JUDICIAL DEFERENCE TO TAXING AGENCIES

NATIONAL ASSOCIATION OF STATE BAR TAX SECTIONS

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I. WHAT IS DEFERENCE?

a. What does the term "deference" actually mean?

    i. (Try to encourage the group to generate definitions, the more conflicting the definitions the better)

b. The term "deference" is often referenced in legal opinions, but it is very loosely defined. This lack of a strict definition has led to inconsistent application of deference principles and therefore unpredictable results.

    i. (If different definitions were mentioned by the group, emphasize the differences)

c. Deference sometimes refers to legal compulsion and other times it only insinuates mere persuasion.

    i. For instance, when a court says it is deferring to a regulation, it usually means that it recognizes the regulation as having force of law.

    ii. In contrast, when a court says it is deferring to an administrative decision, it usually means, not that the decision is binding law, but rather that the court finds the decision to have some influential or persuasive effect.

II. ARGUMENTS FOR DEFERENCE?

a. In ***Chevron U.S.A., Inc. v. NRDC*** the U.S. Supreme Court focused on accountability and noted that it is inappropriate for the judicial branch, which has no constituency, to substitute its policy preferences for that of the executive branch, which has a constituency… ***Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837**

b. Deference promotes consistency among reviewing courts. There are many judges with widely varying ideological perspectives and policy preferences. Without a standard of deference, active judicial review of agency interpretations could result in wildly inconsistent results.

c. Deference acknowledges the agency specialization in the subject matter. Agencies have the expertise that the courts lack to more effectively decide policy and interpret the relevant statutes. This is especially the case in complex or technical areas such as taxation.

d. The agency's proximity to the legislative process may give it special insight into legislative intent, the agency likely even helped draft the relevant statute.

e. Statutory ambiguity may be construed as a delegation of interpretive power to the agency.

f. Are there any other arguments supporting deference??

III. ARGUMENTS AGAINST DEFERENCE?

a. In Southern Ute Indian Tribe v. Amoco Prod. Co., the court argued that routine unquestioning deference to agency interpretations would be an abdication of a court's duty of judicial review and independent judgment, and thus, would grant agency interpretations the force of law where the legislature did not so intend. ***Southern Ute Indian Tribe v. Amoco Prod.* Co., 119 F.3d 816, 833 (10th Cir. 1997)**

b. The Southern Ute court emphasized limited deference as a means to maintain the separation of powers by restraining the unfettered power of the executive branch.

c. Limited deference to unelected agency administrators could be viewed as a protection for citizens against governmental overreach. ***In re Tax Exemption of Kaul,*** **933 P. 2d 717, 725 (Kan. 1997).** Taxes should be imposed by democratically elected legislators, not by interpretations issued by unelected administrators.

d. Limited deference may be especially important when an agency's current position runs contrary to long-standing practice, interpretations, or understandings on which the public may have relied. ***United States v. Home Concrete & Supply, LLC,*** **132 S. Ct. 1836, 1846 (2012)(Scalia, J., concurring)**

e. Excessive deference could be a violation of due process. When judges engage in systematic bias it denies one party or the other their right to due process of law. Therefore, when judges blindly defer to agency interpretations, it may be considered systematic bias in favor of the government and against the citizen

f. Are there any other arguments against deference??

IV. LEVELS OF DEFERENCE ?

a. Although the different state deference standards actually represent a continuous spectrum of possible approaches to agency interpretation, they generally fit into four categories:

   i. strong deference,

   ii. intermediate deference,

   iii. Deferential De-novo review

   iv. Non-deferential De-novo review

b. **<u>Strong Deference</u>**

   i. Where courts defer to the agency interpretation as long as it is not expressly contrary to statute. Courts applying strong deference often stress both legislative intent to delegate authority to an agency and the efficiency in avoiding duplication of interpretive work. This category seems most consistent with the announced "Chevron two-step" because deference is mandatory when a statute is ambiguous and the agency's interpretation is reasonable. ***Chevron U.S.A., Inc. v. NRDC,*** **467 U.S. 837;** ***State Tax Comm'r v. Mask,*** **667 So. 2d 1313, 1314 (Miss. 1996);** ***Buehner Block Co., Inc. v. Dep't of Revenue,*** **139 P.3d 1150, 1153 (Wyo. 2006**).

c. **<u>Intermediate Deference</u>**

   i. Similar to strong deference, but courts exercising intermediate deference often assert discretion to review matters of law de novo. Thus, intermediate deference differs from strong deference because it presents the option, rather than the obligation, to defer to the agency. This category may be most consistent with the current federal application of Chevron because it allows courts the ability to engage in detailed review but the option to ultimately defer.

   ii. The likelihood of a court deferring to an agency's decision often increases if the agency's position was developed through established rulemaking procedures, has been of long standing, has received general acquiescence, has been applied consistently, or involves a highly technical, specialized matter. **E,g.,** ***Kelly v.***

***Zamarello*, 486 P.2d 906, 916 (Ark. 1971); *J.R. Simplot Co. v. State Tax Comm'r*, 820 P.2d 1206 (Id. 1991); Steve R. Johnson, Conditional Deference to Tax Authorities, State Tax Notes, Apr. 25, 2011, p. 269.**

d. **<u>Deferential De-novo Review.</u>**

i. These courts assert their de novo authority and imply that they will not defer. However, the court acknowledges the importance of agency expertise and experience. Here deference is neither mandatory nor forbidden, but, de novo review is the default. This category may be most akin to the Skidmore doctrine because agency interpretations are valued only as far as they are persuasive. ***Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *McCarthy v. Comm'r of Revenue*, 391 Mass. 630, 632 (1984).**

e. **<u>Non-Deferential De-novo review</u>**

i. This standard discourages deference to agency interpretation, asserting that the judiciary is most capable of determining statutory meaning. Since this option restricts the courts discretion to defer to the agency, this standard is usually not espoused by the courts themselves. Most often when this standard is applied it is because it has been mandated by the legislature through statute.

ii. Utah tax code mandates this standard of review on district courts in §59-1-601;

> "… the district court shall have jurisdiction to review by trial de novo all decisions issued by the commission . . . resulting from formal adjudicative proceedings. "trial de novo" means an original, independent proceeding, and does not mean a trial de novo on the record."

iii. Alternatively, when a tax matter is brought before the Utah Court of Appeals or Supreme Court a more deferential standard of review applies similar as would be the case in most states if an appellate court is reviewing a lower court decision.

§59-1-610;

> "When reviewing formal adjudicative proceedings commenced before the commission, the Court of Appeals or Supreme Court shall: (a) grant the commission deference concerning its written findings of fact, applying a substantial evidence standard on review; and (b) grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of discretion contained in a statute at issue before the appellate court."

V. DEFERENCE TO WHAT?

a. The question of judicial deference to agency action often arises in one of the following contexts:

i. Agency rules and regulations

ii. Agency interpretation of statutes

iii. Agency interpretation of its own rules or regulations

iv. Agency final administrative decisions

v. Agency fact finding determinations

VI. DEFERENCE TO AGENCY REGULATIONS OR RULES

a. **Deference to rules or regulations created through proper rulemaking.**

i. California - ***Yamaha Corp. of Am. v. State Bd. of Equalization,*** **960 P.2d 1031 (Cal. 1998):** "[Q]uasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves."

ii. Wyoming - ***RME Petroleum Co. v. Wyoming Dep't of Revenue,*** **150 P.3d 673, 688 (Wyo. 2007):** "Administrative rules and regulations have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its action." *Painter v. Abels*, 998 P.2d 931, 938 (Wyo. 2000).

iii. Minnesota - ***Minnesota Energy Resources Corp. v. Comm'r of Revenue,*** **Docket No. 8041, 2014 WL 4953754, (Minn. Tax Ct. Sep. 29, 2014):** Although a duly adopted administrative rule has the force and effect of law, an administrative regulation is only valid to the extent that it is consistent with the statutory authority pursuant to which it was promulgated. If a regulation is not consistent with statutes, then it does not have the force and effect of law.

b. **Deference to Rules or Regulations that Exceed the Scope of Statute.**

i. Colorado - ***Sears v. Romer,*** **928 P.2d 745 (Colo. App. 1996):** Agency regulations exceeding the scope of the statute for which they were written, they are void.

ii. Connecticut - ***AirKaman, Inc. v. Groppo,*** **Docket No. CV 87-0332458 S (Conn. Superior Ct. Apr. 22, 1991):** The commissioner's regulation must comport with the legislative intent behind the statute.

iii. Kentucky - **Appalachian Racing, LLC v. Family Trust Found. of Kentucky, Inc., 423 S.W.3d 726, 736 (Ky. 2014):** "One of the fundamental tenets of administrative agency law is that an administrative agency 'is limited to a direct implementation of the functions assigned to the agency by the statute. Regulations are valid only as subordinate rules when found to be within the framework of the policy defined by the legislation.'

iv. Ohio - ***Ransom & Randoph Co. v. Evatt,*** **142 Ohio St. 398 (1944), syllabus ¶ 4:** "While the Tax Commissioner has the power under the statutes of this state to enact rules to facilitate the work of his department, such rules may not enlarge or restrict statutes exempting intangible property from taxation."

VII. DEFERENCE TO AGENCY INTERPRETATION OF STATUTE

a. Iowa - ***Am. Home Prod. Corp. v. Iowa State Bd. of Tax Review,*** **302 N.W.2d 140, 142–43 (Iowa 1981):** It is a "rule of construction that tax statutes are to be construed against the taxing authority and in favor of the taxpayer…"

b. Utah - ***Airport Hilton Ventures, Ltd. v. Utah State Tax Comm'n,*** **976 P.2d 1197, 1200 (Utah 1999): "**The statutes at issue operate as tax imposition statutes—they describe who will be taxed. We " 'construe taxation statutes liberally in favor of the taxpayer, leaving it to the legislature to clarify an intent to be more restrictive if such intent "The

rule is different for statutes granting exemptions from taxation. In such cases, this court construes the statute strictly against the taxpayer." *See Newspaper Agency Corp. v. Auditing Div.,* 938 P.2d 266, 270 (Utah 1997).

c. West Virginia - ***CB&T Operations Co. v. Tax Com'r of State,*** **564 S.E.2d 408, 417 (W. Va. 2002):** "In contrast to instances where we are called upon to interpret statutes that affirmatively impose a tax, here we are dealing with a statute that purports to limit an otherwise generally applicable tax law. As to the former circumstance, this Court has consistently signaled its willingness to construe any ambiguity in favor of the taxpayer. In cases involving the latter situation, however, we have indicated that " ' [w]here a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption.'

