other rules of statutory construction are subordinate to this cardinal principle. A reviewing court ascertains the intent of the legislature by examining the language of the statute, which is the most reliable indicator of the legislature's objectives in enacting a particular law. If the language of the statute is plain, clear and unambiguous, the intent of the legislature is to be ascertained therefrom and the statute will be given effect without resort to other aids for construction.[17]

III. Practice Strategies

The two kinds of legislative intent matter most when, as sometimes is the situation, one party in the case has good textual arguments and the other party has good extratextual arguments, such as favorable legislative history. In those cases, a first order of business is to research the jurisdiction's interpretational precedents to ascertain whether the subjective intent approach or the objectified intent approach prevails. In some jurisdictions, the precedents may be sparse or unsettled. There, the task will be to urge the tribunal to follow the favorable approach, in part by citing case law from other jurisdictions that follow the favorable approach.

Elsewhere, there will be a fairly settled interpretational position. Happy is the situation of the advocate who finds himself or herself on the "right" side — that is, who has good textual arguments in an objectified intent jurisdiction or good actual intent arguments in a subjective intent jurisdiction. A principal task of that advocate is to forcefully remind the tribunal in oral argument and on brief of the jurisdiction's established interpretational approach.

The situation of the advocate who finds himself or herself on the "wrong" side is obviously more challenging. Some possible lines of attack are suggested below.

What if the advocate has good textual arguments in a subjective intent jurisdiction? He or she should cite the cases holding that text is the best indicator of intent. So restyled, the arguments may still prevail, not as establishing some objectified intent, but as persuasive indicia of subjective intent.

What if, instead, the advocate has good actual intent arguments in an objectified intent jurisdiction? First, cases saying that intent is the touchstone might still be cited. Opposing counsel may fail to grasp the subjective/objectified distinction or may fail to clearly inform the tribunal of it, in which case intent may be taken in its ordinary, "actual intent" sense. Second, as shown above, a text-oriented court is supposed to consult both the particular statutory language and a variety of contextual clues and sources. The greater the number of those sources that are consulted, the greater the chance will be that a plausible argument can be made on at least one level. If the textual sources can be plausibly asserted to conflict, it might be possible to persuade the tribunal that, since no plain meaning exists, other considerations — that is, the advocate's strong indicators of actual intent — should be consulted.☆

Interpretation Matters is a column by Steve R. Johnson, the E.L. Wiegand Professor of Law and associate dean for faculty development and research, William S. Boyd School of Law, University of Nevada, Las Vegas. He can be contacted at steve.johnson@unlv.edu.

---

[12]*See e.g., Manufab, Inc. v. Mississippi State Tax Comm'n*, 808 So. 2d 947, 949 (Miss. 2002); *National Paving Co., Inc. v. Director, Div. of Tax'n*, 3 N.J. Tax 133, 139 (1981), *aff'd*, 4 N.J. Tax. 535 (N.J. Super. A.D. 1982); *Union & Planters Bank & Trust Co. v. Fort*, 95 S.W.2d 39, 40 (Tenn. 1936); *Petroleum Inc. v. State ex rel. State Bd. of Equalization*, 983 P.2d 1237, 1240 (Wyo. 1999).

[13]*See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528-529 (1989) (Scalia, J., concurring); *In re Appeal of Director of Property Valuation*, 161 P.3d 755, 761 (Kan. 2007). ("Our rules of construction . . . require us to . . . construe the statute to avoid unreasonable results.")

[14]*See e.g., Devillers v. Auto Club Ins. Ass'n*, 702 N.W.2d 539, 557 n.66 (Mich. 2005); *Redford Opportunity House v. Township of Redford*, 2004 WL 1103769, at *2 (Mich. App. 2004) (unpublished opinion); *Department of Tax'n v. Daimler-Chrysler Serv. North Am.*, 119 P.3d 135, 138 (Nev. 2005).

[15]For criticism of the "plain meaning" approach, see an earlier installment of this column: Steve R. Johnson, "The Use and Abuse of the Plain Meaning Doctrine," *State Tax Notes*, Sept. 22, 2008, p. 831, *Doc 2008-19121*, or *2008 STT 185-3*.

[16]*Petroleum Inc. v. State ex rel. Bd. of Equalization*, 983 P.2d 1237, 1240 (Wyo. 1999).

[17]*Inphoto Surveillance, Inc. v. Crowe, Chizek & Co., LLP*, 788 N.E.2d 216, 218 (Ill. App. 2003).