

Commonly Used Rules of Statutory Interpretation in State Taxes — Part 1

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In this installment of *Smitten With the Mitten*, Gandhi examines primary rules of statutory interpretation and the canons of construction to aid state tax practitioners.

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While continuously referenced, the rules of statutory interpretation are rarely explained and often shrouded in passing reference to Latin phrases. While the rules themselves are easily understood, it can be challenging to apply the rules to specific factual situations in a succinct and efficient manner. The application of the rules is greatly affected by the posture of the court's viewpoint — is the basis semantic or pragmatic? Does the court adopt the rule of law or the golden rule? This article provides a simple primer on several primary rules of statutory interpretation and the associated canons of construction to aid the state tax practitioner.¹ These rules can assist in determining whether an exemption from sales tax applies, what the scope of an apportionment

¹In lieu of continuous and repetitive footnotes to primary sources, the author acknowledges reliance on, and encourages readers to use Valerie C. Brannon, "Statutory Interpretation: Theories, Tools and Trends," Congressional Research Service (Apr. 5, 2018); and William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* (2016). There is also the impressive treatise by Justice Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

formula is, or how gain on a sale should be computed. Understanding these rules allows a practitioner to support a return or refund position with a persuasive argument.

Overview

Our legal system has moved from one primarily based on common law, such as court cases, to a system of statutes enacted by legislatures. Understanding a statute and its implications requires an analysis beyond the mere words — a reader must understand how a statute says what it means. A reader must be able to take the statute apart with a clear understanding of how the parts relate to each other. This goes back to rules of grammar that may have not been reviewed since fourth grade or a college entrance test.

The problem of determining meaning is inherent in the nature of words. The meaning of words depends on the context in which they are used and might change over time. This is especially true when creating a statute that is crafted by a complex government process and touched by a range of participants, many of whom have only a limited understanding of the intent to be achieved by the words. The statute is then applied to an unforeseeable variety of circumstances over time. Drafters usually prefer generality of language, and any ensuing ambiguity is often intentional.

Thus, statutes have inherent problems. They are meant to address categories of conduct and must be flexible enough to capture unforeseen situations. Vagueness of language is not always a defect — the language used may be a result of compromise during drafting. A statute may be silent on a particular application because the

situation wasn't anticipated, or it may be intentional.

Two Main Approaches

When a statute is in dispute, the judge must interpret the law. While there is a variety of approaches, all judges share the goal of adhering to the legislature's intended meaning. Different approaches use different interpretative tools. The primary tools of statutory interpretation are (1) ordinary meaning; (2) statutory construction; (3) canons of construction; (4) legislative history; and (5) evidence of how a statute has been or may be implemented, which includes agency deference. This article focuses on statutory context and interpretive canons. Part 2 will focus on legislative history and agency deference.

Courts have adopted two major approaches to statutory interpretation. Know which approach your jurisdiction has adopted or which theory most judges in your state follow. There can be proponents of both approaches in the same judicial forum, which is why you should get information on the judges or hearing officers who will be deciding your case, so you can be persuasive in crafting support for your arguments.

The first approach is labeled intentionalism, or the golden rule. This approach focuses on the legislative process and the problem that the statute was trying to solve. In applying the golden rule, judges try to apply a reasonable standard, which can be supported by extrinsic resources, and liberally construe the statutory language if needed to effectuate the legislature's intent. The second approach is labeled textualism, or the rule of law. This approach focuses on the actual words of the statute, emphasizing the text over any unstated purpose. This approach limits extension of the statute by construction, although there are exceptions.

Both these approaches operate in our system of legislative supremacy, which means that the product of the legislature constrains judicial decisions.² There is a necessity of notice — you

² Forums that adopt the rule of law will not stray beyond the words of the statute. Forums that adopt the golden rule will consider evidence of legislative intent to assist in reading the statute but will not stray beyond recorded intent.

cannot be bound by a law of which you have no notice. This is to avoid secret laws. The necessity of notice is often implicated in retroactive legislation. It is impossible to have notice of a law yet to be enacted. Unfortunately, this limitation is constitutionally mandated only for criminal matters,³ not civil actions.

Next, statutes must be promulgated and passed by the legislature in accordance with the legislative process. While reports, bulletins, notices, and other forms of guidance are helpful, they do not carry the same authority as the law.⁴ Lastly, our legal system has a goal of consistency, which includes the goals of generality and uniformity. Generality of the law means that the law will apply to more than one person, as it will apply in general.⁵ Uniformity of the law means that the law will treat like situations the same.