VIII. DEFERENCE TO AGENCY INTERPRETATION OF ITS OWN RULES AND REGULATIONS.

a. Arizona - ***Empire Sw., LLC v. Department of Revenue,*** **Docket No. TX 2004000593 (Ariz. Tax Ct. Jan. 5, 2006*):*** The Department's interpretation of the statute it enforces is entitled to substantial deference. The same may be said of the Department's interpretation of its implementing Rule, which the Court finds is reasonable in light of the Legislative history of the statute. An agency rule is entitled to far greater weight than a much older agency letter.

b. Illinois - ***Dep't of Revenue v. Doe,*** **Docket No. IT 15-02 (Ill. Dec. Dep't of Rev. Hr'gs Jan. 14, 2015)**: An agency's interpretation of its regulations and enabling statute are "entitled to substantial weight and deference," given that "agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent."

c. Texas - ***Mont Belvieu Caverns, LLC, v. Texas Comm'n on Environmental Quality,*** **382 S.W.3d 472 (Tex. Ct. App. 2012):** To the extent our analysis turns on TCEQ's construction of the rules themselves, we defer to the agency's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule or underlying statute. We construe administrative rules in the same manner as statutes because they have the force and effect of statutes.

d. Massachusetts - ***Rosing v. Teachers' Ret. Sys.,*** **458 Mass. 283, 290 (2010):** "An administrative interpretation developed during, or shortly before, the litigation in question is entitled to less weight than that of a longstanding ... interpretation."

IX. DEFERENCE TO FINAL ADMINISTRATIVE DECISIONS

a. Utah - ***Decker Lake Ventures, LLC v. Utah State Tax Comm'n,*** **356 P.3d 1243, 1245 (Utah 2015): "**Our review of the commission's decision is governed by statute. Utah Code § 59–1–610. Under the cited provision, we review the commission's legal determinations under a 'correction of error standard' that yields 'no deference' to the commission's analysis. As to *mixed* determinations (involving the application of legal standards to a given set of facts), however, the statute is silent. So on those questions we review the commission's application of law to fact under our traditional framework. " That framework treats some mixed questions as fact-like (meriting deferential review) and others as more law-like (meriting no deference). *Manzanares v. Byington (In re Adoption of Baby B.),* 2012 UT 35, ¶ 42, 308 P.3d 382. And it assigns the level of deference based on an assessment of 'the nature of the issue and the marginal costs and

benefits of a less deferential, more heavy-handed appellate touch.' Where the mixed question presented is fact-intensive and unlikely to result in the development of appellate precedent necessary to guide parties in future cases, for example, our review yields substantial deference to the commission.

b. Wyoming - ***Chevron U.S.A., Inc. v. Dep't of Revenue*, 158 P.3d 131, 134 (Wyo. 2007):** "When an appellant challenges an agency's findings of fact and both parties submitted evidence at the contested case hearing, we examine the entire record to determine if the agency's findings are supported by substantial evidence. If the agency's findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the agency and will uphold the factual findings on appeal.

c. New Mexico - ***TPL, Inc. v. New Mexico Taxation & Revenue Dep't*, 64 P.3d 474 (N.M. 2002).** Generally, there is a presumption that the Department's assessment is correct. See NMSA 1978, § 7-1-17(C) (1992). Nonetheless, we review de novo a lower court or administrative agency's application of law to facts. In addition, when we are required to interpret the phrases within a statute, we are presented with a question of law, which we review de novo. In cases where such facts are undisputed, "'it is the function of the courts to interpret the law,' and courts are in no way bound by the agency's legal interpretation."

X. DEFERENCE TO AGENCY FACT FINDING DETERMINATIONS

a. California - ***Spaid v. California Franchise Tax Board*, Docket No. D048338, 2007 WL 1536831 (Cal. Ct. App. 2007) (citations omitted):** "In tax litigation, a presumption of correctness generally attaches to tax assessments. However, in a case involving unreported income, the presumption of correctness does not apply if the taxing authority makes a naked assessment; i.e., a tax assessment that is without rational foundation. The presumption of correctness "is only as strong as its rational underpinnings.

b. Illinois: - ***Sweeney v. Dep't of Revenue*, Docket No. 10 L 050524 (Ill. Cir. Ct. June 26, 2013).** While Courts have uniformly sustained a prima facie case based on corrected tax returns, Illinois law requires that the methods used to formulate the conclusions in a Notice of Deficiency must meet some minimum standard of decency and reasonableness when being called into question.

c. Ohio - ***Bay Mechanical & Electrical Corp. v. Testa, Tax Comm'r*, 978 N.E.2d 882 (Ohio 2012) (quotations omitted).** "The Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful. . . . [Before the Supreme Court], the question for our determination is whether the . . . decision is reasonable and lawful, and because the function of weighing evidence and determining credibility belongs to the [Commission], our review of that aspect of its findings applies the highly deferential abuse-of-discretion standard."

XI. FACTORS RELATING TO DEFERENCE

a. Burden of Proof

i. Taxpayers always bear the burden of proof in civil tax cases. The main reason for this is the fact that the taxpayer has superior access to the relevant evidence. Thus, taxpayers may lose, not because the court has chosen to defer to the agency's view, but because the taxpayer has failed to shoulder her burden of proof.

b. **Presumptions of Correctness**:

   i. The tax agency will prevail if the taxpayer fails to present sufficient evidence to dispel the presumption. (i.e. presumption of domicile under Utah Code §59-10-136). The law as to this type of agency advantage has developed independently of deference doctrine although the two may lead to similar outcomes and some conceptual commonalities exist.

ADDITIONAL MATERIALS

I. DEFERENCE TO AGENCY REGULATIONS OR RULES

A. Deference to rules or regulations created through proper rulemaking.

1. Alaska

***State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 624 (Alaska 1993):** "[W]e accord the administrative regulation a presumption of validity; the party challenging the regulation bears the burden of demonstrating invalidity. *Alaska Int'l Indus. v. Musarra*, 602 P.2d 1240, 1245 n. 9 (Alaska 1979). We review a 'legislative' type of regulation, such as is presented here, with considerable deference:
First, we will ascertain whether the regulation is consistent with and reasonably necessary[1] to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. This aspect of review insures that the agency has not exceeded the power delegated by the legislature.
Second, we will determine whether the regulation is reasonable and not arbitrary. This latter inquiry is proper in the review of any legislative enactment.
Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1971). We will not substitute our judgment for that of the agency with respect to the efficacy of the regulation nor review the 'wisdom' of a particular regulation. *Alaska Int'l Indus. v. Musarra,* 602 P.2d at 1245 n. 9."

2. Arizona

***Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 271 P.2d 477 (Ariz. 1954):** The rule is that general rules and regulations of an administrative board or commission prescribing methods of procedure have the effect of law and are binding on the Commission and must be followed by it so long as they are in force and effect.

***Empire Sw., LLC v. Department of Revenue*, Docket No. TX 2004000593 (Ariz. Tax Ct. Jan. 5, 2006):** The Department's interpretation of the statute it enforces is entitled to substantial deference. The same may be said of the Department's interpretation of its implementing Rule, which the Court finds is reasonable in light of the Legislative history of the statute. Further, the Rule upon which the Department relies was promulgated 10 years after the date of the letter upon which Plaintiff relies.

3. California

***Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031 (Cal. 1998):** "[Q]uasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves."

4. Connecticut

***AirKaman, Inc. v. Groppo*, 607 A.2d 410, 414, n.8 (Conn. 1992):** "We accord great deference and weight to the commissioner's regulatory interpretation of a statute he is charged with administering."

5. Massachusetts

***Zisler v. Commissioner of Revenue*, Docket No. C271677, 2006 WL 2946314 (Mass. App. Tax Bd. Oct. 13, 2006):** In general, "[w]here a regulation is consistent with the statute which it interprets and represents a reasonable interpretation of that statute, the administrative interpretation is entitled to deference."

6. Minnesota

***Minnesota Energy Resources Corp. v. Comm'r of Revenue*, Docket No. 8041, 2014 WL 4953754, (Minn. Tax Ct. Sep. 29, 2014):** Although a duly adopted administrative rule has the force and effect of law, an administrative regulation is only valid to the extent that it is consistent with the statutory authority pursuant to which it was promulgated.

7. Missouri

***DFG Food Ent., Inc. v. Dir. of Revenue*, Docket No. 01-1757 RV, 2002 WL 31205287 (Missouri Admin. Hr'g Comm'n Sep. 5, 2002):** "[S]tate regulations, promulgated pursuant to properly delegated authority, have the force and effect of law[.]" *Pollock v. Wetterau Food Distr. Group*, 11 S.W.3d 754, 766 (Mo. App., E.D. 1999). We are well aware that we need not follow a regulation that is contrary to statute. *Bridge Data Co. v. Director of Revenue*, 794 S.W2d 204, 207 (Mo. 1990).

8. Nebraska

***Valpak of Omaha, LLC v. Nebraska Dep't of Revenue*, 861 N.W.2d 105, 110 (Neb. 2015):** "Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012), *cert. denied* —— U.S. ——, 133 S.Ct. 1631, 185 L.Ed.2d 616 (2013). And, in considering the validity of regulations, 'courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.' *Smalley*, 283 Neb. at 557, 811 N.W.2d at 256."

9. New Jersey

***Regent Corp. of Union, Inc. v. Div. of* Taxation, 27 N.J. Tax 577 (N.J. Tax Ct. Jan. 17, 2014):** An agency's regulations adopted pursuant to a legislative mandate or grant of authority enjoy presumptive validity.

10. Ohio

***Lyden Co. v.* Tracy, 666 N.E.2d 556 (Ohio 1996):** In answer to the first contention, we have previously acknowledged that "[a]dministrative regulations issued pursuant to statutory authority have the force and effect of law; consequently, administrative agencies are bound by their own rules until those rules are duly changed." Thus, for purposes of R.C. 5739.16(B) a rule is "in full force and effect" until the commissioner rescinds it or a court specifically declares it invalid as being contrary to statute or unreasonable.

11. Oregon:

***Fountain Plaza LLC v. Jackson Cty. Assessor*, 2007 WL 3130547, at *3 (Or. T.C. Oct. 25, 2007):** "[A] duly established and promulgated rule has the force and effect of law. *Dayton v. Dept. of Rev.*, 5 OTR 56, 65 (1972), citing *Arnold v. Gardiner Hill Timber Co.*, 199 Or 517, 523, 263 P.2d 403 (1953)."

12. Pennsylvania:

***Evergreen Helicopters, Inc. v. Com.*, 516 A.2d 124, 126–27 (Pa. 1986):** "[A]n administrative agency's regulations which have been duly authorized and promulgated have the force of law and are binding upon that agency." *Fumo v. Department of Insurance,* 58 Pa.Commonwealth Ct. 392, 427 A.2d 1259 (1981).

