The Tax Court: "Insubordinate" or "Prescient" on Auer/Seminole Rock Deference?

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Steve R. Johnson, *Seminole Rock in Tax Cases*, **Yale J. Reg. Notice & Comment** (2016).

Auer/*Seminole Rock* or "*ASR*" deference is a hot topic right now in administrative law. *ASR* gives agencies deference when agencies interpret their own regulations, such as in litigation briefs or in guidance. If you want to know how *ASR* deference works in the tax context, and in particular in the Tax Court, read Steve Johnson's work. This includes his 2013 article and his entry in the Yale Journal of Regulation's recent online symposium on *ASR* deference.

The *Chevron* doctrine often serves as the starting point for deference to agency action. *Chevron* offers judicial deference to agency interpretations in final regulations and other actions with the "force of law" articulated in *Mead*. When the Supreme Court confirmed in its 2011 *Mayo* decision that *Chevron* applies to tax regulations, it helped to usher in a growing awareness of administrative law doctrine in tax cases.

Agency action without force of law, including an agency interpretation of its own regulations, does not get *Chevron* deference. But it might get *ASR* deference. So what does that mean?

In the Tax Court, *ASR* historically doesn't mean very much, as Johnson explains in his 2013 article. *ASR* claims may succeed at a rate of 91% at the Supreme Court and at a rate of 76% at federal circuit and district courts, but such claims, if they are made at all, are less likely to succeed in the Tax Court. Johnson sets forth six doctrinal exceptions that a court might rely on as support for not granting *ASR* deference. These include that agency's action might be "plainly erroneous or inconsistent with the regulation" (*Auer*), that the regulation is unambiguous, that the agency's position is unsettled, that the regulation "parrots" the statute, that regulated parties have not had fair notice of the interpretation, and that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question" (*Auer*).

Johnson shows how these exceptions can be made big enough to drive a truck through, if a court is so inclined. In his 2013 article, he catalogues the Tax Court cases that have refused deference to the Treasury's interpretation of its own regulations between 1980 and 2011. In his online symposium contribution, he reviews more recent case law developments. In many cases, Johnson reports, the government does not even bother to argue *ASR* deference.

Johnson also tells of a 2014 case in which the government argued before the Tax Court that *ASR* deference applied. In that case, the Tax Court nimbly dodged the issue. It wrote, "The regulations are silent on the issue before us, and [the government's] position on brief is at least arguably inconsistent with the statute." This makes little sense. The fact that the regulations are silent should not block the government from offering an *ASR*-protected interpretation as to how the regulations should apply. But the Tax Court refused to defer.

Reasons for the Tax Court's approach may include its status as an expert court. The Tax Court's authorizing statute directs the court to determine the "correct" amount of tax and might be interpreted as a particularly broad mandate for review of agency action. But the Tax Court's reluctance to embrace

ASR deference could also indicate that the *ASR* doctrine in general is overbroad. *Auer* and *Seminole Rock* can be read to suggest that *ASR* gives as much deference to informal agency guidance as *Chevron* gives to final notice-and-comment regulations. Should this be the law? As others have suggested, perhaps the Supreme Court should clarify that *ASR* gives less deference to an agency's interpretation of its regulations than *Chevron* gives to the regulations themselves.

There are three takeaways from Johnson's work on *ASR* deference. First, tax law's awkward relationship with administrative law is a work in progress. Second, sweeping language in a Supreme Court case doesn't automatically translate to sweeping deference in practice. Third, tax law can influence administrative law, as well as the other way around. For purposes of the debate about the proper scope of *ASR*, the Tax Court's reluctance to grant *ASR* deference might prove, as Johnson suggests, "less insubordinate than prescient."

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