International Association of Tax Judges

A PERSPECTIVE ON SOFT LAW: UNITED STATES

JUDGE L. PAIGE MARVEL
UNITED STATES TAX COURT

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CAVEAT

The views expressed in this presentation are solely those of the speaker and should not be attributed to the United States Tax Court as an institution or to any other judge of that Court.

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"SOFT LAW" GENERALLY

- The term "soft law" is not one that is generally found in U.S. tax jurisprudence.
- Term coined to describe "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effect." See, Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques," 56 Modern Law Review, 19, 32 (1933).
- In the United States, soft law is not binding precedent in U.S. courts that decide tax matters.

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The Concept of "Authority" in the United States

- "Primary authority" is generated directly by a law-making body (Congress, the Courts, or Agencies) and includes statutes enacted by Congress and related legislative history, final regulations promulgated by the United States Treasury Department (Treasury), temporary regulations if issued, administrative guidance issued by the Internal Revenue Service (IRS), and judicial opinions.
- Researching a tax issue in the United States almost always involves an examination of various "primary authority" and sometimes involves an examination of some "secondary authority".
- "Secondary authority" explains but does not establish the law, and includes treatises, articles, and other publications by non-governmental sources.

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The Status of "Authority" as "Precedent" in the United States

- Not all primary authority is binding.
- Whether a primary authority is binding depends on the type of authority, the administrative agency or court that is working on a tax issue, and the status of the authority within that agency or court.
- The IRS is normally expected to follow its own published guidance. For example, in Rauenhorst v. Commissioner, 119 T.C. 157, 171-173 (2002), the Tax Court criticized the IRS for taking a litigating position that conflicted with a published revenue ruling. Subsequently, the IRS amended its Internal Revenue Manual to provide that "Chief Counsel attorneys must follow legal positions established by [IRS] publications in papers filed in Tax Court or in defense letters or suit letters sent to DOJ. Chief Counsel attorneys may not rely on case law to take a position that is less favorable to a taxpayer in a particular case than the position set forth in a publication." IRM 32.2.2.10(4) (Aug. 11, 2004)(Force and Effect of Revenue Rulings, Revenue Procedures, Notices, Announcements, and New Releases).

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TREASURY REGULATIONS

- Congress, in the Internal Revenue Code and in other statutes, authorizes the Treasury Department to issue regulations.
- Most regulations are issued pursuant to the general mandate in IRC sec. 7805(a), which provides that the Secretary of the Treasury "shall prescribe all needful rules and regulations ... as may be necessary by reason of any alteration of law in relation to internal revenue." These regulations are sometimes referred to as "general authority", "interpretive", or "interpretative" regulations.
- Some regulations are issued by the Treasury Department pursuant to a specific grant of authority made by Congress in the course of enacting or amending a particular tax provision. These regulations are sometimes referred to as "specific authority" or "legislative" regulations.
- For the deference accorded regulations generally, see, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984); Mayo Foundation for Medical Education and Research v. United States, 562 U.S. 44, 52-58 (2011).
- IRC sec. 7805(b) imposes limits on issuing regulations with retroactive effect.

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TREASURY REGULATIONS (continued)

- A regulation can take several forms:
  - A proposed regulation is one that the Treasury Department has proposed to provide guidance to taxpayers and will often enable taxpayers to submit written comments before it is finalized.
  - A temporary regulation is effective when published in the Federal Register and provides immediate, binding guidance until it expires. See, IRC sec. 7805(e), which requires that temporary regulations issued after Nov. 20, 1988 also be issued as proposed regulations and provides that temporary regulations expire no more than 3 years after they are issued.
  - A final regulation is a regulation issued in final form after any notice and comment period if applicable. The regulation is issued in a Treasury decision that will include a preamble, which describes comments received, if any, and any changes made in response to comments.

