The Seminole Rock Doctrine and Deference to IRS Interpretations

By Peter A. Lowy and Juan F. Vasquez Jr.

When interpreting tax statutes, many judges treat revenue rulings like a brief filed by one of the parties — thus valuing them only to the extent they convince the court — or lend a minimal level of deference to the ruling.1 There is a question, however, whether the same level of deference applies when in a revenue ruling the IRS interprets not a tax statute but instead a Treasury regulation. There is a line of authority, originating from Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), that administrative agencies, when interpreting their own regulations, are entitled to deference. That is known as the Seminole Rock doctrine, and the IRS has at times attempted to invoke it to get judges to yield to revenue rulings without having to prove the validity of the ruling’s content.

The American Bar Association Section on Taxation’s Task Force on Judicial Deference recently counseled against the application of the Seminole Rock doctrine in the tax context.2 This article concurs with the task force’s conclusion and highlights five reasons courts should reject attempts by government litigators to obtain deference for revenue rulings without having to prove the validity of the ruling’s content.

I. The Seminole Rock Doctrine

The genesis of the doctrine that courts should defer to an agency’s interpretation of its own regulations can be traced to the Supreme Court’s leading decision in this area, Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). In Seminole Rock, the Court was faced with interpreting a regulation issued by the Office of Price Administration under the Emergency Price Control Act of 1942. In its official bulletins, OPA had interpreted the regulation, and that interpretation was consistent with the guidance it provided on inquiry by the general public. Addressing the issue of deference, the Court determined that the agency’s interpretation of its own regulation is entitled to controlling weight unless plainly inconsistent with the regulation.

On occasion over the past few decades, the Seminole Rock doctrine has affected the outcome of nontax cases. For example, in Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144 (1991), the Supreme Court deferred to a Labor Department interpretation of an Occupational Safety and Health Administration regulation (which the Labor Department had promulgated), because “the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.”3 Accordingly, the Court concluded that the agency’s interpretation controls “so long as its interpretation ‘sensibly conforms to the purpose and wording of the regulations.’”4

The Supreme Court has not, however, applied Seminole Rock in a tax case. In fact, the Court on several occasions has had the opportunity to apply the Seminole Rock doctrine to revenue rulings, but did not. For example, in United States v. Swank, 451 U.S. 571 (1981), the Court dealt with the interpretation of the percentage depletion regulations under section 611. The dissent argued that under the Seminole Rock doctrine the Court should defer to a revenue ruling that interprets relevant regulations. The majority, in a 7-2 decision, did not follow the path the dissent suggested and decided the case in contradiction to the IRS’s revenue rulings and other administrative interpretations.5

Note also that recent decisions call into question the continued validity of Seminole Rock in any context — tax or nontax. For example, in United States v. Mead, the Supreme Court enunciated a broad holding regarding deference to agency promulgations. According to the Court, the level of deference, if any, that the judiciary


should afford an agency action depends on how it fares under its earlier precedents in *Chevron* and *Skidmore.* The *Mead* decision does not on its face limit its application to agency interpretations of statutes, and doctrinally it seems applicable to an agency’s interpretation of its own regulations. Thus, although the Supreme Court has not expressly renounced the *Seminole Rock* doctrine, it is open to debate whether in *Mead*s wake the doctrine is dead.8

II. *Seminole Rock* Should Not Apply to Tax Cases

A. Treas. Regs Are Not the IRS’s to Interprete

Even if *Seminole Rock* is still good law, the IRS’s interpretation of Treasury regulations should not fall within the *Seminole Rock* doctrine because Treasury regulations are not the IRS’s own regulations, they are those of the Treasury.

The IRS is a bureau of the Treasury Department and ordinarily plays a role in the preparation of Treasury regulations, but the IRS does not speak with the voice of the Treasury and does not issue Treasury regulations. The issuance of a Treasury regulation is made under the signature of the secretary of the Treasury or his delegate (which can be an assistant secretary or deputy assistant secretary only; there has never been that delegation of authority for the IRS commissioner or any other IRS personnel). 9 In contrast, revenue rulings are issued by the IRS (ordinarily by approval from an assistant commissioner) without the imprimatur of the secretary, and thus a revenue ruling does not represent the Treasury’s interpretation of its own regulation.10

Because the *Seminole Rock* doctrine applies only when an agency interprets its own rule, and Treasury regulations are not the IRS’s own rules, the *Seminole Rock* doctrine should be inapplicable to an IRS revenue ruling that interprets a Treasury regulation.

B. Conflicts With Treasury Policy

The Treasury Department has a long-held practice of satisfying the notice and comment procedures under the Administrative Procedures Act (APA) before issuing final regulations. That practice applies to both legislative regulations and interpretive regulations, even though the APA does not necessarily require notice and comment for rules that are interpretative.11 Testing both types of regulations through notice and comment trials is an admirable and advisable practice because it produces better-informed rules through a more deliberative and democratic process.12

If the IRS could issue an interpretation without notice and comment, and if that interpretation were given the weight of an interpretive regulation — which the *Seminole Rock* doctrine would do if applicable — it would undermine the Treasury’s practice and policy by, in effect, accordng the status of an interpretative regulation to an administrative ruling issued without public input. That would result in interpretative rules issued without the deliberation and democratic qualities that Treasury has determined should exist for rules that potentially bind taxpayers.

Plainly, courts should not defer to an administrative interpretation under circumstances that contravene the relevant agency’s own policy and practice for issuing interpretations that bind the public and are to receive judicial deference.

C. Circumvents Supreme Court Precedent

Affording deference to revenue rulings would allow the IRS to make an end-run around judicial precedent regarding deference when interpreting tax statutes, because the IRS could almost always claim it is interpreting a regulation, not a statute.

