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by Angela Acosta, Jim San Fillippo, and David Winkler

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by Angela Acosta, Jim San Fillippo, and David Winkler

Angela Acosta

Jim San Fillippo

David Winkler

Angela Acosta is a principal, Jim San Fillippo is a managing director, and David Winkler is a senior manager with the state and local tax practice of BDO USA.

In this article, the authors examine the role of judicial deference in the interpretation of administrative guidance and discuss prior decisions on the topic, as well as expected U.S. Supreme Court decisions that will affect the concept.

The result of taxpayer litigation against an administrative agency such as a tax authority does not always turn directly on the substance of the underlying issue. Instead, it sometimes turns on the application of judicial deference, which is the idea that under some circumstances, a judicial body should defer to an administrative agency's interpretation of a statute or regulation rather than imposing its own interpretation.

Judicial deference exists in varying forms at both the federal and state levels; however, there has been a recent trend toward scaling back the level of deference accorded to administrative agencies. That trend, which has been a favorable development for taxpayers contesting state tax matters, may be accelerated by some anticipated U.S. Supreme Court decisions in 2024.

Deference at the Federal Level

Understanding deference at the federal level is useful for understanding how the concept is applied at the state level. For decades, judicial review of federal agency decisions has been governed by the *Chevron* doctrine, which essentially holds that if a statute is ambiguous, the judicial body must defer to the agency's interpretation of it, provided the interpretation is reasonable.[1] A similar concept involving the interpretation of an agency's own regulations (as opposed to the interpretation of a statute) is referred to as *Auer* deference.[2]

Many have objected to these doctrines as creating an uneven playing field in favor of the agency involved and as inconsistent with the principle of the separation of powers. The U.S. Supreme Court significantly tempered *Auer* deference in 2019's *Kisor*[3] ruling by adding several criteria that must be satisfied for deference to

[1] The doctrine is named for the decision that created it: *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[2] This stems from the decision in *Auer v. Robbins*, 519 U.S. 452 (1997), and its precursor, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

[3] *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

apply, including finding that the agency's position reflects fair or considered judgment.

On January 17 the Court heard oral arguments in two cases that seek to overturn the *Chevron* doctrine,[4] and rulings are expected this year. While the cases' outcome is unknown, based on opinions in earlier cases and comments made during oral arguments, it appears that several justices have significant concerns about the *Chevron* doctrine and that the Court may well water it down, as it did with *Auer*, or even discard it entirely. The Court could also turn back to an earlier, more limited doctrine referred to as *Skidmore* deference, under which an agency's interpretation is given deference only if it is based on persuasive reasoning.[5]

Deference at the State Level

How much judicial deference applies in the states varies dramatically, and in some states is uncertain, either because of nonexistent or inconsistent authority. However, there appears to be an accelerating trend among states toward limiting or rejecting judicial deference to agency positions, particularly *Chevron*-type deference. Since 1999, approximately a dozen states have rejected that deference, with about two-thirds of them doing so since 2018. The movement away from deference typically has been the result of judicial or legislative action, although one state implemented the change via constitutional amendment.

Delaware appears to be the first state to clearly reject *Chevron*-type deference. In 1999 its supreme court said:

> Statutory interpretation is ultimately the responsibility of the courts. A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it. A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.

Regarding *Chevron*, the court said, "We expressly decline to adopt such a standard with respect to review of an agency's interpretation of statutory law and reaffirm our plenary standard of review."[6]

The next rejection of *Chevron* appears to be in 2008, when the Michigan Supreme Court reviewed Michigan case law on agency deference (finding past authority to be confusing and "not entirely consistent").[7] In setting a standard to be followed, the court said that "an agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation."[8] As part of its analysis, the court expressly rejected *Chevron*-type deference, finding that "the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles discussed above by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government."[9]

In Kansas, the tide against an agency's interpretation of a statute being due any significant deference by a court began turning during the late 2000s, leading up to a 2013 Kansas Supreme Court decision in which the court said the doctrine of deferring to an agency's interpretation of a statute "has 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."[10]

Between 2013 and 2016, the Utah Supreme Court issued a series of decisions critical of deference to agency decisions, renouncing first *Chevron*-type deference and then *Auer*-type

[4] *Loper Bright Enterprises v. Raimondo*, No. 22-451 (2022); *Relentless Inc. v. Department of Commerce*, No. 22-1219 (2023).

[5] Stemming from the decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[6] *Public Water Supply Co. v. DiPasqualle*, 735 A.2d 378, 382-383 (Del. 1999).

[7] *SBC Michigan v. PSC (In re Complaint of Rovas)*, 754 N.W.2d 259, 267 (Mich. 2008).

[8] *Id.* at 262.

[9] *Id.* at 272.

