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PAUL J. HARTMAN
STATE AND LOCAL TAX FORUM

Agency Guidance and Judicial Deference

Joe Garrett, Managing Director, Deloitte Tax LLP
Mark F. Sommer, Partner, Frost Brown Todd LLP
Brian L. Oliner, General Counsel, Federation of Tax Administrators

Paul J. Hartman State & Local Tax Forum
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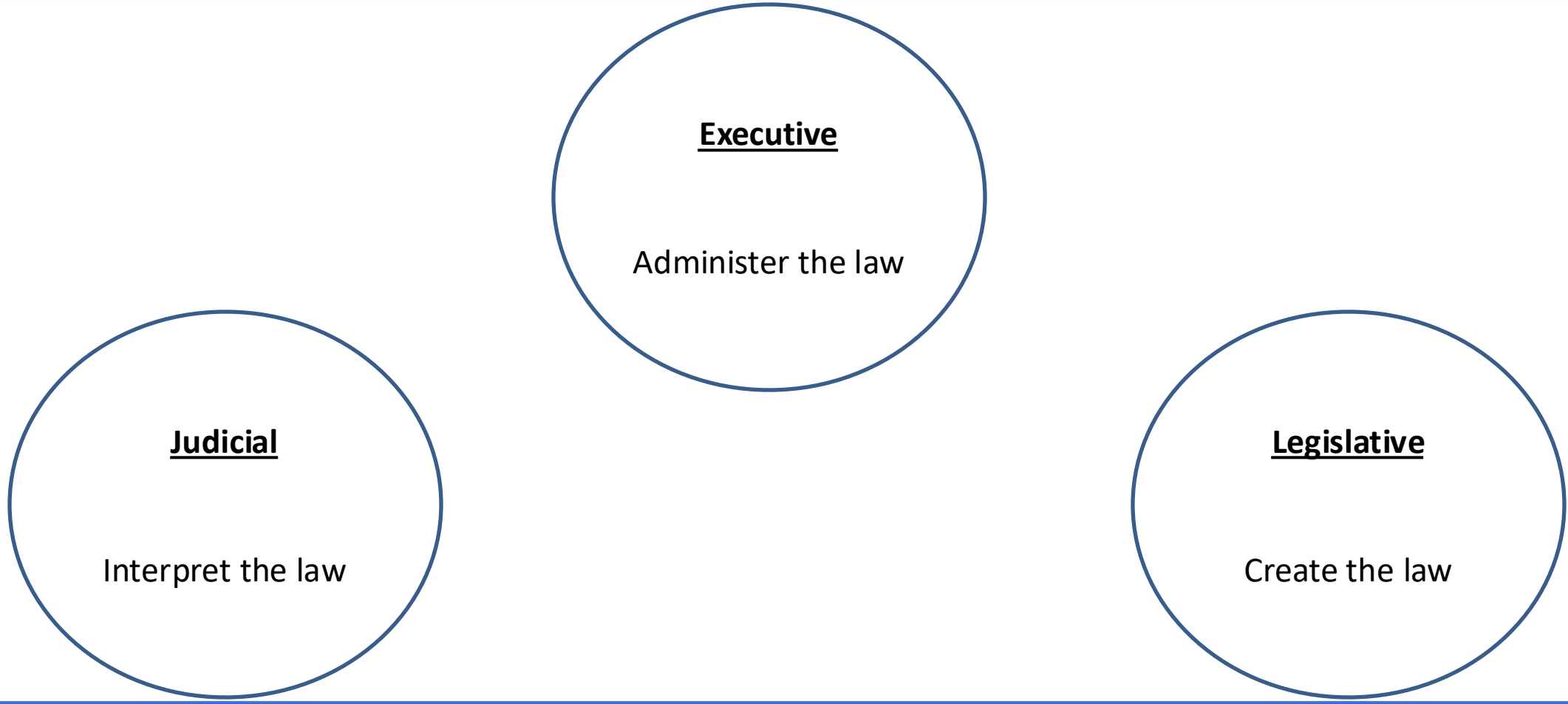
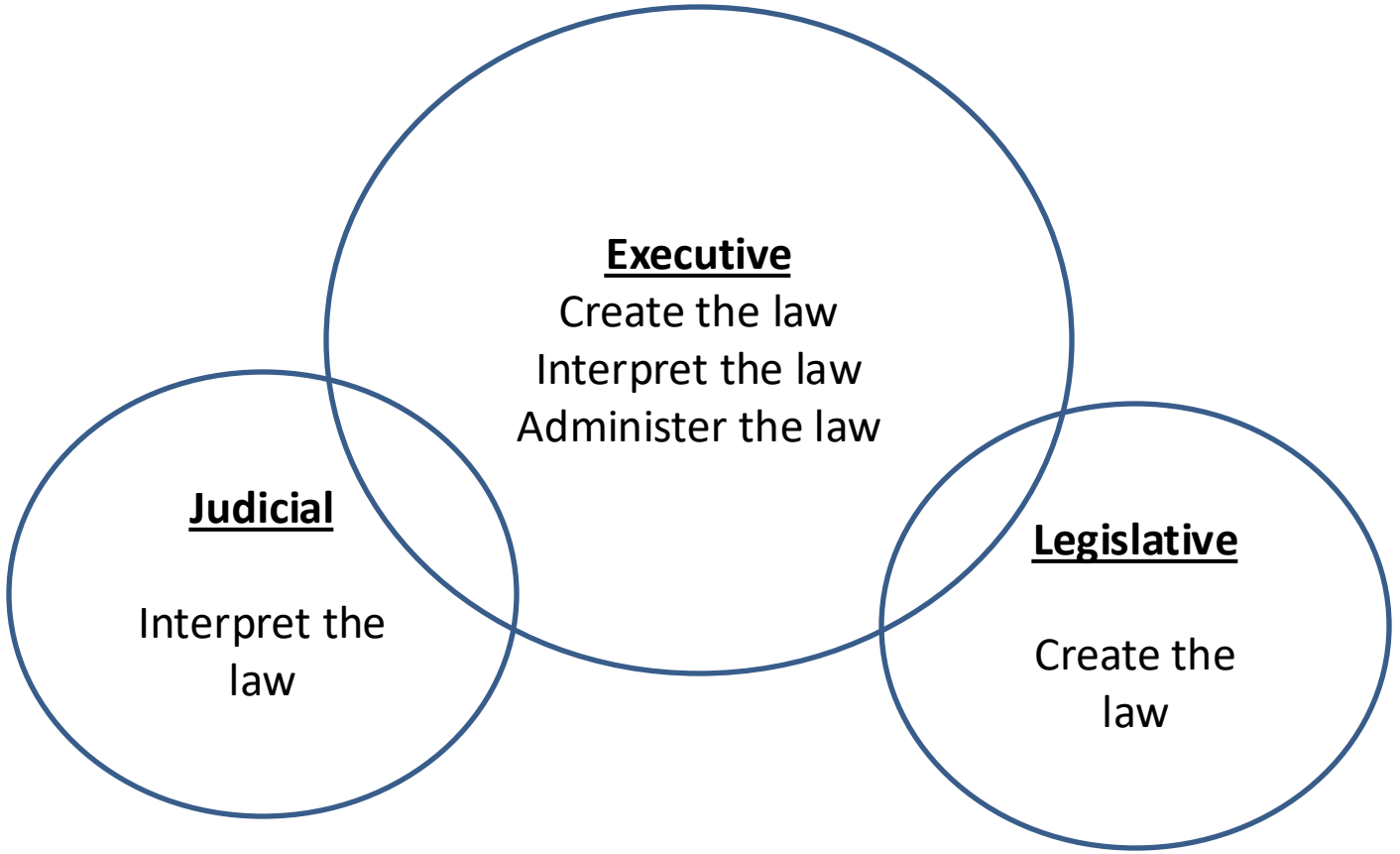
Overview