Fundamentals to Reading a Statute

There are three elements in reading a statute: syntax, semantics, and pragmatics. Syntax refers to how words relate to each other. Syntax is innate, as it is internalized in our native tongue — you know if a verb is used incorrectly when it does not sound right. Semantics refers to the relation of words to meaning, that is, why the word "giraffe" means what it does. Pragmatics refers to the relation of words to the context of their use. All three are used simultaneously.

A statute generally has a title, preamble, definitions, interpretation clauses, entry conditions, and punctuation. Each of these elements performs a specific function. For example, the preamble contains the reason for the statute's enactment and the situations to be remedied. The purpose is taken as a limitation on how the statute is to be interpreted and the extent of its coverage. Definitions are often provided, and these definitions also work as a limitation. It is not appropriate to rely on an ordinary understanding of a defined word or term; if a specific definition is provided it will control over the ordinary meaning. Often the definition may

³ U.S. Const., Art. I, sections 9 and 10.

⁴ This guidance may be given deference, or may not. See *In re Complaint of Rovas*, 482 Mich. 90; 754 N.W.2d 259 (2008).

⁵ Or could apply to more than one person. Credits, incentives, and even exemptions are often pursued and written for only one taxpayer.

be in a separate section of the act. Always check definitions that cross-reference other sections or even other acts.

Interpretation clauses control the interpretation of any section. Examples include the phrases “shall be liberally construed” or “shall be deemed remedial.”

Then there are entry conditions. These are the words and phrases that control the application of the statute and must be satisfied for the provision to apply. For example, if the language states, “An individual 18 years of age or older may make a will,” the entry conditions are (1) an individual, and (2) who must be 18 years of age or older.

Grammar

In reviewing the words of the statute, we rely on the syntax rules we first learned in grammar school. The subject of the statute is the noun, which generally comes before the verb. In the above example, “an individual” is the subject, and the verb is “make.” The predicate refers to everything else (“18 years of age or older may [make] a will”). The verb is the heart of the predicate. The adjective “18 years of age or older” applies to the noun — an individual — and the adverb “may” modifies the verb. The adverb indicates how the action denoted by the verb occurs.

Grammar is also influenced by punctuation and anaphora. The function of punctuation is to make the writer’s meaning clear and aid in the statute’s grammatical structure. Proper syntax provides that commas usually set off words, phrases, and other sentence elements that are parenthetical or independent.⁶ For example, we look at how commas separate items in a list. However, punctuation is always subordinate to the text and can never control the plain meaning. Anaphora governs control and instructs in the relationship of words, and how words take their meaning from other words in the statute. Statutory language must be read in its grammatical context unless something else was clearly intended.⁷

⁶ See *Dale v. Beta-C Inc.*, 227 Mich. App. 57, 69; 574 N.W.2d 697 (1997).

⁷ *In re AGD*, 327 Mich. App. 332, 344-345; 933 N.W.2d 751 (2019) (quoting *Niles Township v. Berrien County Board of Commissioners*, 261 Mich. App. 308, 315; 683 N.W.2d 148 (2004)).

Other simple grammar tools can assist in understanding the meaning of the words used. One tool is to turn negatives into affirmatives. When the statute states “not more than,” the affirmative phase would be “less than or equal to.” When the statute states “unless” or “except,” the affirmative phase would be “if not” when placed at the beginning of the phrase.

Tools of Statutory Interpretation

The Plain Meaning Rule

Statutory construction begins with the plain meaning rule: The statute should be enforced as plainly written if possible, without additions or subtractions from the words provided. If a statute is susceptible to two constructions — which is not the same as being ambiguous — the court may look to prior or contemporaneous acts, extraneous circumstances, and the purpose intended. As noted above, whether the court follows the golden rule or the rule of law can affect statutory construction. Thus, it is important to understand the view taken by the court in preparing your arguments.

Ordinary meaning refers to the popular meaning of a word. Unless a word is defined in the statute or act, courts will look to its ordinary meaning as a definitional aid in interpreting the statute. Courts are permitted to use a variety of materials to gather evidence of the word’s ordinary meaning, including dictionaries and common usage. Multiple definitions may be provided by dictionaries, so check multiple sources to ensure similar meaning is given to similar words and to avoid a battle between definitions. Some words may have an industry-specific meaning which provides additional context. Do not be discouraged if the dictionary definition is not particularly helpful, because context is also important.