13. South Dakota

***Sioux Falls Shopping News, Inc. v. Dep't of Revenue & Regulation*, 749 N.W.2d 522, 527 (S.D. 2008):** "Administrative rules have the force of law and are presumed valid." *Matter of Sales and Use Tax Refund Request of Media One*, 559 N.W.2d 875, 877 (S.D. 1997).

14. Texas

***Mont Belvieu Caverns, LLC, v. Texas Comm'n on Environmental Quality*, 382 S.W.3d 472 (Tex. Ct. App. 2012):** We construe administrative rules in the same manner as statutes because they have the force and effect of statutes.

15. West Virginia

***Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 466 S.E.2d 424, 434–35 (1995):** "[L]egislative rules in West Virginia are authorized by acts of the Legislature and we have treated them, as they should be, as statutory enactments."

16. Wyoming

***RME Petroleum Co. v. Wyoming Dep't of Revenue*, 150 P.3d 673, 688 (Wyo. 2007):** "Administrative rules and regulations have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its action." *Painter v. Abels*, 998 P.2d 931, 938 (Wyo. 2000).

B. Deference to Rules or Regulations that Exceed the Scope of Statute.

1. Alabama

***Alabama Dep't of Revenue v. Jim Beam Brands Co.*, 11 So. 3d 858, 864 (Ala. Civ. App. 2008):** "The provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation." *Ex parte Jones Mfg. Co.*, 589 So.2d 208, 210 (Ala. 1991). *See also Ex parte Crestwood Hosp. & Nursing Home, Inc.*, 670 So.2d 45 (Ala. 1995) (accord); *Ex parte City of Birmingham*, 992 So.2d 30, 32 (Ala. Civ. App.2008) (accord); *Kids' Klub, Inc. v. State Dep't of Hum. Res.*, 874 So.2d

1075 (Ala. Civ.App. 2003) (accord); and 1A N. Singer, *Sutherland Statutory Construction* § 31.02 (4th ed. 1985) (accord).
"It is axiomatic that administrative rules and regulations must be consistent with the constitutional or statutory authority by which their promulgation is authorized. See C. Sands, *Sutherland Statutory Construction* § 31.02 (4th ed. 1973). 'A regulation ... which operates to create a rule out of harmony with the statute, is a mere nullity.' *Lynch v. Tilden Produce Co.*, 265 U.S. 315, 44 S.Ct. 488, 68 L.Ed. 1034 (1924). This is because an administrative board or agency is purely a creature of the legislature, and has only those powers conferred upon it by its creator. *Woodruff v. Beeland,* 220 Ala. 652, 127 So. 235 (1930)."
Ex parte City of Florence, 417 So.2d 191, 193–94 (Ala. 1982).
…
"[A]s a general rule, the Department is not authorized to subvert a statute, *see Ex parte Jones Mfg. Co.,* 589 So.2d at 210 ("A regulation cannot subvert or enlarge upon statutory policy."), or to render statutory language meaningless, *see Ex parte Uniroyal Tire Co.*, 779 So.2d 227, 236 (Ala. 2000) (" 'It must be presumed,' however, that statutes are enacted with a 'meaningful purpose.' " (quoting *Adams v. Mathis*, 350 So.2d 381, 385–86 (Ala. 1977)))."

***Ex parte Jones Mfg. Co., Inc.*, 589 So. 2d 208, 210 (Ala. 1991):** "The provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation. *Ex parte State Dep't of Human Resources,* 548 So.2d 176 (Ala. 1988). An administrative regulation must be consistent with the statutes under which its promulgation is authorized. *Ex parte City of Florence,* 417 So.2d 191 (Ala. 1982). An administrative agency cannot usurp legislative powers or contravene a statute. *Alabama State Milk Control Bd. v. Graham,* 250 Ala. 49, 33 So.2d 11 (1947). A regulation cannot subvert or enlarge upon statutory policy. *Jefferson County Bd. of Ed. v. Alabama Bd. of Cosmetology,* 380 So.2d 913 (Ala. Civ. App. 1980)."

2. Colorado

***Sears v. Romer*, 928 P.2d 745 (Colo. App. 1996):** Where an agency's regulations exceed the scope of the statute for which they were written, they are void.

3. Connecticut

***AirKaman, Inc. v. Groppo*, Docket No. CV 87-0332458 S (Conn. Superior Ct. Apr. 22, 1991):** The commissioner's regulation must comport with the legislative intent behind the statute.

4. Florida

***6 to 12 Store 2, Inc. v. Dep't of Revenue*, Docket No. DOR 08-3-FOF; 07-3163, 2008 WL 618203 (Fl. Div. Admin. Hr'gs July 14, 2008):** Even if one or more of Respondent's rules were to define sampling authorized in Subsection 212.12(6)(b) to mean the field visits evidenced in this proceeding, rulemaking is authorized in furtherance of statutory authority and not to amend, expand, or enlarge statutory authority. *Willette v. Air Products and Bassett and Department of Labor and Employment Security, Division of Workers' Compensation,* 700 So. 2d 397, 399 (Fla. 1st DCA 1397). In *Willette,* the court wrote:
Executive branch rulemaking is authorized in furtherance of, not in opposition to, legislative policy. Just as a court cannot give effect to a statute (or administrative rule) in a manner repugnant to a constitutional provision, so a duly promulgated rule, although "presumptively valid until invalidated in a section 120.55 rule challenge [citations omitted]," must give way in judicial proceedings to any contradictory statute that applies.

5. Georgia

***Dep't of Human Res. v. Anderson*, 218 Ga. App. 528 (1995):** An administrative rule which exceeds the scope of or is inconsistent with authority of the statute upon which it is predicated is invalid.

6. Illinois

***Hartney Fuel Oil Co. v. Hamer*, 998 N.E.2d 1227 (Ill. 2013):** Administrative agencies have deference in enacting regulations, and regulations are presumed valid. Administrative agencies likewise are entitled to deference in interpreting the statutes they enforce. Agencies' broad latitude in enacting regulations to enforce their statutes may include presumptions or other shortcuts in administrative decision making. We do not strike regulations down simply because they are unwise or bad policy. Thus, our review is not whether the regulation is the best possible implementation, but rather whether it is a permissible interpretation of the statute.

As noted above, the question of determining tax situs for a tax on the business of selling presents a complicated inquiry. One line of reasoning would persuade us to find the regulation constitutes a reasonable compromise between the administrative difficulty of determining appropriate tax situs in every situation and the need for accurate tax assessment. A regulation might call for a "shortcut" in decision-making without effecting a prohibited expansion or contraction of the taxing statute it implements.

On the other hand, a regulation cannot narrow or broaden the scope of intended taxation under a taxing statute. A regulation that does so must be held invalid. We are persuaded that this regulation impermissibly narrows the local ROT Acts, contrary to the legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions.

7. Kansas

***Hockett v. Trees Oil Co.*, 251 P.3d 65, 70–71 (Kan. 2011), *as corrected* (June 20, 2011):** "To be valid, a regulation must come within the authority conferred by statute, and a regulation which goes beyond that which the legislature has authorized or which extends the source of its legislative power is void." (quoting *In re Tax Appeal of Alex R. Masson, Inc.*, 909 P.2d 673 (Kan. App. 1995)).

8. Kentucky

Appalachian Racing, LLC v. Family Trust Found. of Kentucky, Inc., 423 S.W.3d 726, 736 (Ky. 2014): "One of the fundamental tenets of administrative agency law is that an administrative agency 'is limited to a direct implementation of the functions assigned to the agency by the statute. Regulations are valid only as subordinate rules when found to be within the framework of the policy defined by the legislation.' *Flying J Travel Plaza v. Com., Transp. Cabinet, Dep't of Highways*, 928 S.W.2d 344, 347 (Ky. 1996). '[R]egulations may not exceed the scope of the statutory provisions on which they are based." *Faust v. Commonwealth*, 142 S.W.3d 89, 98 (Ky. 2004). An administrative agency may not by regulation 'amend, alter, enlarge, or limit terms of legislative enactment.' *Bd. of Educ. of Fayette County v. Hurley–Richards*, 396 S.W.3d 879, 889 n. 12 (Ky. 2013) (quoting *Ruby Const. Co. v. Dep't of Revenue, Com. ex rel. Carpenter*, 578 S.W.2d 248, 252 (Ky.App. 1978))."

9. Louisiana

A tax regulation cannot extend the taxing jurisdiction of the statute, as taxes are imposed by the legislature, not the Department. *See Chicago Bridge & Iron Co. v. Cocreham*, 317 So.2d 605, 612 (La.1975), *Dow Chemical Co. v. Traigle*, 336 So.2d 285, 288 (La.App. 1st Cir.). In *Utelcom, Inv. v. Bridges*, (La. App. 1 Cir. 2011) 77 So.3d 39, 49 the Court recently re-affirmed these principles and struck down a significant corporate franchise tax regulation.
An administrative agency's construction of its own regulation cannot be given effect where it is contrary to or inconsistent with the legislative intent of the applicable statute. *See BP Products North America, Inc. v. Bridges*, 2010-1860 (La. App. 1st Cir. 8/10/11), 77 So.3d 27, 31, writ denied, 2011-1971 (La. 11/14/11), 75 So.3d 947.

10. Massachusetts

***Duarte v. Comm'r of Revenue,* 451 Mass. 399 (2008):** Our review of the "validity of a regulation promulgated by a State agency is guided by the established principle that `[r]egulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate, '"Only an "agency regulation that is contrary to the plain language of the statute and its underlying purpose may be rejected by the courts. . . . While we generally defer to the regulations promulgated by a State agency, the "principles of deference ... are not principles of abdication." An agency "has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes" under which the agency operates.

11. Minnesota

***Minnesota Energy Resources Corp. v. Comm'r of Revenue,* Docket No. 8041 (Minn. Tax Ct. Sep. 29, 2014):** If a regulation is not consistent with statutes, then it does not have the force and effect of law.

***Billion v. Comm'r of Revenue,* 827 N.W.2d 773, 781 (Minn. 2013):** "To the extent that [a Minnesota rule] conflicts with [a Minnesota statute] . . . , the administrative rule is invalid."

***Dumont v. Comm'r of Taxation*, 154 N.W.2d 196 (Minn. 1976):** Minnesota agency rules are invalid if inconsistent with the authority under which they were promulgated.