- Background on deference
- *Chevron* deference
- *Mead* deference
- *Auer* deference
- *Loper Bright* and the demise of *Chevron* (and demise of *Mead* and *Auer*?)
- Deference and state tax

Background: Separation of Powers



Background: What Separation of Powers?



Background: What is Deference?

- Administrative deference is a judicially-created doctrine that requires a court to accept an administrative interpretation of an ambiguous statute or regulation if that interpretation meets certain criteria.
- Administrative deference comes in three main flavors:
  - Deference to Regulatory Guidance (*Chevron* Deference)
  - Deference to Subregulatory Guidance (*Mead* Deference)
  - Deference to Interpretations of Regulations (*Auer* Deference)

Background: Why Defer?

- Modern world is too big and too complicated
- Agencies are either expressly or implicitly given the authority by Congress to fill the gaps knowing statutes can't answer all questions
- Courts are too busy to decide complicated issues in the first instance
- Foster consistency across the country in how the law will be interpreted
- Agencies have more technical expertise than courts
- Agencies can update interpretations as facts change

Background: Benefits of Deference?

- Encourages agencies to issue advance guidance
- Promotes predictability and uniformity
- Allows agencies flexibility
- Enhances political accountability
- Limits judicial discretion
- Discourages litigation

Background: Pre-*Chevron*

- *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):
  - "We consider the rulings, interpretations, and opinions of the [agency] under the Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort of guidance. The weight of such a judgment in a particular case will depend upon 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." *Skidmore* at 140.

Chevron Deference

- "Chevron deference" requires that a court defer to an agency's regulatory interpretation of a statute so long as:
  - Step Zero: The agency tasked with administering the congressionally created program has authority to formulate policy and to make rules to fill gaps left by Congress;
  - Step One: The statute is ambiguous; and
  - Step Two: The agency's interpretation is a reasonable construction of the statute.
- When applied, a court cannot exercise independent judgment of the arguments and does not consider whether the agency's interpretation is the best interpretation of the statute or legislative intent.
- *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

Chevron: Practical Impact

- *Chevron* shifts power from the legislature/courts to agencies.
- *Chevron* deference gives agencies an advantage in litigation.
- A 2017 study published in the Michigan Law Review* of 1,558 agency interpretations in the federal circuit courts from 2003 to 2013 found that agencies prevailed in 77.4% of the cases in which *Chevron* deference applied.
  - In cases that make it to *Chevron* Step Two (reasonableness), the agency almost always prevails.
  - On the other hand, of the cases that were decided at *Chevron* Step One, (was statute ambiguous), agencies only prevailed 39% of the time.
- The same study also found:
  - That the circuit courts varied considerably in the overall agency-win rates, application of *Chevron*, and an agency win-rates under *Chevron*.
  - Agency win-rates varied dramatically by subject matter and the agency advancing the interpretation.

*https://doi.org/10.36644/mlr.116.1.chevron

Chevron: General Criticism

- Contrary to the language of the federal APA which provides that a reviewing court of law "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action."
- Violates separation-of-powers principles under the U.S. Constitution by granting administrative agencies both legislative and judicial powers and abdicates the duties of the courts to independently interpret the law.
- Raises Due Process concerns when an administrative agency is a party to the litigation, because such deference creates an inherent bias in favor of the agency's position.
- Creates "administrative whiplash" when agencies change the law every time the administration changes.

Loper Bright Enterprises v. Raimondo: "*Chevron* is overruled."

- In *Loper Bright Enterprises v. Raimondo*, the Court overruled *Chevron*
- Case involved a challenge to regulations that require fishing vessels to pay the salaries of federal fishing monitors
- In a 6-2 decision, written by Roberts, C. J., in which Thomas, Alito Gorsuch, Kavanaugh, and Barret, JJ., joined. Thomas, J., and Gorsuch, J., filed concurring opinions. Kagan, J., filed a dissenting opinion, in which Sotomayor, J., joined. Jackson, J., took no part in the consideration or decision of the case.

Loper Bright Takeaways

- 1. "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Loper Bright Takeaways

2. Federal APA controls: "*Chevron* cannot be reconciled with the APA…by presuming that statutory ambiguities are implicit delegation to agencies."
3. Best meaning of the statute must control: "Courts instead understand that such statutes, no matter how impenetrable, do – in fact, must – have a single, best meaning."
4. Agencies have no special competence: "Perhaps most fundamentally, *Chevron's* presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do . . . . That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate."
5. Congress can still exercise control:
   - It can revise a statute if it disagrees with a court's interpretation.
   - Congress can "confer discretionary authority to agencies…subject to constitutional limits."