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TREASURY REGULATIONS (continued)

- Administrative departments and agencies including the Treasury Department and the IRS must promulgate regulations in accordance with the directives contained in a variety of statutes and orders including:
  - The Administrative Procedure Act, codified at 5 U.S.C. sec. 551 et seq.
  - Various Executives Orders issued by the President of the United States
  - The Paperwork Reduction Act of 1995, codified at 44 U.S.C. sec. 3501 et seq.
  - The Regulatory Flexibility Act, codified at 5 U.S.C. sec. 601 et seq.

The **Federal Register** contains the text of proposed, temporary, and final regulations including their Preambles and other information about the regulations. The **Code of Federal Regulations** (C.F.R.) collects all final and temporary regulations by topic.

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TREASURY REGULATIONS (continued)

- A final or temporary regulation is a primary source of tax law that is given deference by the courts if the regulation passes the Chevron test.
- However, a taxpayer may challenge a Treasury regulation for failure to adhere to regulatory requirements or because it exceeds the authority granted to Treasury by Congress, or because it reflects an erroneous interpretation of the law.

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IRS DOCUMENTS

- **Officially Published IRS Documents** – published in the weekly Internal Revenue Bulletins (IRB)
  - **Revenue Rulings** – Rulings designed to address a topic of general interest that apply the law to particular factual situations
    - Not as authoritative as a Treasury regulation but taxpayers whose factual circumstances are substantially the same as those described in the ruling can rely on it
  - **Revenue Procedures and Procedural Rules** – Published statements of IRS practice and procedure that are published in the IRBs
  - **Notices** – Issued to provide guidance before revenue rulings, revenue procedures and regulations are available
  - **Announcements** – Alert taxpayers to certain information but are less formal than the above
  - **Notices of Acquiescence and Non-acquiescence** – Documents in which the IRS states whether it will continue to litigate an issue it has lost in a judicial proceeding
  - **Delegation Orders** – These announce delegations of authority within the IRS.

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IRS DOCUMENTS (continued)

- The IRS issues other written determinations and documents that are not published in the IRBs.
- They include--
  - Actions on decision – issued at the discretion of the IRS only on unappealed issues decided against the government [I.R.M. 4.10.7.2.9.8.1 (Jan. 1, 2006)]
  - Appeals Settlement Guidelines (e.g., Industry Specialization Program Coordinated Issue Papers)
  - Chief Counsel Bulletins
  - General Counsel Memoranda
  - IRS Written Determinations (e.g., private letter rulings, determination letters, technical advise memoranda, field service advice, Chief Counsel advice – see, IRC sec. 6110(b)(1)[definition of written determination] and sec. 6110(k)(3)[may not be used or cited as precedent])
  - Administrative Manuals & Instructions (e.g., Internal Revenue Manual, which sets forth IRS operating policies and procedures)

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Treasury and IRS Guidance—Status as Precedent

I. Deference Owed to Promulgated Regulations
   I. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (holding that Court must defer to an agency's reasonable interpretation of an ambiguous statute if issued by duly promulgated regulation).
   II. Mayo Foundation v. United States, 562 U.S. 44 (2011) (holding that Chevron applies to the interpretation of duly promulgated tax regulations).
   III. National Cable v. Brand X, 545 U.S. 967 (2005) (noting that Chevron applies to a duly promulgated regulation even if it changes agency policy and thereby creates a future practice inconsistent with prior agency practice).

II. Deference Owed to Sub-Regulatory Agency Guidance
   I. United States v. Mead Corp., 533 U.S. 218 (2001) (sub-regulatory guidance is not entitled to Chevron deference but rather to so-called Skidmore deference).
   II. Skidmore v. Swift & Co., 323 U.S. 134 (1944) (holding that various sub-regulatory guidance may warrant deference to the extent it is persuasive).

III. Deference Owed to Agency's Interpretation of its Own Prior Regulations
   I. Bowles v. Seminole Rock & Sand Co., 325 U.S> 410 (1945) (holding that where a regulation is ambiguous, a court should defer to the agency's interpretation of its own regulation unless plainly erroneous).
   II. Auer v. Robbins, 519 U.S. 452 (1997) (reaffirming that a court should defer to an agency's construction of its own, prior but ambiguous regulation).
   III. Kisor v. Wilkie, 588 U.S. ___ (2019) (reaffirming and clarifying the scope of Auer/Seminole Rock deference).