[10] *Douglas v. Ad Astra Information Systems LLC*, 293 P.3d 723, 728 (Kan. 2013), and cases cited therein, including *Higgins v. Abilene Machine Inc.*, 204 P.3d 1156 (Kan. 2009), and cases cited therein.

deference.[11] In the last opinion in the series, the court said:

> It makes little sense for us to defer to the agency's interpretation of law of its own making. If we did so we would place the power to write the law and the power to authoritatively interpret it in the same hands. That would be troubling, if not unconstitutional.[12]

The anti-deference movement really picked up steam in 2018, when both Wisconsin and Mississippi court decisions rejected deference. The Wisconsin Supreme Court did so via a lengthy opinion overturning precedent that supported deference. While a majority of the court supported eliminating deference, there was a split in opinion regarding the reason to do so, with the lead opinion finding deference unconstitutional and a concurring opinion indicating deference should be rejected — without reaching the constitutional issue.[13] The court's decision was reinforced later that year by the enactment of a statute providing that "no agency may seek deference in any proceeding based on the agency's interpretation of any law."[14]

Like Wisconsin, the Mississippi Supreme Court also rejected precedent, deeming it "vague and contradictory" and stating, "We abandon the old standard of review giving deference to agency interpretations of statutes."[15] In 2020 it confirmed that position by striking down as unconstitutional a statute that required courts to give deference to the Department of Revenue's interpretation of statutes.[16] In 2021 the court expanded its anti-deference stance, stating it would no longer give deference to an agency's interpretation of its own rules and regulations.[17]

In April 2018 Arizona adopted a broad anti-deference position by amending its statute regarding the scope of review for administrative decisions to provide that "the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency."[18] It made another addition to that statute in 2021 to provide that courts shall also not give deference to agency decisions relating to questions of fact.[19]

Unlike the states that used judicial or legislative means to adopt anti-deference, Florida struck down deference in 2018 via constitutional amendment. The new provision provides: "In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule *de novo*."[20]

In 2020 the Arkansas Supreme Court found the deference standard for review of agency interpretation of statutes confusing and concluded that such deference is inappropriate.[21] Later in the year, the court incorporated that position in an opinion involving an appeal of an Arkansas Department of Finance and Administration decision regarding a corporate income/franchise tax issue.[22]

Georgia codified anti-deference via statutory amendment in 2021 specifically for tax matters. It created a general rule that all questions of law to be decided by a court or the Georgia Tax Tribunal are to be made "without any deference to any determination or interpretation, whether written

[11] *Murray v. Utah Labor Commission*, 308 P.3d 461 (Utah 2013); *Hughes General Contractors Inc. v. Utah Labor Commission*, 322 P.3d 712 (Utah 2014); *Ellis-Hall Consultants v. PSC*, 379 P.3d 1270 (Utah 2016).

[12] *Ellis-Hall Consultants*, 379 P.3d at 1275.

[13] *Tetra Tech EC Inc. v. Wisconsin Department of Revenue*, 914 N.W.2d 21 (Wis. 2018).

[14] Wis. Stat. section 227.10(2g).

[15] *King v. Mississippi Military Department*, 245 So. 3d 404, 408 (Miss. 2018). The court noted that because only statutes were at issue in the case, it was addressing "the standard of review only as it applies to agency interpretations of statutes." *Id.* at 407.

[16] *HWCC-Tunica Inc. v. Mississippi Department of Revenue*, 296 So. 3d 668 (Miss. 2020).

[17] *Mississippi Methodist Hospital & Rehabilitation Center Inc. v. Mississippi Division of Medicaid*, 319 So. 3d 1049, 1055 (Miss. 2021).

[18] Ariz. Rev. Stat. section 12-910(F).

[19] *Id.*

[20] Fla. Const. Art. V, section 21.

[21] *Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613 (Ark. 2020).

[22] *American Honda Motor v. Walther*, 610 S.W.3d 633 (Ark. 2020).

or unwritten, that may have been made on the matter" by the DOR.[23]

The next state to hop on the anti-deference bandwagon was Tennessee, which did so wholeheartedly. It amended its statutes effective April 2022 to provide:

> In interpreting a state statute or rule, a court presiding over the appeal of a judgment in a contested case shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule *de novo*. After applying all customary tools of interpretation, the court shall resolve any remaining ambiguity against increased agency authority.[24]

The provision not only prohibits both *Chevron*- and *Auer*-type deference, but also goes beyond that to require that ambiguity be interpreted against the agency.

Ohio and Indiana were the most recent states to adopt anti-deference positions. In December 2022 the Ohio Supreme Court found the state's law on deference inconsistent and set forth a new standard that "the judicial branch is never required to defer to an agency's interpretation of the law."[25]

On March 13 Indiana Gov. Eric Holcomb (R) signed legislation on appeals from state agencies to provide that a reviewing court "shall decide all questions of law, including any interpretation of a federal or state constitutional provision, state statute, or agency rule, without deference to any previous interpretation made by the agency."[26]

The anti-deference movement in the states appears likely to continue. In 2023 Nebraska legislation was introduced to enact a broad anti-deference statute generally similar to that enacted by Tennessee.[27] Although the legislation did not advance from committee in 2023, it remains active as a carryover bill in the current legislative session.