***Wallace v. Comm'r of Taxation*, 184 N.W.2d 588, 594 (Minn. 1971):**"It is well established that the legislature may confer discretion on the commissioner in the execution of administration of the law. It may not give him authority to determine what the law shall be or to supply a substantive provision of the law which he thinks the legislature should have included in the first place. We accordingly hold that Regulation 2008 (5) was without force and effect and is merely an expression of the commissioner's views as to what the law should be."

12. Missouri

***Union Electric Co. v. Dir. Of Revenue*, Docket No. 11-0427 RS (Missouri Admin. Hr'g Comm'n Dec. 19, 2012):** As between a regulation and the statute under whose authority the regulation was promulgated, the regulation may be promulgated only to the extent of and within the delegated authority of the statute involved. When there is a direct conflict or inconsistency between a statute and a regulation, the statute, which represents the true legislative intent, must necessarily prevail.

13. New Jersey

***Regent Corp. of Union, Inc. v. Div. of* Taxation, 27 N.J. Tax 577 (N.J. Tax Ct. Jan. 17, 2014):** An agency regulation will be set aside "if it is proved to be arbitrary and capricious, plainly transgresses the statute it purports to effectuate, or alters the terms of the statute and frustrates the policy embodied in it." A regulation may not thwart legislative intent or give a statute "greater effect than its language permits." The party challenging the regulation has the burden of proving the regulation is invalid.

14. Ohio

***Ransom & Randoph Co. v. Evatt*, 142 Ohio St. 398 (1944), syllabus ¶ 4:** "While the Tax Commissioner has the power under the statutes of this state to enact rules to facilitate the work of his department, such rules may not enlarge or restrict statutes exempting intangible property from taxation."

15. Oregon

***Dayton v. Dep't of Revenue*, 5 Or. Tax 56, 64–65 (1972): "**The court recognizes that administrative rules and regulations can go no further than fill in the interstices of the dominant act. They cannot overcome and override any of its provisions. *Van Ripper v. Liquor Cont. Com.*, 228 Or 581, 365 P2d 109 (1961); *Gouge v. David et al*, 185 Or 437, 464, 202 P2d 489 (1949). See also Parker, *The Contours of Oregon Administrative Law*, 1 Willamette L J 145 (1960)."

16. South Carolina

***McNickel's Inc. v. S. Carolina Dep't of Revenue*, 503 S.E.2d 723, 725 (S.C. 1998):** "An administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. *Hunter & Walden Co. v. South Carolina State Licensing Bd. for Contractors*, 272 S.C. 211, 251 S.E.2d 186 (1978). Although a regulation has the force of law, it must fall when it alters or adds to a statute. *Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984). A rule may only implement the law. *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943)."

17. Washington

***Duncan Crane Serv., Inc. v. State Dep't of Revenue*, 723 P.2d 480, 482 (Wash. App. 1986):** "[I]n order to have the same force and effect as the excise tax statutes, a regulation adopted by the Department must be not inconsistent with those statutes. RCW 82.32.300. If a regulation taxes more broadly than does the statute it purports to implement, it is invalid. *Lone Star Indus., Inc. v. Department of Rev.*, 97 Wash.2d 630, 634, 647 P.2d 1013 (1982)."

18. West Virginia

***Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 466 S.E.2d 424, 430 (1995):** "A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A–4–2 (1982)."

C. DEFERENCE TO AGENCY INTERPRETATION OF STATUTE

1. Alabama

***Patterson v. Emerald Mountain Expressway Bridge, L.L.C.*, 856 So. 2d 826, 833 (Ala. Civ. App. 2002), *aff'd sub nom. Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So. 2d 834 (Ala. 2003):** "The law is…clear that statutory tax exemptions are strictly construed against the taxpayer and in favor of the right to tax. *Monroe v. Valhalla Cemetery Co.*, 749 So.2d 470 (Ala. Civ. App. 1999). Such a construction, however, must not contravene the plain language of the statute. *State v. Pettaway*, 794 So.2d 1153 (Ala. Civ. App. 2001)."

"The Supreme Court of Alabama has held that: '[tax] exemption clauses are not to be so strictly construed as to defeat or destroy the intent and purpose of the statute, and no strained statutory construction is to be given which would have that effect. Our responsibility is to give effect to the legislative intention where it is manifested.' *Flav-O-Rich, Inc. v. City of Birmingham*, 476 So.2d 46, 48 (Ala.1985). This court will not 'read into [a] statute something which the legislature did not include[,] although it could have easily done so.' *Noonan v. East-West Beltline, Inc.*, 487 So.2d 237, 239 (Ala. 1986)."

2. Iowa

***Am. Home Prod. Corp. v. Iowa State Bd. of Tax Review*, 302 N.W.2d 140, 142–43 (Iowa 1981):** It is a "rule of construction that tax statutes are to be construed against the taxing authority and in favor of the taxpayer…" *See American cites Scott County Conservation Board v. Briggs*, 229 N.W.2d 126, 127 (Iowa 1975) ("We think the decision is controlled by the general principle that a taxing statute is construed liberally in favor of the taxpayer and strictly against the taxing body."); *Dodgen Industries, Inc. v. Iowa State Tax Commission*, 160 N.W.2d 289, 296 (Iowa 1968) ("It must appear from the language of the statute the tax assessed against taxpayer was clearly intended."); *see also Estate of Dieleman v. Department of Revenue*, 222 N.W.2d 459, 461 (Iowa 1974); *Knudsen v. Iowa Liquor Control Commission*, 171 N.W.2d 538, 540 (Iowa 1969).

"We therefore conclude that while the rule of strict construction is one factor to be considered, it does not preclude consideration of other principles of construction. All rules of statutory construction that tend to shed light on the intent of the legislature should be utilized in attempting to ascertain the true meaning of a statutory provision."

3. Louisiana

Utelcom, supra. If the statute can reasonably be interpreted more than one way, the interpretation less onerous to the taxpayer is to be adopted. *Entergy Louisiana, Inc. v. Kennedy*, 03-0166 (La.App. 1st Cir.7/2/03), 859 So.2d 74, 79. Furthermore, words defining a thing to be taxed should not be extended beyond their clear import. *Cleco Evangeline, LLC v.*
Louisiana Tax Com'n, 01-2162 (La.4/3/02), 813 So.2d 351, 355. Absent evidence to the contrary, the language of the statute itself must clearly and unambiguously express the intent to apply to the property in question. Unless the words imposing the tax are expressly in the statute, the tax cannot be imposed. *Id.*

***Odebrecht Construction, Inc. v. Louisiana Dep't of Revenue*, Docket No. 2015 CA 0013 (La. Ct. App. 2015).** Tax exemptions are strictly construed in favor of the Department and "must be clearly and unequivocally and affirmatively established" by the taxpayer. Exclusions, on the other hand, are construed liberally in favor of the taxpayers and against the taxing authority. *Harrah's Bossier City Inv. Co., LLC v. Bridges*, 2009-1916, p. 10 (La, 5/11/10), 41 So.3d 438, 446.

In *Harrah's Bossier City Inv. Co., LLC*, the supreme court explained the difference between a tax exemption and a tax exclusion as follows:

(1) "tax exemption is a provision that exempts from tax a transaction that would, in the absence of the exemption, otherwise be subject to tax. That is, there has been a statutory decision not to tax a certain transaction that is clearly within the ambit and authority of the taxing statutes to tax."

(2) An exclusion, on the other hand, "relates to a transaction that is not taxable because it falls outside the scope of the statute giving rise to the tax, ab initio. Transactions excluded from the tax are those which, by the language of the statutes, are defined as beyond the reach of the tax." *Id.*

4. Michigan

***Betten Auto Ctr., Inc. v. Dep't of Treasury*, 723 N.W.2d 914, 918 (Mich. App. 2006), *aff'd in part, vacated in part*, 731 N.W.2d 424 (Mich. 2007):** "'[T]ax exemptions are strictly construed against the taxpayer and in favor of the taxing authority.' *Nomads, Inc. v. Romulus*, 154 Mich. App. 46, 55, 397 N.W.2d 210 (1986) (emphasis in original). 'Since taxation is the rule and exemption the exception, the intention to make an exemption must be expressed in clear and unambiguous terms.' *Id.* Because tax exemptions are disfavored, the taxpayer has the burden of proving entitlement to a tax exemption. *Elias Bros. Restaurants, Inc. v. Treasury Dep't*, 452 Mich. 144, 150, 549 N.W.2d 837 (1996)."

***Knight Facilities Mgmt., Inc v. Dep't of Treasury*, 2012 WL 4465155, at *3 (Mich. Ct. App. Sept. 27, 2012):** ' "[T]ax exemptions are strictly construed against the taxpayer and in favor of the taxing authority." ' *Betten Auto Ctr v. Dep't of Treasury*, 272 Mich.App 14, 19; 723 NW2d 914 (2006), aff 'd in part and vacated in part 478 Mich. 864 (2007),[3] quoting *Nomads, Inc v. Romulus*, 154 Mich.App 46, 55; 397 NW2d 210 (1986) (emphasis in original). "Because tax exemptions are disfavored, the taxpayer has the burden of proving entitlement to a tax exemption." Betten Auto Ctr, 272 Mich.App at 19–20. "This Court should not, however, produce a strained construction that is adverse to legislative intent." *Mich Milk Producers Ass'n v. Dep't of Treasury*, 242 Mich.App 486, 493; 618 NW2d 917 (2000). "[A]mbiguities in the language of a tax statute are to be resolved in favor of the taxpayer." *Id.*

5. Minnesota

Minn. Stat. § 645.16(8): "When the words of a law are not explicit, the intention of the legislature may be ascertained by considering . . . administrative interpretations of the statute."

***Billion v. Comm'r of Revenue*, 827 N.W.2d 773, 778 (Minn. 2013):** "By definition, an unambiguous statute is subject to only one reasonable interpretation, and thus there is no reason to apply a strict or liberal construction to an unambiguous statute to ascertain its meaning."

***Busch v. Comm'r of Revenue*, 713 N.W.2d 337, 349 n.14 (Minn. 2006):** "We note that we stated that tax statutes must be strictly construed against the taxing authority and in favor of the taxpayer when ambiguous. In a few cases, we have also articulated an exception to this general rule in the case of tax deductions."

***Bemidji Community Hospital v. Comm'r of Revenue*, Docket No. 3284 (Minn. Tax Ct. June 16, 1982): "**Taxing regulations are strictly construed for the taxpayer."

6. Montana

***W. Energy Co. v. State, Dep't of Revenue*, 990 P.2d 767, 769 (Mont. 1999): "**We have previously stated that when a taxing statute is susceptible to two constructions, doubt should be resolved in the favor of the taxpayer. See *Anaconda Co. v. Department of Revenue* (1978), 178 Mont. 254, 258, 583 P.2d 421, 423. Moreover, tax statutes are to be strictly construed against the taxing authority and in favor of the taxpayer. *Canbra Foods Ltd. v. Montana Dep't of Revenue* (1996), 278 Mont. 368, 373, 925 P.2d 855, 857–58."

