Refashioning Anti-Abuse Doctrines As Substantive Canons

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Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 **Stan. L. Rev.** ___ (forthcoming 2020), available at SSRN.

Jurists and legal scholars who think about methods and approaches for resolving questions of statutory meaning like to talk about traditional tools of statutory interpretation and the metaphorical toolbox in which those tools are kept. Textualism versus purposivism; the relative merits of text, history, and purpose; and the meaning and utility of both semantic and substantive canons are all common fodder for discussion and debate. Adding to the literature at the intersection of statutory interpretation and tax, Jonathan Choi offers an interesting and thorough treatment of why we ought to think of tax anti-abuse doctrines like the economic substance doctrine, the step transaction doctrine, and the assignment-of-income doctrine as substantive canons of statutory interpretation. (Helpfully, Choi provides a nice appendix, including footnotes, in which he catalogues substantive tax canons, including a couple of "not a canon" entries.)

Choi begins his article by surveying all of the reasons we ought to be dissatisfied with the status quo of tax anti-abuse doctrines. Courts and the IRS do not apply tax anti-abuse doctrines consistently. The Internal Revenue Code's own terms sometimes contradict a particular tax anti-abuse doctrine, for example by requiring form to trump substance notwithstanding the doctrine preferencing substance over form, exacerbating the difficulty. Also, because tax anti-abuse doctrines are purposivist by nature and origin, they do not mix very well with the more textualist approach to statutory interpretation adopted by contemporary courts. Overall, the picture that Choi paints of tax anti-abuse doctrines is one of confusion and inconsistency.

Having identified the problem, Choi turns to his proposed solution, "the substantive canon framework." Drawing from the literature and jurisprudence on statutory interpretation, Choi describes substantive canons as "inform[ing] the substantive meanings of statutes based on normative concerns." A nontax example of a substantive canon is the rule of lenity, which calls upon reviewing courts to construe ambiguous criminal statutes to favor defendants, for reasons rooted in notions of democratic legitimacy and fair notice. Yet substantive canons are not necessarily purposivist in nature. Critically, given Choi's account of the problems facing tax anti-abuse doctrines, textualists often rely on substantive canons to help resolve statutory meaning. Hence, Choi contends that courts should think of tax anti-abuse doctrines as substantive canons, and should employ them as such by asking two questions: first, whether the facts and circumstances of a taxpayer's case suggest that a tax anti-abuse doctrine is relevant; and if so, then second, "whether statutory text or purpose rebuts this presumption."

Central to Choi's two-step framework is his characterization of substantive canons. As Choi acknowledges, some scholars and judges think of substantive canons as mere "ambiguity tie-breakers" that apply only "'at the end of the interpretive analysis,' after statutory text, legislative history, or whatever other tools the court prefers have still left the court 'in great doubt' about the statute's meaning." Choi disagrees and classifies substantive canons instead as rebuttable presumptions that apply "at the *beginning* of the interpretive analysis," on the ground that "this is closer to how they are currently treated." In particular, he maintains that textualists actually are "more likely to use

canons…as 'safety valves' that prevent formalist textualism from producing absurd results." Well, perhaps. Regardless, Choi's two steps clearly place the tax anti-avoidance canons at the beginning rather than at the end of the analysis.

Choi goes on to apply his two-step substantive canon framework to a handful of cases. And he then suggests that, even if judges do not want to adopt his approach, Congress can mandate it by codifying the tax anti-avoidance doctrines, much as it did in 2010 with Internal Revenue Code § 7701(o) and the economic substance doctrine (though, as discussed below, §7701(o) arguably leaves open a pretty critical question regarding the timing of the doctrine's consideration). Finally, Choi addresses potential criticisms. He defends tax anti-avoidance doctrines as providing the sorts of background norms on which substantive canons typically are based.The tax anti-avoidance doctrines, he maintains, reflect longstanding and universally-accepted concepts that are familiar throughout the community of tax experts and lawyers more generally—so much so that drafters of tax legislation undoubtedly take them into account. Choi also contends that his substantive canon framework fits well with the nature of tax anti-avoidance doctrines, allowing courts to employ them in a more intuitive (and thus more consistent) manner.

Choi's article contributes to the academic literature simply by engaging seriously and deeply in the tax context with the more general scholarship and jurisprudence regard substantive canons, though he is by no means the first scholar to do so. His treatment of tax anti-avoidance doctrines as substantive canons is not, however, purely theoretical. This fall, the Supreme Court will decide whether to grant a petition for certiorari filed in *Tucker v. Comm'r*, with former Solicitor General Gregory Garre as lead counsel, asking the Court to decide whether the economic substance doctrine is "properly invoked only as a tool for interpreting the meaning of tax laws," or whether it may "be invoked to supplant any tax results that…stem from the application of clear, unambiguous, and mechanical provisions of tax law." According to the *Tucker* cert petition, irrespective of Internal Revenue Code § 7701(o), the circuits are divided over exactly *when* to apply the economic substance doctrine, with some circuits relying on the doctrine more like an ambiguity tie-breaker, and others invoking the doctrine even where the Code's text is unambiguous.

Neither the cert petition in *Tucker* nor the circuit court opinions it cites rely upon or address Choi's substantive canon framework. For that matter, the taxpayer's position in *Tucker* clearly would relegate the economic substance doctrine to the role of ambiguity tie-breaker, rather than the rebuttable presumption that Choi prefers. Nevertheless, the *Tucker* cert petition's framing of the economic substance doctrine in traditional statutory interpretation terms is consistent with Choi's suggestion that we think of tax anti-avoidance doctrines in such a way. And, whether or not the courts adopt Choi's substantive canon framework, perhaps recharacterizing tax anti-avoidance doctrines as tools of statutory interpretation will, in one way or another, help resolve the confusion and inconsistency that Choi identifies.

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