Disputes surrounding statutory interpretation are often focused on the meaning of only a few words. The court will need to interpret those words within the context of the full statutory provision and the rest of the act. The language of the rest of the provision and other provisions of the act will assist in clarifying the contested words. The remainder of the provision or act is referred to as the statutory scheme. Focus on and

explain how the disputed terms fit into the rest of the scheme (the section, the part, the chapter, the act). See if the language of the preamble is helpful in its declaration of intent and if it contains other declarations of purpose. Regardless of which rule the court follows, its goal will be to avoid an unintended result and consider practical consequences.

Canons of Construction

What are canons of construction? They are rules of thumb for decoding legal language. Think of them as similar to grammatical rules. There are semantic and substantive (sometimes called pragmatic) canons. Semantic canons are also referred to as textual canons, because they focus on the words of the statute. Pragmatic canons focus on context — looking at how words are used — and seek to balance predictability, efficiency, and the public interest. We start with a few of the most commonly applied canons for state tax statutes.

Rule of the Last Antecedent

The rule of last antecedent states that a limiting clause or phrase should read as modifying only the noun or phrase that it immediately follows. For example, “in the phrase ‘Texas courts, New Mexico courts, and New York courts in the federal system,’ the words ‘in the federal system’ might be held to modify only New York courts and not Texas courts or New Mexico courts.”⁸ A recent example provided by Justice Sonia Sotomayor highlights the proper application of this rule:

Imagine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year’s World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a *pitcher* to last year’s championship team, but to look more broadly for catchers and shortstops.⁹

Under the last antecedent rule, the phrase “from last year’s World Champion Kansas City Royals” modifies only the noun that it immediately follows, that is, “a pitcher.” An exception to the last antecedent rule applies if something in the subject matter or dominant purpose of the statute requires a different interpretation. For example, “the last antecedent rule does not apply when the modifying clause is set off by punctuation, ‘such as a comma.’”¹⁰ In the above example, there is no comma before the limiting clause (“from last year’s World Champion Kansas City Royals”). The absence of a comma between “pitcher” and “from” is presumed to be intentional, and therefore, the limiting clause cannot be read to modify the entire sentence. Rather, the limiting clause modifies only the last antecedent. The legislature could have included a comma before the limiting clause, which would read: “or a pitcher, from last year’s World Champion Kansas City Royals.” The absence of the comma instructs us how to apply the limiting clause in interpreting the statute.

The Rule Against Surplusage

The rule against surplusage instructs that each word and clause of a statute must be given operative effect if possible. The goal is to avoid an interpretation that would render a word or a part of a statute inoperative or redundant. Using our above example, if the scouts proposed a pitcher who had not been from last year’s World Champion Kansas City Royals, they would be failing to give operative effect, if possible, to the clause “from last year’s World Champion Kansas City Royals.” It would not matter whether the proposed pitcher was capable and competent. If there was a pitcher or two who had been from last year’s World Champion Kansas City Royals, only these pitchers would satisfy complying with the rule against surplusage.

The Rule of Specific Over General

The specific controls over the general. If there is a conflict between two statutory provisions — one of them a general statement and the other a

⁸ “Rule of the Last Antecedent,” *Black’s Law Dictionary* (2019).

⁹ *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) (emphasis added).

¹⁰ *Campbell v. Department of Treasury*, 331 Mich. App 312; 952 N.W.2d 312 (2020) (quoting *Cameron v. Auto Club Insurance Association*, 476 Mich. 55, 71; 718 N.W.2d 784 (2006)).

specific statement — the court will apply the more specific statement as an exception to the general statement.

For example, Michigan allows an exemption from sales and use taxes for machinery and equipment used in industrial processing.¹¹ The term “industrial processing” is defined to “begin[s] when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.”¹² The statute provides an exemption for machinery and equipment used in recycling. In the case of *TOMRA*, the state contended that bottle and can recycling machines in grocery stores did not qualify for the industrial processing exemption because the collection by the machines occurred before the crushed aluminum cans or glass bottles entered raw material storage, even though the collection step constituted recycling.¹³ The Michigan Supreme Court held that because the statute’s recycling provision is more specific than the general provision of “industrial processing,” the temporal limitation of the general statute (removal from raw materials storage through finished goods inventory storage) did not control or limit the specific exemption provision addressing recycling. Thus, machinery and equipment used at any time during recycling activity may qualify for the provision notwithstanding the boundaries of the temporal limitation contained in the general rule.