Is *Loper* the death of *Auer* and *Mead*?

United States v. Mead Corp., 533 U.S. 218 (2001)

- "*Mead* deference" allows, but does not require, a court to defer to an agency's sub-regulatory interpretation of a statute.
  - Spectrum of deference from "great respect" to "near indifference."

Factors Influencing Deference:

- Agency's Care
- Agency's Consistency
- Agency's Relative Expertness
- Persuasiveness of the Agency's Position

Practical Impact:

- Agencies can receive deference (1) for positions that have not gone through notice-and-comment rulemaking, and (2) even when they do not have the power to make binding interpretations of the law.
- Courts have flexibility in determining when and whether to invoke deference to sub-regulatory guidance.
- Taxpayers face uncertainty in evaluating the strength of sub-regulatory guidance.

Is *Loper* the death of *Auer* and *Mead*?

Auer v. Robbins, 519 U.S. 452 (1997).

- "*Auer* deference" allows deference to an agency's informal interpretation of its own ambiguous regulation so long as the interpretation is not "plainly erroneous." Such interpretations come in a variety of forms and are adopted without following the notice-and-comment requirements of the administrative rulemaking process.

Recent Trends & Future of *Auer* Deference :

- *Kisor v. Wilkie*, 139 S.Ct. 657 (2018)
  - VA refused veteran's retroactive benefits for post-traumatic stress disorder on regulatory interpretation.
  - Federal appeals court found both parties offered reasonable constructions of the statute, deemed the regulation ambiguous, but deferred to the VA's interpretation, upholding the denial of retroactive benefits.
  - SCOTUS, in a 5-4 decision, did not overrule *Auer*, but significantly narrowed the scope of the doctrine by setting up a 5-step inquiry in lieu of the bright-line rule that a court must defer to an agency regulatory interpretation unless it is plainly erroneous or inconsistent with the regulation.
- Treasury Department Policy (March 5, 2019)
  - The Treasury Department announced it will no longer seek judicial deference under *Auer* or *Chevron* for subregulatory guidance such as revenue rulings, revenue procedures, notices, and announcements.
  - Therefore, the application of *Auer* deference in federal tax cases is likely to be minimal moving forward.
  - Question remains if states will follow suit.

Does *Loper Bright* matter for federal tax regulations?

Five years before *Chevron*, the U.S. Supreme Court decided *National Muffler Dealers Ass'n. v. U.S.*, affirming Congress had delegated to Treasury and the I.R.S. the authority to enact regulations and that the Court should defer to those regulations if they have a reasonable basis in the statute.

This position was affirmed by the U.S. Supreme Court seven years after *Chevron* in *Cottage Savings Ass'n v. Comm.*

Does *Loper Bright* matter for federal tax regulations?

National Muffler Dealers Ass'n v. U.S., 440 U.S. 472 (1979): "[T]his Court customarily defers to the [IRS] regulation, which, if found to implement the congressional mandate in some reasonable manner, must be upheld."

- Congress has delegated to Treasury and the IRS, "not to the courts, the task of prescribing 'all needful rules and regulations for enforcement'" of the I.R.C. *National Muffler Dealers Ass'n*, 440 U.S. at 476, 477 (citing §7805(a) and *United States v. Correll*, 389 U.S. 299 (1967)).
- This "delegation helps ensure that in this area of limitless factual variations, like cases will be treated alike. It also helps guarantee that the rules will be written by masters of the subject who will be responsible for putting the rules into effect." *Id.* at 477.
- "The choice among reasonable interpretations is for the Commissioner, not the courts." *Id.* at 488.
- Factors to consider:
  - Does the regulation harmonize with the plain language of the statute and its purpose
  - Is it a substantially contemporaneous construction
  - If it dates from a later period, the manner in which it evolved
  - Length of time in effect
  - Reliance placed on it
  - Consistency of Commissioner's interpretation tempered by the understanding that a court should "be reluctant to adopt a rigid view that an agency may not alter its interpretation in light of administrative experience." *Id.* at 486.
  - Degree of scrutiny by Congress to the regulation during subsequent re-enactments of the statute

Does *Loper Bright* matter for federal tax regulations?