***Lucas Ranch, Inc. v. Montana Dep't of Revenue*, 347 P.3d 1249, 1253–54 (Mont. 2015):** It is a "maxim that tax statutes must be strictly construed in favor of the taxpayer." *Western Energy Co. v. Dep't of Revenue*, 1999 MT 289, ¶ 10, 297 Mont. 55, 990 P.2d 767 (citations omitted).

7. <u>New Mexico</u>

***New Mexico Taxation & Revenue Dep't v. Dean Baldwin Painting, Inc.*, 174 P.3d 525 (N.M. Ct. App. 2007):** A taxpayer has the burden of proof when claiming entitlement to a deduction from tax. There is a statutory presumption that "all receipts of a person engaging in business are subject to the gross receipts tax." There is a separate statutory presumption that a TRD tax assessment is correct. When a taxpayer claims an exemption or deduction from a tax, strict rules of construction structure a court's analysis: (1) the court must construe the statute allowing the exemption or deduction in favor of the taxing authority; (2) the statute must clearly and unambiguously express the right to the exemption or deduction; and (3) the taxpayer must clearly establish the right to the exemption or deduction. Additionally, the taxpayer has the obligation to maintain books of account or other records in a manner that will permit the accurate computation of state taxes.

8. <u>Ohio</u>

***Bay Mechanical & Electrical Corp. v. Testa, Tax Comm'r*, 978 N.E.2d 882 (Ohio 2012):** "In a claim for tax exemption, the 'onus is on the taxpayer to show that the language of the statute 'clearly express[es] the exemption' in relation to the facts of the claim.'"
***Cleveland-cliffs Iron Co. v. Glander* (Oh. 1945) 62 N.E. 2d 94; *H.R Options v. Wilkins*, 102 Ohio St.3d 1214 (Oh. 2004),** an exclusion or definitional exception is treated in the same manner as an exemption, "as an exclusion from taxation, it must be construed strictly against the taxpayer." *H.R. Options, supra.*

9. <u>Utah</u>

***Newspaper Agency Corp. v. Auditing Div. of Utah State Tax Comm'n*, 938 P.2d 266, 268 (Utah 1997): "**We start from the premise that because this is an exemption from taxation, we construe it strictly against the taxpayer. *Eaton Kenway*, 906 P.2d at 886; *Parson Asphalt Prods., Inc. v. Utah State Tax Comm'n*, 617 P.2d 397, 398 (Utah 1990). When interpreting a statute, we look first to the plain language. *State v. Vigil*, 842 P.2d 843, 845 (Utah 1992)."

***Airport Hilton Ventures, Ltd. v. Utah State Tax Comm'n*, 976 P.2d 1197, 1200 (Utah 1999): "**The statutes at issue operate as tax imposition statutes—they describe who will be taxed. We " 'construe taxation statutes liberally in favor of the taxpayer, leaving it to the legislature to clarify an intent to be more restrictive if such intent exists.' " *County Bd. of Equalization v. Utah State Tax Comm'n*, 944 P.2d 370, 374 (Utah 1997) (quoting *Salt Lake County v. State Tax Comm'n*, 779 P.2d 1131, 1132 (Utah 1989)); *see also SF Phosphates Ltd.*, 972 P.2d at 386.
Footnote 5: "The rule is different for statutes granting exemptions from taxation. In such cases, this court construes the statute strictly against the taxpayer." *See SF Phosphates*, 972 P.2d at 386, 346

Utah Adv. Rep. at 19; *see also Newspaper Agency Corp. v. Auditing Div.*, 938 P.2d 266, 270 (Utah 1997).

10. West Virginia

***CB&T Operations Co. v. Tax Com'r of State*, 564 S.E.2d 408, 417 (W. Va. 2002):** "In contrast to instances where we are called upon to interpret statutes that affirmatively impose a tax, here we are dealing with a statute that purports to limit an otherwise generally applicable tax law. As to the former circumstance, this Court has consistently signaled its willingness to construe any ambiguity in favor of the taxpayer. *See, e.g., Consolidation Coal Co. v. Krupica,* 163 W.Va. 74, 80, 254 S.E.2d 813, 816 (1979) ('tax statutes are generally to be construed in favor of the taxpayer and against the taxing authority'). In cases involving the latter situation, however, we have indicated that " ' [w]here a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption.' " Syl. pt. 2, *Tony P. Sellitti Constr. Co. v. Caryl,* 185 W.Va. 584, 408 S.E.2d 336 (1991) (citations omitted); *see also Wooddell v. Dailey*, 160 W.Va. 65, 68, 230 S.E.2d 466, 469 (1976) ('a tax law under which a person claims an exemption is strictly construed against the person claiming the exemption').[14]"

11. Wisconsin

***Cannon & Dunphy, S.C. v. Dep't of Revenue*, Docket No. 13-S-221 (Wisc. Tax. App. Comm'n June 30, 2015).** The imposition of a tax is to be narrowly construed. A tax cannot be imposed without clear and express language for that purpose, and where ambiguity and doubt exist, it must be resolved in favor of the person upon whom it is sought to impose the tax.

***Telephone & Data Systems, Inc. v. Dep't of Revenue*, Docket No. 10-S146 (Wisc. Tax App. Comm'n Feb. 28, 2014).** Determinations the Department makes are presumed to be correct, and the Petitioner bears the burden to prove by clear and satisfactory evidence in what respects the Department erred. This presumption extends to field audits and denial of tax refund claims. Moreover, tax refund statutes must be construed strictly in favor of imposing the tax and against allowing the refund, and the burden is on the taxpayer to bring itself within the refund statute. Before we begin our analysis, we specifically reject the assertion by the Department that every ambiguity in a tax refund statute must lead to automatic tax liability. The taxpayer still carries the burden of proof which, although high, is not per se insurmountable. In fact, the Commission in *Dairyland*, while finding ambiguity in the former version of this statute, did not rule against the taxpayer. See Dairyland Harvestore, Inc. v. Dep't of Revenue, 151 Wis. 2d 799, 447 N.W.2d 56 (Ct. App. 1989).

D. DEFERENCE TO AGENCY INTERPRETATION OF ITS OWN REGULATIONS, WRITTEN PUBLICATIONS, OR UNWRITTEN POLICIES.

1. Alaska

***IN THE MATTER OF: KEYSTONE ASSOCIATES, INC., APPELLANT*, 2008 WL 8186220, at *2 (Alaska Dept. Rev. Oct. 15, 2008).** "The department's informal conference decision is entitled to deference only 'as to a matter for which discretion is legally vested in the Department of Revenue.'" Ariz. Stat. 43.05.435(3).

2. Arizona

Empire Sw., LLC v. Department of Revenue*, Docket No. TX 2004000593 (Ariz. Tax Ct. Jan. 5, 2006*): The Department's interpretation of the statute it enforces is entitled to substantial deference. The same may be said of the Department's interpretation of its implementing Rule, which the Court finds is reasonable in light of the Legislative history of the statute. Further, the Rule upon which the Department relies was promulgated 10 years after the date of the letter upon which Plaintiff relies. An agency rule is entitled to far greater weight than a much older agency letter, particularly when the context of the letter is unclear. Also, Plaintiff never relied on the letter for the tax years at issue.

3. California

***Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031 (Cal. 1998):** The question is what legal effect courts must give to the Board's annotations when they are relied on as supporting its position in taxpayer litigation. In the broader context of administrative law generally, the question is what standard courts apply when reviewing an agency's interpretation of a statute. In effect, the Court of Appeal held the annotations were entitled to the same "weight" or "deference" as "quasi-
legislative" rules. The Court of Appeal adopted the following formulation"[A] long- standing and consistent administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is either "arbitrary, capricious or without rational basis" [citations], or is "clearly erroneous or unauthorized." [Citation.] Opinions of the administrative agency's counsel construing the statute," the court went on to say, "are likewise entitled to consideration. [Citations.] Especially where there has been acquiescence by persons having an interest in the matter," the court added, "courts will generally not depart from such an interpretation unless it is unreasonable or clearly erroneous." As this extract from the Court of Appeal opinion indicates, the court relied on a skein of cases as supporting these several, somewhat inconsistent, propositions of administrative law. We reach a different conclusion. An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation...
Tax annotations representing the Board's longstanding position may usefully be contrasted to positions the Board might adopt in the context of litigation. In *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, we found that such litigating positions were not entitled to as great a level of deference as administrative rulings that were "embodied in formal regulation[s] or even interpretive ruling [s] covering the ... industry as a whole...." (Id. at p. 92). The tax annotation at issue in this case, although originally addressing an individual taxpayer's query, was published and has represented the Board's categorical position regarding taxation of gifts originating from a California source. The annotation, therefore, being both an interpretive ruling of a general nature, and one of long standing, is deserving of significantly greater weight than if the Board had adopted its position only as part of the present litigation.
It may be argued that regulations formally adopted in compliance with the APA should intrinsically be assigned greater weight than tax annotations, because the former are promulgated only after a notice and comment period, whereas the latter are devised by the Board's legal staff without public input. In the abstract, that argument is not without merit. But even if the statutory interpretations contained in tax annotations are not, ab initio, as reliable or worthy of deference as

formally adopted regulations, the well-established California case law quoted above demonstrates that such reliability may be earned subsequently. Tax annotations that represent the Board's administrative practices may, if they withstand the test of time, merit a weight that initially may not have been intrinsically warranted. Or in other words, while formal APA adoption is one factor in favor of giving greater weight to an agency construction of a statute, the fact that a rule is of longstanding and the statute it interprets has been reenacted are other such factors.

3. Colorado

***Huber v. Kenna*, 205 P.3d 1158 (Colo. 2009):** When a statute is ambiguous, courts accord "great deference to an agency's interpretation of the statute." Courts may only disregard an agency's interpretation of a statute it is charged with enforcing when that interpretation is inconsistent with the clear language of the statute or the agency has exceeded the scope of the statute. Similarly, subsequent agency action that contradicts previous agency action carries less weight than contemporaneous, consistent agency interpretations.

4. Georgia

***Hicks v. Fl. State Bd. Of Admin.*, 594 S.E.2d 745 (Ga. Ct. App. 2004):** While the Revenue Commissioner did not promulgate a rule or regulation defining which public authorities were entitled to an exemption from transfer tax, in his denial of the Board and Buckhead Atlanta Plaza's request for refund, he found that the exemption set out in OCGA § 48-62(a)(3) applied only to public authorities of this State and the United States. As the Revenue Commissioner's decision reflects the meaning of the statute and comports with the legislative intent, we give deference to it just as we would a rule or regulation promulgated under OCGA § 48-2-12.