Canon of Casus Omissus

The canon of casus omissus instructs that a matter not covered should be treated as intentionally omitted. Thus, if the scouts proposed a pitcher from the Detroit Tigers who was even better than those from the Royals, this proposal would violate the canon of casus omissus. Because the directive was silent as to the Tigers, this silence is intentional, negating the proposal of a pitcher from that team.

¹¹ Mich. Comp. Laws section 205.54t; Mich. Comp. Laws section 205.94o.

¹² Mich. Comp. Laws 205.94o(7)(a).

¹³ *TOMRA of North America Inc. v. Department of Treasury*, _ N.W.2d _; 2020 WL 3261606 (Mich. Sup. Ct. June 16, 2020).

Substantive Canons

Turning to substantive canons, the intent is to derive context from the words used. These are often stated in Latin. Following are two that often arise in the context of state taxes.

Expressio unius — meaning “the express mention of one thing excludes all others.” When a statute includes a list of specific items, that list is presumed to be exclusive, and the statute will apply only to the listed items and not to other items. For example, if a statute states that “cars, motorcycles, scooters, and trains must be licensed,” the court would probably not require planes to be licensed. This is also referred to as the canon of negative implication. But if the list starts with a modifying phrase such as “at a minimum” or “including” or “such as,” or ends with a general catch-all term like “etc.,” the court will interpret the list as illustrating the types of things the statute applies to and not as an exclusive list.

Compare this to the canon *ejusdem generis* — meaning “of the same kind, class, or nature.” If the statute lists some things and ends with a general statement to include other things (a catchall phrase), the court will assume that the general statement includes only things that are of the same kind as the items listed. For example, if a statute states that “cars, motorcycles, scooters, and other motorized vehicles must be licensed,” the court would probably not require boats or planes to be licensed but may require a license for electric-assist bicycles or golf carts (the similarities being that all are vehicles with wheels, or travel on roadways).

Presumptions

Another form of pragmatic canons are judicial presumptions found in statutory precedent, which express for or against a particular outcome.¹⁴ Unlike rebuttable presumptions and conclusive presumptions, which are found in the rules of evidence, these practical presumptions assist in setting the context in which to review statutes. These presumptions come into play as courts try to balance the not-perfectly drafted law

¹⁴ Some may not consider these to be true canons. See Anita S. Krishnakumar and Victoria F. Nourse, “The Canon Wars,” 97 *Tex. L. Rev.* 163 (2018).

with the different viewpoints across courts. Unlike textualists, these presumptions allow courts to fill in a gap that may exist in a statute in a reasonable way until the legislature can address the perceived gap. Presumptions that are often applicable to state tax statutes are listed below.

- Presumption against implied repeals — repeals by implication are not favored. If subsequent statutory language can be argued to be in opposition, the court will want plain evidence of the intent to repeal the prior language.
- Presumption against retroactive legislation — courts read laws as prospective in application unless the legislature has unambiguously instructed retroactivity.
- Presumption of continuity — do not create discontinuities in legal rights and obligations without a clear statement to that effect.
- Presumption of legislative acquiescence — a long adherence to administrative interpretation with no subsequent change raises a presumption of legislative acquiescence.
- Presumption of narrow construction of exceptions — an exception to a general statement of policy is usually read narrowly to preserve the primary operation of the provision. This is often applied to tax exemptions.
- Presumption of purposive amendment — the courts assume that the legislature intends any statutory amendment to have real and substantial effect.

These presumptions look to the legal consequences of the interpretation rather than the textual issues. Regardless of the presumption, if the statute clearly states the opposite to the presumptions, the presumption is void. An example would be retroactive legislation. While it is not necessary for the statute to be ambiguous to apply these pragmatic canons, many courts will first apply the other interpretive tools available to them prior to applying presumptions.

Conclusion

Understanding the basic rules of statutory interpretation assists practitioners in reading the law and forming arguments to sway the trier of

fact. Knowledge of how to decipher the statutory text may reveal opportunities for claiming a refund or crafting an apportionment formula. While other tools can be used to interpret statutes, such as review of legislative history, statutory precedents, and the standards governing deference to administrative interpretations, these basic statutory interpretation tools should first be applied. ■