See also:

- *Helvering v. Reynolds Co.*, 306 U.S. 110 (1939)
- *United States v. Cartwright*, 411 U.S. 546 (1973)
- *United States v. Correll*, 389 U.S. 299 (1967)
- *Cottage Savings Ass'n v. Commissioner*, 499 U.S. 554, 56-61 (1991)
  - "Because Congress has delegated to the Commissioner the power to promulgate 'all needful rules and regulations for the enforcement of the [Internal Revenue Code], 26 U.S.C. § 7805(a), we must defer to his regulatory interpretations of the Code so long as they are reasonable."

Deference and State Tax: State Standards

- Federal judicial doctrine not automatically applicable at state level.
- Variation among states as to level of deference accorded (if any).
- Approximately 30 states can be considered to provide strong or intermediate deference to regulatory or subregulatory interpretations.

Deference and State Tax: State Standards

- Strong Deference: Court must defer to an agency's interpretation when the statute is ambiguous (or silent) and the agency's interpretation is reasonable.
- Intermediate Deference: Deference will not be per se mandatory where the relevant statute is ambiguous.
- *De Novo* Review: Court considers the persuasiveness of the specific position, acknowledging agency expertise, but not predetermining the conclusion.
- Non-Deferential *De Novo* Review: Court considers the persuasiveness of the specific position, but does not provide any deference to the position.

Deference and State Tax: State Standards

- Some states limit the application of the *Chevron* doctrine to regulations promulgated by a revenue agency, as is the case at the federal level (e.g. Colorado).
- Other states have expanded the scope of *Chevron* deference beyond agency regulations to include any type of statutory interpretation by the state agency - including unpublished or informal policy positions or even positions taken during audit (e.g. Alabama).

Deference and State Tax: Examples

- *Citrix Systems Inc. v. Comm'r of Revenue*, Dkt. Nos. C31160, C325421 (Mass. App. Tax Bd. 2018).
  - Deference to DOR's regulation extending sales tax to remotely-accessed software.
  - Deference to regulation despite recognition that "the right to tax must be plainly conferred by statute."

Deference and State Tax: Examples

- *Kohl's Department Stores, Inc. v. Virginia Dept. of Taxation*, 803 S.E.2d 336 (Va. 2017); 810 S.E.2d 891 (Va. 2018).
  - Virginia Supreme Court issued opinion citing deference to Commissioner's interpretation of addback statute.
  - Rehearing and revised opinion issued to reflect Virginia law precluding deference to certain administrative interpretations.

Deference and State Tax: Examples

- *Vodafone Americas Holdings, Inc. v. Roberts*, 486 S.W.3d 496 (Tenn. 2016)
  - Tennessee Supreme Court applied *Auer*-type deference in a tax context, albeit without citing directly to *Auer* itself.
  - Case involved DOR's application of alternative apportionment to source the taxpayer's receipts for purposes of the Tennessee franchise and excise tax.
  - The court upheld the use of alternative apportionment, based in part on its according "great deference" to the commissioner's interpretation of the relevant regulation.
  - Or, as the court stated, "we give great deference to the Department's interpretation of its own rules."

Deference and State Tax: Examples

- *Alabama Dep't of Revenue v. Bryant Bank*, 2018 WL 4401687 (Ala. Civ. App. Sept. 14, 2018)
  - Alabama Court of Civil Appeals deferred to the DOR's interpretation of a statute related to the financial-institution excise tax.
  - Although the DOR had not promulgated a rule or regulation interpreting the underlying tax credit statute at issue, the court held that the DOR was entitled to deference because it applied its interpretation "on its internal paperwork in making its final assessment."

Deference and State Tax: Examples

- *New Cingular Wireless PCS LLC v. Georgia DOR*, 797 S.E.2d 190 (Ga. Ct. App. 2017); 813 S.E.2d 388 (Ga. 2018)
  - State Superior Court and Court of Appeals deferred to DOR's interpretation of its sales tax refund regulation.
  - Taxpayer was forced to take its case to the Georgia Supreme Court before the DOR's interpretation was deemed unreasonable because it contradicted the plain language of the regulation and would upset the "orderly and logical refund process."