5. Illinois

***Dep't of Revenue v. Doe*, Docket No. IT 15-02 (Ill. Dec. Dep't of Rev. Hr'gs Jan. 14, 2015)**: An agency's interpretation of its regulations and enabling statute are "entitled to substantial weight and deference," given that "agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent."

6. Massachusetts

***Guenter v. Zisler*, Docket No. C271677 (Mass. App. Tax Bd. Oct. 13, 2006):** The Supreme Judicial Court has emphasized that "principles of deference ... are not principles of abdication." Therefore, "[a]lthough in general deference is given to an interpretation of a statute by the administrative agency charged with its administration, '[a]n incorrect interpretation of a statute ... is not entitled to deference.'"

***Lowell Gas Co. v. Comm'r of Corps. & Tax'n*, 377 Mass. 255, 262 (1979):** Administrative interpretations of the agency charged with interpreting a statute, if reasonable and adopted contemporaneously with the enactment or amendment of that statute, are accorded weight in interpreting that statute.

***Rosing v. Teachers' Ret. Sys.*, 458 Mass. 283, 290 (2010):** "An administrative interpretation developed during, or shortly before, the litigation in question is entitled to less weight than that of a longstanding ... interpretation."

7. Michigan

***Kmart Michigan Prop Servs., LLC v. Dep't. of Treasury*, 283 Mich. App. 647, 654–55, 770 N.W.2d 915, 919 (Mich. App. 2009): "**Under MCL 24.207(h), explanatory guidelines are distinguished from rules that have the force of law: rules do not include '[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.' The Department indicated to this Court that bulletins are considered 'interpretative statements.' Accordingly, we agree with the tribunal that KMPS was not legally required to follow RAB 1999–9."
"We note that even though RAB 1999–9 is not legally binding, it reflects the Department's interpretation of a statute it is charged with enforcing, entitling it to respectful consideration. *In re Complaint of Rovas, supra* at 103, 754 N.W.2d 259."

8. Minnesota

Minn. Stat. § 645.16(8): "When the words of a law are not explicit, the intention of the legislature may be ascertained by considering . . . administrative interpretations of the statute."
***Mankato Citizens Tel. Co. v. Comm'r of Taxation*, 145 N.W.2d 313, 317 (Minn. 1966):** "Another important rule of statutory construction is that administrative interpretations of statutes, although not binding upon the courts, should receive consideration unless found to be erroneous and in conflict with the express purpose of the act and the intention of the legislature. A longstanding administrative interpretation of a statute is entitled to great weight, although not if it is erroneous and contrary to legislative intent or if such administrative construction extends or modifies provisions of the statute."

9. New Jersey

***Regent Corp. of Union, Inc. v. Div. of* Taxation, 27 N.J. Tax 577 (N.J. Tax Ct. Jan. 17, 2014):** When an administrative agency that is charged with enforcing a statute interprets that statute, we give substantial deference to the agency's interpretation. But, such deference is not absolute.

***GE Solid State, Inc. v. Director, Div. of Taxation*, 132 N.J. 298, 306 (1993):** Generally, courts accord substantial deference to the interpretation an agency gives to a statute that the agency is charged with enforcing.

***Oberhand v. Director, Div. of Taxation*, 193 N.J. 558, 568 (2008):** Judicial deference is not absolute. An administrative agency's interpretation that is plainly at odds with a statute will not be upheld.

10. New York

***Kurcsics v. Merchants Mut. Ins. Co.*, 426 N.Y.2d 454 (N.Y. Ct. App. 1980):** Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight.

11. Pennsylvania

***SEI Investments v. Commonwealth of Pennsylvania*, 600 F.R. 2003 (Commonwealth Ct. Penn. Jan. 17, 2006):** We begin by noting the well-established principle that when interpreting regulations promulgated by an agency, this court affords substantial deference to the interpretation rendered by the administrative agency. *Davis v. Dep't of Welfare*, 776 A.2d 1026 (Pa. Cmwlth. 2001). However, such deference is not afforded the agency's interpretation when the agency's construction of the regulation is contrary to its plain meaning or frustrates legislative intent. Id.

12. Texas

***Mont Belvieu Caverns, LLC, v. Texas Comm'n on Environmental Quality*, 382 S.W.3d 472 (Tex. Ct. App. 2012):** To the extent our analysis turns on TCEQ's construction of the rules themselves, we defer to the agency's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule or underlying statute. We construe administrative rules in the same manner as statutes because they have the force and effect of statutes.

13. Washington

***Dot Foods, Inc. v. Dep't of Revenue*, 215 P.3d 185 (Wash. 2009):** The wording of the statute has not changed since its enactment; only the Department's interpretation and application of the statute have changed. Considering the foregoing, we reject the Department's interpretation. To do otherwise would add words to and rewrite an unambiguous statute. The Department argues that its statutory interpretation is entitled to judicial deference. While we give great deference to how an agency interprets an ambiguous statute within its area of special expertise, "such deference is not afforded when the statute in question is unambiguous." The Department's argument for deference is a difficult one to accept, considering the Department's history interpreting the exemption. Initially, and shortly after the statutory enactment, the Department adopted an interpretation which is at odds with its current interpretation. One would think that the Department had some involvement or certainly awareness of the legislature's plans to enact this type of statute. As a general rule, where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation
or application of a statute is by amendment or revision of the statute, rather than a new agency interpretation.

14. West Virginia

Appalachian Power Co. v. State Tax Dep't of W. Virginia, 466 S.E.2d 424, 434–35 (W. Va. 1995): "Interpretive rules, on the other hand, do not create rights but merely clarify an existing statute or regulation. *See* W.Va.Code, 29A–1–2(c) (1982). Because they only clarify existing law, interpretive rules need not go through the legislative authorization process. *See* W.Va.Code, 29A–3–1, *et seq.; Chico Dairy Co. v. West Virginia Human Rights Comm'n, supra.* Although they are entitled to some deference from the courts,[7] interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court.[8] They are entitled on judicial review only to the weight that their inherent persuasiveness commands. We believe that *Gilbert* furnishes the appropriate analysis for reviewing interpretive rules:
" 'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of

such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' " 429 U.S. at 141–42, 97 S.Ct. at 411, 50 L.Ed.2d at 357–58, *quoting Skidmore,* 323 U.S. at 140, 65 S.Ct. at 164, 89 L.Ed. at 129."

15. Wisconsin

***Dep't of Revenue v. Menasha Corp.,* 754 N.W.2d 95 (Wisc. 2008):** "[W]hen interpreting administrative regulations, we use the same rules of interpretation as we apply to statutes." . . . If a rule is ambiguous, we may resort to extrinsic aids to determine agency intent. "In resolving the ambiguity, this court gives deference to an agency's settled 'interpretation and application of its own administrative regulations unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous.'" "When an administrative agency promulgates regulations pursuant to a power delegated by the legislature, we construe those regulations 'together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason.'"

This court has articulated three possible levels of deference for an agency's interpretation of a statute: great weight, due weight, and no deference. Great weight deference is given to the agency's statutory interpretation when each of the following requirements are met: (1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency interpretation is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

An administrative agency's interpretation of its own rules or regulations is controlling unless 'plainly erroneous or inconsistent with the regulations.

16. Wyoming

***Wyoming Min. Ass'n v. State*, 748 P.2d 718, 724 (Wyo. 1988): "**Administrative pronouncements such as interpretive rules and general statements of policy do not require the same public participation in their formulation as do substantive rules. This is so because interpretive rules and general statements of policy do not establish binding norms which are finally determinative of anyone's rights. At most, they merely repeat or emphasize an obligation already existing in a statute. *American Hospital Association v. Bowen,* 640 F.Supp. 453 (D.D.C.1986), reversed on other grounds, 834 F.2d 1037 (D.C. Cir. 1987)."

E. DEFERENCE TO ADMINISTRATIVE DECISIONS

1. Alaska

***State, Dep't of Revenue v. DynCorp & Subsidiaries*, 14 P.3d 981, 985 (Alaska 2000):** "In reviewing the Office of Tax Appeals' decision, we apply the "substantial evidence" test to questions of fact, and the "substitution of judgment" test for questions of law. [*See Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).] Finally, when the superior court acts as an intermediate court of appeal, we give no deference to the superior court's decision; instead, we independently review the merits of the administrative determination. [*See id.* (citation omitted).]."

***Palmer v. Municipality of Anchorage, Police & Fire Ret. Bd.*, 65 P.3d 832, 837 (Alaska 2003):** "'In considering an administrative appeal from a decision issued by the superior court [sitting] as an intermediate court of appeal, we review the agency's action directly.' [*Snyder v. State, Dep't of Pub.*

Safety, Div. of Motor Vehicles, 43 P.3d 157, 160 (Alaska 2002).] We review questions of law not involving agency expertise using our independent judgment. [*Tolbert v. Alascom, Inc.*, 973 P.2d 603, 607 (Alaska 1999).] We review the agency's factual determinations under the substantial evidence standard. [*Id.*] Whether the quantum of evidence is sufficient to constitute "substantial evidence" supporting the agency's conclusion to deny benefits is a legal question to which we apply our independent judgment. [*Id.* (citing *Fireman's Fund Am. Ins. Co. v. Gomes*, 544 P.2d 1013, 1015 & n. 6 (Alaska 1976)).]"

***Nw. Med. Imaging, Inc. v. State, Dep't of Revenue*, 151 P.3d 434, 438 (Alaska 2006) 12** "When the superior court acts as an intermediate court of appeal in an administrative matter, we "independently review and directly scrutinize the merits of the [agency]'s decision." [*Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003).] In reviewing the Office of Tax Appeals's decision, we apply the substantial evidence test for questions of fact and the substitution of judgment test for questions of law. [*State, Dep't of Revenue v. DynCorp*, 14 P.3d 981, 985 (Alaska 2000)]."

2. Louisiana

In reviewing the Department of Revenue's decisions, the Board of Tax Appeals hears all matters *de novo*, with the appellant bearing the burden of proof. ***Odebrecht Construction, Inc. v. Louisiana Dep't of Revenue*, Docket No. 2015 CA 0013 (La. Ct. App. 2015).** Judicial review of a decision of the Board is rendered upon the record as made up before the Board and is limited to facts on the record and questions of law. The Board's findings of fact should be accepted where there is substantial evidence in the record to support them and should not be set aside unless they are manifestly erroneous in view of the evidence in the entire record. With regard to questions of law, the judgment should be affirmed if the Board has correctly applied the law and has adhered to the correct procedural standards.