Also, 27 states have joined in filing an amicus curiae brief on behalf of the petitioners in the cases before the U.S. Supreme Court seeking to overturn the *Chevron* doctrine.[28] That includes nine of the aforementioned states that have adopted anti-deference provisions since 1999, indicating there is some level of anti-deference sentiment in at least 18 additional states. If the Court's decisions discard or water down the *Chevron* doctrine at the federal level, judges and lawmakers might take that as a cue to advance a similar position at the state level.

Concerns Regarding Deference

Various arguments have been raised against the concept of judicial deference to administrative agencies. A central theme is that deference gives the government an unfair advantage, with the administrative agency's position being summarily approved by the reviewing court, even if that position is not a particularly reasonable interpretation of the law. Moreover — and most compelling — agencies rarely are unbiased interpreters of the law. Employees of, say, an environmental protection agency are going to have a natural bias to maximize the regulation of the environment. Likewise, employees of a taxation or revenue department are going to have a bias in favor of maximizing the state's revenue.

In theory, an administrative agency's decisions are subject to review by the head of the executive branch and can be questioned by lawmakers; however, in practice, those parties could never scrutinize the overwhelming volume of rules and regulations issued. If courts are required to defer to agency positions, there is

[23] O.C.G.A. sections 48-2-18(c), 48-2-35(c)(7), 48-2-59(e), and 50-13A-14(a), as amended by Ga. L. 2021, p. 120, S.B. 185 (eff. Apr. 29, 2021).

[24] Tenn. Code Ann. section 4-5-326, created by Acts 2022, ch. 883, section 1 (eff. Apr. 14, 2022).

[25] *TWISM Enterprises LLC v. State Board of Registration for Professional Engineers & Surveyors*, 223 N.E.3d 371 (Ohio 2022). *TWISM* involved *Chevron*-type deference. A subsequent Ohio Supreme Court decision rejected *Auer*-type deference; however, a concurring opinion by two justices argued that because the deference issue was not properly before the court, the majority's discussion regarding *Auer*-type deference did not create legal precedent. *In re Alamo Solar I LLC*, 2023-Ohio-3778 (Ohio 2023).

[26] H.B. 1003, 123rd General Assembly, Regular Session, amending Ind. Code 4-21.5-5-11. However, Ind. Code 4-21.5 does not apply to some state agencies, including the Department of Revenue and the Board of Tax Review, Ind. Code 4-21.5-2-4. Thus, it appears the new legislation is not controlling for state tax matters.

[27] L.B. 43, 108th Leg., 1st Sess. (introduced Jan. 5, 2023).

[28] *Loper Bright, Brief of Amici Curiae State of West Virginia and 26 Other States in Support of Petitioners* (filed Dec. 15, 2022). Amicus curiae briefs filed regarding *Loper Bright* will also be considered in *Relentless*; Docket for *Loper Bright*, Proceedings and Orders (Oct. 27, 2023).

essentially no practical remedy for an aggrieved party subjected to agency overreach.

Deference opponents also argue that the concept contradicts the separation of powers principle fundamental to the United States, under which the judicial branch — not the administrative branch — is the part of government granted the authority to interpret legislation.[29]

Assessing Deference in the Context of State Taxation

Concerns regarding deference apply in the context of state taxation just as in other areas of law. Conversely, the principal arguments in favor of deference lose much of their persuasiveness in this context. For example, a common argument in support of deference is that an agency responsible for administrating a statute presumably has specialized knowledge on the topic and is thus better equipped to interpret the law than a judge or similar party without that specialized background. While one can envision situations in which this position may have merit, such as setting acceptable levels for hazardous substances, state taxation does not appear to be one of them. Although tax issues can be complex, they are not so technical that they cannot be understood by well-educated judges or other legal arbiters, especially because there is no shortage of highly qualified nongovernmental accountants and attorneys (many of whom may have previously been employed by the tax authority) who can explain the relevant law. Further, the reviewing body for tax matters is often a specialized court, commission, or other tribunal dedicated to tax cases, where the judges, commissioners, and so forth have extensive experience with tax topics.

Another argument in favor of federal-level deference is that the federal level requires national uniformity on issues, instead of different positions in the various federal circuit courts of appeals districts.[30] Such a concern regarding uniformity would rarely seem to be relevant for state tax matters.

Conclusion

Administrative deference is declining in the states, and that trend could accelerate if the U.S. Supreme Court eliminates or dilutes the *Chevron* doctrine this year. While there are rare situations in which deference has benefited a nongovernment litigant,[31] the policy normally favors the government. Thus, the decline of deference should be a favorable development for individuals, businesses, and other organizations contesting state tax matters. ■

[29] *See, e.g., Brief of Amici Curiae* (throughout) and the Ohio Supreme Court cases discussed earlier.

[30] *See, e.g., Hughes General Contractors*, 322 P.3d 712, at 717-718.

[31] For example, *Chevron* involved an action by an environmental advocacy group objecting to a rule change by the Environmental Protection Agency that essentially loosened the EPA regulations. The Supreme Court's decision to defer to the EPA's action thus benefited Chevron, the regulated party.