Deference and State Tax: Examples

- *Sewon America, Inc. v. Riley*, No. 1627180 (Ga. Tax Trib. 2017)
  - Georgia Tax Tribunal deferred to DOR's unpublished interpretation of its own regulation but cited to *Chevron*.
  - The Tribunal noted "the Department is not bound to choose the best interpretation and… courts are required to give great weight to the Department's interpretation."

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Deference and State Tax: Legislative Reform

- Arizona – Statute enacted in 2018 eliminated deference to state agencies.
- Georgia – Statute enacted in 2021 eliminated subregulatory deference in tax litigation.
- Florida – Constitutional amendment eliminated deference to state agencies.
- Tennessee – Statute enacted in 2022 eliminates deference to state agency interpretations of laws or regulations, requiring courts to interpret such de novo.

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Deference and State Tax: Judicial Reform

- Wisconsin – 2018 court decision in *Tetra Tech* eliminated deference to state agencies. Agency actions are given "due weight" but no true deference. New standard later codified.
- Mississippi – 2018 court decision in *Mississippi Military Department* eliminated deference to state agencies.
- Arkansas – 2020 decision in *Myers* clarified that agency interpretations of statutes are reviewed de novo.

Deference and State Tax: Judicial Reform

- Michigan – 2008 decision in *In Re Complaint of Rovas Against SBC Michigan*, based on existing precedent and principals of separation of powers, an agency's interpretation of a statute entitled to "respectful consideration," but ultimately the interpretation rests with the court.
- Kansas – 2013 decision in *Ad Astra Info. Sys.* "unequivocally" declared that deference had been "abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal.

Deference and State Taxation: Post-*Loper* Decisions

Skidmore now applies:

- California
  - *Int'l Ass'n of Sheet Metal, Air, Rail & Transp. Workers v. Cal. Pub. Emp. Rels. Bd.*, No D083813, 2024 BL 239780, 2024 CA App Unpub Lexis 4380 (Ca. App. 4th Dist., Div. One July 15, 2024)

Confirming existing policy that *Chevron* does not apply (even before *Loper Bright*)

- Colorado
  - *HCPI/CO Springs Ltd. P/S v. El Paso Cnty. Bd. Of Comm'rs,* 2-24 COA 82:

Chevron still applies or may still apply:

- Connecticut
  - *Williams v. Ari of Conn. Inc.*, No. FST-CV-21-605407-S, 2024 BL 298034, 2024 CT Super Lexis 1786 (Conn. Super. Ct. Aug. 21, 2024)
- New York
  - *Matter of Cerick v. New York City Dept. of Bldgs.*, No. INDEX No. 158941.2023, 2024 BL 285374, 2024 NY Misc Lexis 3878 (Sup. Ct. July 26, 2024)

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Deference and State Taxation: Post-*Loper* Decisions

Loper Bright casts doubt on what state standard is, but declined to address issue in the case at bar:

- District of Columbia
  - *Lane v. D.C. Dep't of Hous. & Cmty. Dev.*, No. 23-AA-0473, 2024 BL 292395 (D.C. Aug. 22, 2024)
  - *Friends of the Field v. D.C. Bd. Of Zoning Adjustment*, No. 23-AA-0360, 2024 Bl 301908 (D.C. Aug. 29, 2024)
  - *Vornado 3040 M St. LLC v. District of Columbia*, 318 A.3d 1185 (D.C. 2024)
- Vermont
  - *In re Investigation Pursuant to 30 VSA Sec. 30 & 209*, 2024 VT 58 (August 30, 2024)

Chevron does not apply

- Georgia
  - *Bd. Of Comm'rs of Brantley Cnty. V. Brantley Cnty. Dev. Partners, LLC*, No. A24A0612, 2024 BL 283121 (Ga. Ct. App. Aug. 15, 2024)
- South Carolina
  - *Colonial Pipeline Co. v. SCDOR*, No. Opinion No. 6072, 2024 BL 243439, 2024 Sc App Lexis 54 (S.C. Ct. App. July 17, 2024)

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Questions?

Joe Garrett, Managing Director, Deloitte Tax LLP
jogarrett@deloitte.com

Mark Sommer, Partner, Frost Brown Todd LLP
msommer@fbtlaw.com

Brian Oliner, General Counsel, Federation of Tax Administrators
Brian.Oliner@taxadmin.org

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