3. Minnesota

Minn. Stat. § 271.06, subd. 6: "The Tax Court shall hear, consider and determine without a jury every appeal de novo."

4. New Mexico

***TPL, Inc. v. New Mexico Taxation & Revenue Dep't*, 64 P.3d 474 (N.M. 2002).** Generally, there is a presumption that the Department's assessment is correct. See NMSA 1978, § 7-1-17(C) (1992). Nonetheless, we review de novo a lower court or administrative agency's application of law to facts. In addition, when we are required to interpret the phrases within a statute, we are presented with a question of law, which we review de novo. This is not a case where the hearing officer was asked to resolve conflicting evidence, and therefore was required to resolve any inferences in favor of the Department. The essential facts—the facts regarding the nature of TPL's contracts with IOC—are undisputed. In cases where such facts are undisputed, "'it is the function of the courts to interpret the law,' and courts are in no way bound by the agency's legal interpretation."

5. Ohio

***MacDonald v. Shaker Heights Board of Income Tax Review*, 41 N.E.3d 376 (Ohio 2015):** A local municipality in Ohio argued that the Ohio Board of Tax Appeals was required to defer to the local taxing authority with respect to the interpretation of the local income tax ordinance. The

Supreme Court of Ohio disagreed and, found that the standard of review for an appeal to the Ohio Board of Tax Appeals from a municipal board of appeals on a tax matter is de novo as to both facts and law.

***Snodgrass v. Testa,* 50 N.E.3d 475 (Ohio 2015):** The Ohio Board of Tax Appeals reviews final determinations of the Ohio Tax Commissioner's final determination de novo.

6. Oklahoma

***Cimmarron Transportation, LLC v. Denise Heavner, County Assessor of Cleveland County, Oklahoma,* 186 P.3d 947 (Okla. 2008).** The proper standard of review for a trial judge valuing property for tax purposes is to make a de novo ruling on both the facts and the law.

7. Utah

***ABCO Enterprises v. Utah State Tax Comm'n*, 211 P.3d 382, 385 (Utah 2009):** "In reviewing a formal adjudicative proceeding of the Utah State Tax Commission, we look to Utah Code section 59–1–610. *See State Tax Comm'n v. Stevenson,* 2006 UT 84, ¶ 20, 150 P.3d 521. We grant deference to the Commission's 'findings of fact, applying a substantial evidence standard on review.' Utah Code Ann. § 59–1–610(1)(a) (2008). We review the Commission's conclusions of law for correctness, granting no deference where the statute at issue, as here, gives no explicit grant of discretion to the Commission. *Id.* § 59–1–610(1)(b)."

***Mandell v. Auditing Div. of Utah State Tax Comm'n*, 186 P.3d 335, 339 (Utah 2008): "**Our standard of review for mixed questions of law and fact varies 'according to the nature of the legal concept at issue.' *State v. Levin,* 2006 UT 50, ¶ 21, 144 P.3d 1096. To determine the standard of review for a mixed question of law and fact, we apply a test that considers (1) the complexity of the facts; (2) the degree to which the lower court relied on observable facts that cannot be adequately reflected in the record, such as witness demeanor and appearance; and (3) any policy reasons favoring or disfavoring the exercise of discretion. *Id.* ¶ 25."

***Decker Lake Ventures, LLC v. Utah State Tax Comm'n*, 356 P.3d 1243, 1245 (Utah 2015): "**Our review of the commission's decision is governed by statute. Utah Code § 59–1–610. Under the cited provision, we review the commission's legal determinations under a 'correction of error standard' that yields 'no deference' to the commission's analysis. *Id.* As to *mixed* determinations (involving the application of legal standards to a given set of facts), however, the statute is silent. So on those questions we review the commission's application of law to fact under our traditional framework. *See Murray v. Utah Labor Comm'n,* 2013 UT 38, ¶ 23, 308 P.3d 461."

" That framework treats some mixed questions as fact-like (meriting deferential review) and others as more law-like (meriting no deference). *Manzanares v. Byington (In re Adoption of Baby B.),* 2012 UT 35, ¶ 42, 308 P.3d 382. And it assigns the level of deference based on an assessment of 'the nature of the issue and the marginal costs and benefits of a less deferential, more heavy-handed appellate touch.' *Id.* Where the mixed question presented is fact-intensive and unlikely to result in the development of appellate precedent necessary to guide parties in future cases, for example, our review yields substantial deference to the commission. *See id.* In this case we apply a deferential standard, for reasons explained below. *See infra* ¶ 15."

8. West Virginia

***Frymier-Halloran v. Paige*, 458 S.E.2d 780, 788 (W.Va. 1995):** "When reviewing the administrative decision of the Tax Commissioner, the circuit court is required to engage in a substantial inquiry, but it must not substitute its own judgment for that of the Tax Commissioner.[14] We, therefore, make it explicit that the same standard set out in the State Administrative Procedures Act is the standard of review applicable to review of the Tax Commissioner's decisions under W.Va.Code, 11-10-10(e). Thus, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."

***Charleston Area Med. Ctr., Inc. v. State Tax Dep't of W. Virginia*, 687 S.E.2d 374, 378 (W. Va. 2009):** "The same standard set out in the State Administrative Procedures Act, W. Va.Code, 29A–1–1, *et seq.*, is the standard of review applicable to review of the Tax Commissioner's decisions under W. Va.Code, 11–10–10(e) (1986)." Syl. Pt. 3, in part, *Frymier–Halloran v. Paige,* 193 W.Va. 687, 458 S.E.2d 780 (1995). The West Virginia Administrative Procedures Act provides that "an agency action may be set aside if it is '[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record; or ... [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.' " *Id.* at 695, 458 S.E.2d at 788 (*quoting* W. Va.Code § 29A–5–4(g)(5) and –4(g)(6)(1964)). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Id.*

"However, the clearly erroneous rule does not protect findings made on the basis of incorrect legal standards." *Frymier–Halloran,* 193 W.Va. at 695 n. 13, 458 S.E.2d at 788 n. 13. As always "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995). Thus, "[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va.Code § 29A–5–4[ ] and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996).

9. Wyoming

***Chevron U.S.A., Inc. v. Dep't of Revenue*, 158 P.3d 131, 134 (Wyo. 2007):** "When an appellant challenges an agency's findings of fact and both parties submitted evidence at the contested case hearing, we examine the entire record to determine if the agency's findings are supported by substantial evidence. *Colorado Interstate Gas Co. v. Wyoming Department of Revenue,* 2001 WY 34, ¶ 8, 20 P.3d 528, 530 (Wyo. 2001); *RT Commc'ns, Inc. v. State Bd. of Equalization,* 11 P.3d 915, 920 (Wyo. 2000). If the agency's findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the agency and will uphold the factual findings on appeal. "Substantial evidence is more than a scintilla of evidence; it is evidence that a reasonable mind might accept in support of the conclusions of the agency.' *Id.*"

"This Court reviews an agency's conclusions of law *de novo. Wyo. Dep't of Revenue v. Guthrie,* 2005 WY 79, ¶ 13, 115 P.3d 1086, 1091 (Wyo. 2005). If a conclusion of law is in accord with the law, it is affirmed. *Airtouch Commc'ns, Inc. v. Dep't of Revenue,* 2003 WY 114, ¶ 10, 76 P.3d 342, 347. "However, when the agency has failed to properly invoke and apply the correct rule of law, we correct the agency's error." *Id. See also, Powder River Coal Co. v. Wyo. State Bd. of Equalization,* 2002 WY 5, ¶ 6, 38 P.3d 423, 426 (Wyo. 2002); *Chevron U.S.A., Inc. v. State,* 918 P.2d 980, 983 (Wyo. 1996)."

"When an agency's determinations contain elements of law and fact, we do not treat them with the deference we reserve for findings of basic fact. When reviewing an 'ultimate fact,' we separate the factual and legal aspects of the finding to determine whether the correct rule of law has been properly applied to the facts. We do not defer to the agency's ultimate factual finding if there is an error in either stating or applying the law. *Basin Elec. Power Co-op., Inc. v. Dep't of Revenue, State of Wyo.*, 970 P.2d 841, 850–51 (Wyo. 1998) (citations omitted). *See also Colorado Interstate Gas*, ¶ 8, 20 P.3d at 530–31."

F. DEFERENCE TO AGENCY FACT FINDING DETERMINATIONS

> In many jurisdictions, agency determinations are cloaked with a presumption of correctness.E.g., R.*H. Stearns Co. v. United States*, 291 U.S. 54 (1934)(presumption of regularity as to agency actions generally); United States v. Silkman, 156 F.3d 833 (8th Cir. 1998)(tax assessment constitutes prima facie evidence that a tax deficiency existed).

1. Alaska

***IN THE MATTER OF JOHN & MARY JONES*, 1994 WL 931928, at *8 (Alaska Dept. of Rev. Dec. 22, 1994):** "[T]he Division's assessments have a presumption of validity. AS 43.05.245, *cf. Welch v. Helvering*, 290 U.S. 111, 115, (1933) (Commissioner's ruling has 'a presumption of correctness, and the petitioner has the burden of proving it to be wrong'). '[A] deficiency determination asserted by the commissioner in the notice of deficiency is presumed to be correct.' J. Mertens, The Law of Federal Income Taxation § 50.433 at 370 (1992)."

2. Arizona

***Arizona Joint Venture v. Department of Revenue*, 66 P.3d 771 (Ariz. 2002) (citing *Arizona State Tax Comm'n v. Kieckhefer*, 191 P.2d 729, 731 (Ariz. 1948)).** "Kieckhefer holds that an assessment of additional taxes is presumed correct, but does not state or imply anything about the burden of proof in such a case. Section 42-1254 (D)(4) shifts the burden of proof on an issue of fact to ADOR only if the taxpayer has asserted a reasonable dispute on that issue, has maintained all required records, and has fully cooperated with ADOR, including producing all information and documents that ADOR has reasonably requested. Here the taxpayers asserted no dispute at all concerning the amount of their permissible land-value deductions during the audit period. They merely contended that ADOR was legally barred from changing its original approval of those deductions. The burden of proof on that issue accordingly remained with the taxpayers."

3. California

***Spaid v. California Franchise Tax Board*, Docket No. D048338, 2007 WL 1536831 (Cal. Ct. App. 2007) (citations omitted):** "In tax litigation, a presumption of correctness generally attaches to tax assessments. However, in a case involving unreported income, the presumption of correctness does not apply if the taxing authority makes a naked assessment; i.e., a tax assessment that is without rational foundation. The presumption of correctness "is only as strong as its rational underpinnings. Where it lacks a rational basis the presumption evaporates." *Some* reasonable foundation for the assessment is necessary to preserve the presumption of correctness. The naked assessment doctrine is "a challenge to the ... assessment itself on the basis that it bears no factual relationship to the taxpayer's liability, not a challenge to any proof offered by the taxing authority at trial.