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TREASURY AND IRS GUIDANCE – STATUS (continued)

- Other Federal courts have applied Supreme Court caselaw to reach conclusions on the level of deference, if any, to be given to administrative guidance. Some examples are below:
  - An IRS Notice is not binding but may be entitled to Skidmore deference if persuasive [citation omitted].
  - A revenue procedure that is unsupported by any analysis of the statute or its legislative history is simply a litigating position that is not entitled to Skidmore deference [citation omitted].
  - A revenue ruling (1) is not binding precedent but may be entitled to some weight if persuasive, or (2) represents the official IRS position on the application of law to specific facts and is entitled to "precedential weight" [citations omitted]. What???

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TREATY INTERPRETATION IN THE UNITED STATES

- When considering the meaning of a treaty (whether bilateral or multilateral), the United States Tax Court construes the treaty as a contract between sovereigns. See, Bhutta v. Commissioner, 145 T.C. 351, 360-361 (2015) (citing United States v. Stuart, 489 U.S. 353, 365-366 (1989)).
- The Court begins with the text of the treaty and the context within which the words are used.
- The plain meaning of terms controls unless that meaning is contrary to the intent or expectations of the signatories.

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TREATY INTERPRETATION IN THE UNITED STATES COURTS

- In determining the intent of the signatories, a court may consider the treaty's legislative history, including the parties' negotiations and diplomatic correspondence, and the practical construction that the signatories have adopted regarding the text.
- The courts will also give weight to how the departments of the respective governments charged with negotiating and enforcing a treaty interpret that treaty – including the courts of a signatory. See, e.g., Abbott v. Abott, 560 U.S. 1, 16 (2010) ("In interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight.")
- See also, Restatement (Third) of Foreign Relations Law of the United States, sec. 325, comment d (1986) ("Treaties that lay down rules to be enforced by the parties through their internal courts...should be construed so as to achieve uniformity of result despite differences between national legal systems.")

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OECD "Soft Law" – Model Treaties, Commentaries and Guidelines

- In deciding treaty cases, the United States Tax Court has used various OECD model treaty commentaries to buttress its analysis of bilateral treaties containing language substantially similar to that of the OECD model treaty. See, e.g., Topsnik v. Commissioner, 146 T.C. 1, 10 (2016) (confirming the Court's construction of the U.S.-Germany Tax Treaty by reference to the 1977 OECD model treaty's commentaries because "in all pertinent respects, [the model treaty was] identical."
- See also, American Air Liquide, Inc. v. Commissioner, 116 T.C. 23, 29 (2001)(noting that Article 24(3) of the U.S.-France Treaty corresponds to Article 24(5) of the then-current OECD model convention and looking to the model convention to explain the purpose of the provision); Nothwest Life Assur. Co. of Canada v. Commissioner, 107 T.C. 363, 378-379 (1996)(noting that the Model Double Taxation Convention on Income and on Capital and its explanatory commentaries "provide helpful guidance" in determining the intent and purpose of the signatories to the U.S.-Canada Convention With Respect to Taxes on Income and on Capital); Taisei Fire and Marine Ins. Co., Ltd. v. Commissioner, 104 T.C. 535, 547-548 (1995)(stating that, because the U.S.-Japan Convention's text was "not only based upon, but [was] duplicative of" a 1963 OECD draft model convention, the commentaries on the model convention elucidated the original intent of the signatory parties).

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OECD "Soft Law" – Model Treaties, Commentaries and Guidelines (cont.)

- The transfer pricing guidelines are a different story.
- The Tax Court has not cited or relied upon OECD's transfer pricing guidelines to decide its transfer pricing cases.
- That may be because the guidelines are an evolving set of standards that function more like a treatise or practice guide and do not necessarily reflect consensus within the international community.

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