IS TIME UP ON AUER?
APPLICATION OF AUTHORITY IN THE CHANGING WORLD OF DEFERENCE

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SEPARATION OF POWERS ISSUE

- The Constitution divides power among the Executive, Legislative, and Judicial branches of government. Yet, rules promulgated by administrative agencies muddle, rather than respect the division of power.

HISTORY OF ADMINISTRATIVE AGENCIES

- Prior to 1932, it was understood that Congress could not delegate legislative power; thus, the ability of agencies themselves to make legislative rules was weak to non-existent. *See United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear.").

- Following Franklin D. Roosevelt's New Deal, the way agencies would be viewed and allowed to function changed dramatically. During the New Deal era, agencies were allowed to implement the policies of Congress, make their own policy-making decisions, and were generally viewed as the experts in the field they represented.

- In 1940, the Supreme Court strayed away from the non-delegation doctrine, opening the doors for legislative rulemaking by agencies. *See Sunshine Anthracite Coal v. Adkins*, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.").

- In 1946, concerns regarding establishing a framework of legitimate regulatory procedures and protecting the regulated from potential abuse led to Congress's enactment of the Administrative Procedures Act (APA). Most notably, the APA mandates that agencies submit

notices of proposed regulations and allow interested parties to submit comments in lieu of the traditional congressional hearing that would otherwise be held during the legislative process.

TYPES OF AUTHORITY

Treasury Regulations

- Regulations promulgated pursuant to specific authority grants have traditionally been denoted as "legislative" regulations.

- Regulations promulgated pursuant to the Treasury's general rule making authority to develop "all needful rules and regulations for the enforcement" of the Code are known as "interpretive" regulations. *See* I.R.C. § 7805(a).

- For practical purposes, both types of regulations have the same effect because interpretive regulations do not carry any less "deferential" weight than legislative regulations. *See Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011). (explaining that whether a rule carries the force of law "does not turn on whether Congress's delegation of authority was general or specific.").

Sub-Regulatory Guidance

- **Revenue ruling:** "an interpretation by the Service that has been published in the Internal Revenue Bulletin ... for the information and guidance of taxpayers, Service personnel, and other interested parties."

  - The effect of revenue rulings when challenged by taxpayers in judicial proceedings is unclear. The IRS acknowledges that they "do not have the force and effect of Treasury Department Regulations," an admission reflecting the fact that rulings are issued, amended, and revoked with less formality than regulations.

  - A revenue ruling is likely to be greeted with judicial hostility if it is patterned on the facts of the case before the court and was issued after the case was in litigation. *See AMP, Inc. v. United States*, 185 F3d 1333, 1339 (Fed. Cir. 1999) ("A revenue ruling issued at a time when the I.R.S. is preparing to litigate is often self-serving and not generally entitled to deference by the courts," especially "when the ruling cites no authority and is inconsistent with regulations and other pronouncements of the I.R.S.").

  - In other contexts, they deserve, and sometimes get, more deference. According to the Court of Appeals for the Fifth Circuit, "revenue rulings are odd creatures unconducive to precise categorization in the hierarchy of legal authorities. They are clearly less binding on the courts than Treasury regulations or Code provisions, but probably (and in this circuit certainly) more so than the mere legal conclusions of the parties." *McLendon's Est. v. Comm'r*, 135 F3d 1017, 1023–1024 (5th Cir. 1998). The Fifth Circuit has stated that Revenue Rulings are entitled to *Skidmore* deference. *Kornman & Associates, Inc. v. United States*, 527 F.3d 443, 453 (5th Cir. 2008)

- The Supreme Court has said that revenue rulings are entitled to "considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Davis v. United States*, 495 U.S. 472 (1990)

- Nonetheless, the Tax Court often refers to a revenue ruling as "simply the contention of one of the parties to the litigation," which is "entitled to no greater weight" than the taxpayer's contentions. *Lang's Est. v. Comm'r*, 64 T.C. 404, 407 (1975)

- **Revenue procedure:** a statement, also published in the Internal Revenue Bulletin, of (1) procedures affecting the rights or duties of taxpayers or other members of the public under the Code, related statutes, treaties, or regulations or (2) information "that should be a matter of public knowledge," even if it may not affect anyone's rights and duties.

- **Notice:** "a public pronouncement," published in the Internal Revenue Bulletin, usually containing "substantive interpretations of the Internal Revenue Code or other provisions of the law." The IRS often uses notices to inform the public about its current views on issues it may later cover by regulations and to "solicit public comments on issues under consideration, in connection with non-regulatory guidance, such as a proposed revenue procedure."

- **Announcement:** "a public pronouncement," also published in the Internal Revenue Bulletin, "that has only immediate or short-term value." The IRS may, for example, issue an announcement to summarize a new law or regulation "without making any substantive interpretation" or to notify taxpayers of an election or an approaching deadline.

- **Letter ruling:** "a written determination issued to a taxpayer by" an office of an Associate Chief Counsel, "in response to the taxpayer's written inquiry," that "interprets the tax laws and applies them to the taxpayer's specific set of facts."

  - The taxpayer to which the letter is directed ordinarily may rely on a letter ruling or determination letter. Rev. Proc. 2019-1. However, such letters are not precedential as to other taxpayers.

- **Determination letter:** a written statement that is issued by an IRS "Director[1]" in response to an inquiry by a taxpayer and applies "principles and precedents previously announced by the Service to a specific set of facts."

[1] The term "Director" includes, among others, the Director, Field Operations, Large Business and International Division (LB&I); the Director, Field Examination, Small Business/Self-Employed Division (SB/SE); the Program Manager, Estate and Gift Tax Policy, SB/SE; the Director, Return Integrity & Compliance Services, of the Wage and Investment Division (W&I); the Director, Employee Plans Examinations; and the Director, Exempt Organizations Examinations. Rev. Proc. 2019-1, § 1.01(3).

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