The content of most tax statutes is cut and pasted into a Treasury regulation. Treasury regulations frequently echo the statute’s language and then on selected points provide elaboration or clarification, depending on the statute under which they are promulgated. Opening the door for *Seminole Rock* whenever a regulation parrots the statute would permit the IRS, at its whim, to circumvent Supreme Court precedent such as *United States v. Mead,*13 in which the Court, in connection with agency interpretations of statutes, expressly limited the application of the deferential standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*,14 because the IRS could almost always claim that it is interpreting the regulation, not the statute, thus taking the analysis beyond the reach of *Mead* and other Supreme Court precedent that could be applicable in the case of statutory interpretation.15

Said another way, the *Seminole Rock* doctrine is limited to agency interpretations of other agency pronouncements; it does not apply to interpretations of acts of

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323 U.S. 134 (1944).
9See “ABA Section of Taxation Report,” supra note 2 at 746 (suggesting that *Mead* diminished the application of *Seminole Rock*).
11For a discussion on the IRS’s role in the Treasury regulation process, see id.
14Supra note 6.
15As mentioned earlier, there is grave doubt whether the *Seminole Rock* doctrine is still viable after *Mead*; however, this section assumes arguendo that it is and that *Mead* does not apply in some instances when an administrative agency interprets its own regulations.
Congress. In the tax context, however, most tax statutes are restated in Treasury regulations — often verbatim — so the IRS can almost always claim it is interpreting a regulation, not a statute, thus bootstrapping judicial deference under the pretense that it is not treading on the well-charted judicial waters of statutory interpretation. The IRS could thereby receive deference for its rulings, comparable to Chevron-style deference, even though Congress has never delegated to the IRS general authority to make rules carrying the force and effect of law.

In short, permitting the IRS to hide behind the Seminole Rock doctrine would invite the IRS to circumvent Supreme Court precedent and allow the IRS to prevent the judiciary from making its own, independent judgment about the meaning of tax statutes.

D. Policy Reasons for Deference Do Not Apply

Courts interpret statutes; that is their business. Courts interpret regulations too. That is also their business. Nevertheless, courts do sometimes give deference to an agency’s interpretations of statutes and their own regulations, when the regulatory body has particular expertise that the court may lack. Specifically, deference to agency interpretation may make sense when the interpretation and application of the law is not merely a matter of legal analysis and enters the realm of the agency’s specialized expertise.

For example, the Environmental Protection Agency issues regulations on air quality standards. Similarly, the Labor Department issues regulations on ergonomics in the workplace. If the EPA determines that X pollutants may be emitted by manufacturers, or if the Labor Department determines that every business with X number of workers should have available nonreflective computer screens and chairs that have lumbar support, courts should be reluctant to second-guess the agency’s judgment, provided the regulation does not exceed the agency’s rulemaking authority. In those instances, regulations depend largely on scientific studies and judgments about public policy — matters committed to the expertise of the administrative agency. That differs from pure issues of statutory construction.

The distinction may be analogized to expert witnesses at trial. Courts tend to permit expert witnesses on issues of fact. If the expert’s methods seem reasonable, the expert’s judgment is afforded at least some degree of deference. In contrast, courts usually do not permit experts to testify as to what the law is; that is the job of judges. That is so even if the judge has no experience with the area of the law involved in the case, and even if the expert is one of the preeminent scholars in that area of law. Likewise, when an agency is merely engaging in substantive interpretation of some factual or scientific matter, courts may exercise their own, independent analysis, without deference to an administrative body.

Applying that paradigm to IRS interpretations of tax statutes and regulations suggests that in most instances the courts should not give deference to revenue rulings. In contrast to the interpretation and application of matters involving air quality and ergonomics, interpretation of tax statutes and regulations is usually pure interpretation of law. Said another way, while the internal rev-

E. Encourages Poorly Drafted Regulations

Empowering the IRS to issue outcome determinative rulings whenever Treasury regulations present ambiguity encourages the government to promulgate unclear regulations. All the government would have to do is “occupy the field” with a general regulation on a subject for the IRS to be permitted to bind taxpayers with specific interpretations. That is both a bad idea and contrary to the statutory scheme.

Taxpayers in litigation are already disadvantaged by their burden of proof and the presumption of correctness that are ordinarily given to IRS determinations; allowing the government to issue ambiguous regulations and then render self-serving interpretations during litigation would represent an unprecedented slanting of the playing field against taxpayers. The IRS should not be able to dictate the outcome of litigation by issuing a revenue ruling based on the fact pattern of the case to guarantee its victory.16

Moreover, ambiguous regulations foster uncertainty for taxpayers seeking to comply with the tax laws and properly report their federal taxes, and thus regulation drafters should be encouraged to strive for clarity, not obfuscation.17

Conclusion

The question is unsettled whether a revenue ruling should be given greater deference when it claims to interpret a Treasury regulation as opposed to an act of Congress. The better view appears to be that it should not. That is the view adopted by the ABA Tax Section’s Judicial Deference Tax Force and endorsed in this article. Giving revenue rulings controlling weight under those circumstances would encourage vague and ambiguous regulations and unfairly tilt the playing field against taxpayers. It would also conflict with Treasury’s policy to permit the public to participate in the promulgation of all binding interpretations of the tax code, and it would take questions of statutory interpretation out of the hands of the judiciary and into the hands of bureaucrats.

16 Cf. Thomas Jefferson University v. Shalala, supra note 4 (Thomas, J., dissenting) (arguing that the Seminole Rock doctrine would encourage vague and ambiguous regulations because it would maximize the agency’s power and give it greater latitude to make expedient decisions).

17 See id. (Thomas, J., dissenting) (explaining that regulations should be clear and definite so that affected parties have adequate notice concerning the agency’s understanding of the law).