Even if a taxpayer presents no evidence, the tax assessment will be invalidated if the taxing authority does not make this thresholds showing that the assessment is supported by a factual

foundation. The taxing authority must present some minimal substantive evidence linking the taxpayer to the charged income-generating activity or reflecting unreported income to justify the assessment.

When a taxpayer fails to provide adequate income information to the taxing authority, the taxing authority has wide discretion to choose an income reconstruction method. If the taxing authority's estimation method is reasonable, the courts will presume it is correct unless the taxpayer shows otherwise. The taxing authority may use statistics to estimate
income; however, the statistics must be reasonably employed to approximate the correct amount of income.

If the taxing authority triggers application of the presumption of correctness by introducing some evidence of a factual foundation to justify the tax assessment, the burden shifts to the taxpayer to rebut the presumption by showing by a preponderance of the evidence that the assessment was arbitrary or erroneous. 'The taxpayer must not only prove that the tax assessment is incorrect, but also must produce evidence to establish the proper amount of the tax.'"

***In re Bloom*, Docket No. 745188 (Cal. State Bd. Eq. Nov. 19, 2014):**

Respondent's determination of tax is presumed to be correct, and a taxpayer has the burden of proving such a determination erroneous. To overcome the presumed correctness of respondent's findings on issues of fact, a taxpayer must introduce credible evidence to support his or her assertions.

4. Illinois:

***Stark Materials Co. v. Dep't of Revenue*, 812 N.E.2d 362 (Ill. Ct. App. 2004).** A plaintiff taxpayer must establish by competent evidence that a return corrected by the Department is not correct, and until it provides such proof, corrected returns are presumptively correct. A taxpayer may overcome the presumption by presenting his books and records.

***Sweeney v. Dep't of Revenue*, Docket No. 10 L 050524 (Ill. Cir. Ct. June 26, 2013).** While Illinois Courts have uniformly sustained a prima facie case based on corrected tax returns, Illinois law requires that the methods used to formulate the conclusions in a Notice of Deficiency must meet some minimum standard of decency and reasonableness when being called into question. *Mel-Park Drugs, Inc. v. Dep't of Revenue*, 218 Ill. App. 3d 203, 207, 577 N.E.2d 1278, 1281 (1st Dist. 1991); *Fillichio v. Dep't of Revenue*, 15 Ill. 2d 327, 155 N.E.2d 3 (1958).This reasonableness standard "is based upon the statutory provision which requires that the Department's corrected returns be made "according to its best judgment and information." *Masini v. Dep't of Revenue*, 60 Ill. App. 3d 11, 14, 376 N.E.2d 324, 327 (1st Dist. 1978) (citing Ill. Rev. Stat. 1975, ch. 120, par. 443). To be entitled to the presumption of validity, the IDOR must show the correct return was prepared in a reasonable and accurate manner. 35 ILCS 5/404; see also *American Welding Supply Co. v. Dep't of Revenue*, 106 Ill. App. 3d 93, 435 N.E.2d 761 (5th Dist 1982). Where the Department disregards credible evidence or fails to fully investigate the facts on which its conclusions are based, the conduct of the Department is presumptively unreasonable. *Goldfarb v. Dep't of Revenue*, 411 Ill. 573, 578, 104 N.E.2d 606, 608 (1952) (auditor's disregard of taxpayer's records that were both competent and uncontradicted found to be unreasonable); *Fashion-Bilt Coat Mfg. Co. v. Dep't of Finance*, 383 Ill. 253, 259, 349 N.E.2d 41, 44 (1943) (auditor's disregard of undisputed facts presented by taxpayer ruled to be arbitrary).

5. Minnesota:

Minn. Stat. § 271.06, subd. 6: "All such parties shall have an opportunity to offer evidence and arguments at the hearing; provided, that the order of the commissioner . . . in every case shall be prima facie valid."

Minn. Stat. § 270C.33, subd. 6: "A return or assessment of tax made by the commissioner is prima facie correct and valid. The taxpayer has the burden of establishing its incorrectness or invalidity in any related action or proceeding."

***Conga Corp. d/b/a Conga Latin Bistro v. Comm'r of Revenue*, 868 N.W.2d 41, 53–54 (Minn. 2015) (citations omitted)**. The Commissioner's order or determination is 'prima facie valid,' and is dispositive in the absence of evidence rebutting it. The presumptive validity of the assessment order imposes on the taxpayer the burden of going forward with evidence to rebut or meet the presumption. When a taxpayer presents substantial evidence that the Commissioner's assessment order is invalid or incorrect, the presumption of validity is overcome, and the case is 'decided by the trier of fact the as if the presumption had never existed. The taxpayer, however, continues to bear the burden of proof in the proceeding. The taxpayer retains this burden of proof because the taxpayer is in the best position to produce the records and information relevant to the matter in dispute. Once the presumption of validity is overcome, the tax court must examine the evidence presented by both parties and determine 'the amount of taxes owed.' Ultimately, the tax court may conclude that the taxpayer owes the amount of taxes assessed in the Commissioner's order, or owes the amount of taxes contended by the taxpayer, or owes some different amount of taxes. The determination of the amount of taxes owed requires independent support in the record.

6. Montana

***ABBEY/LAND LLC, APPELLANT v. THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, RESPONDENT*, 2015 WL 5565232, at *24 (Mont. Tax. App. Bd. Mar. 18, 2015): "**While the DOR must be able to explain and defend the proposed value, in tax appeals of property values, the burden is on the Taxpayer to overcome a presumption of correctness given to the DOR." *Farmers Union Cent Exch. v. Department of Revenue*, 901 P.2d 561, 564 (1995); *Western Airlines, Inc. v. Michunovich*, 428 P. 2d 3, 7, *cert., denied* 389 U.S. 952 (1967).

7. New Hampshire

***KGI GORHAM, LLC v. TOWN OF GORHAM*, 2010 WL 4069092, at *6 (N.H. Bd. Tax. Land. App. July 8, 2010):** "…initial presumption of correctness normally ascribed to the assessed value…."

8. New Mexico

***TPL, Inc. v. New Mexico Taxation & Revenue Dep't*, 64 P.3d 474 (N.M. 2002).** Generally, there is a presumption that the Department's assessment is correct. See NMSA 1978, § 7-1-17(C) (1992). Nonetheless, we review de novo a lower court or administrative agency's application of law to facts. In addition, when we are required to interpret the phrases within a statute, we are presented with a question of law, which we review de novo. This is not a case where the hearing officer was asked to resolve conflicting evidence, and therefore was required to resolve any inferences in favor of the Department. The essential facts—the facts regarding the nature of TPL's contracts with IOC—are undisputed. In cases where such facts are undisputed, "'it is the function of the courts to interpret the law,' and courts are in no way bound by the agency's legal interpretation."

***New Mexico Taxation & Revenue Dep't v. Casias Trucking*, 336 P.3d 436 (N.M. Ct. App. 2014).** Any assessment of taxes or demand for payment made by the department is presumed to be correct. The presumption exists even if the secretary has issued assessments using alternative methods of reconstruction of a tax or has estimated the tax. The effect of the presumption of correctness is that the taxpayer has the burden of coming forward with some countervailing evidence tending to dispute the factual correctness of the assessment made by the secretary. However, unsubstantiated statements that the assessment is incorrect cannot overcome the presumption of correctness. Absent a showing of incorrectness by taxpayers, the audit and notice of assessment of taxes must stand. On the other hand, when a taxpayer rebuts the presumption, the burden shifts to the Department to demonstrate the correctness of the tax assessment.

9. Ohio

***Bay Mechanical & Electrical Corp. v. Testa, Tax Comm'r*, 978 N.E.2d 882 (Ohio 2012) (quotations omitted).** "[B]efore the BTA, [t]he Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful. . . . [Before the Supreme Court], the question for our determination is whether the BTA's decision is reasonable and lawful, and because the function of weighing evidence and determining credibility belongs to the BTA, our review of that aspect of its findings applies the highly deferential abuse-of-discretion standard."

***Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 754 N.E. 2d 789 (Ohio 2001).** The Supreme Court of Ohio "will not hesitate to reverse a BTA [Board of Tax Appeals] decision that is based on an incorrect legal conclusion."

10. Utah

***T-Mobile USA, Inc. v. Utah State Tax Comm'n*, 254 P.3d 752, 758 (Utah 2011): "**With the reinstatement of section 59–1–601, the Utah Code now creates two potential avenues of review for a petitioner. One avenue is an appeal to the tax court under section 59–1–601, where a petitioner is entitled to a de novo proceeding to determine property value in which no deference is given to any previous Commission decision. Id. § 59–1–601. The other avenue is an appeal to an appellate court through the traditional administrative review process, where deference is given to the Commission's findings of fact and substantial prejudice must be shown to overturn the Commission's decision. *See id.* §§ 59–1–610(1), 63G–4–403(1), (4). In this case, T–Mobile chose the first avenue. As a result, the tax court correctly conducted a de novo proceeding where it afforded no deference or presumption of correctness to any previous Commission assessment."

11. West Virginia

***State of West Virginia*, 2008 WL 11240271, at *17 (W. Va. Off. Hrg. App. Aug. 26, 2008):** Evidence offered by Petition "insufficient to overcome the presumption of correctness of the Tax Commissioner's assessment, to satisfy the Petitioner's burden of proof."

12. Wisconsin

***Willett v. Dep't of Revenue*, 771 N.W.2d 929 (Wisc. Ct. App. 2009).** A DOR tax assessment is presumptively correct and the burden is upon the taxpayer to demonstrate any aspect of the assessment's invalidity. The Commission consistently applies the rule that a taxpayer cannot overcome the presumption of correctness of DOR assessments by relying upon the oral testimony of an interested party that is unsupported by sufficient, detailed documentary evidence.

***Telephone & Data Systems, Inc. v. Dep't of Revenue*, Docket No. 10-S146 (Wisc. Tax App. Comm'n Feb. 28, 2014).** Determinations the Department makes are presumed to be correct, and the Petitioner bears the burden to prove by clear and satisfactory evidence in what respects the Department erred. This presumption extends to field audits and denial of tax refund claims. Moreover, tax refund statutes must be construed strictly in favor of imposing the tax and against allowing the refund, and the burden is on the taxpayer to bring itself within the refund statute. Before we begin our analysis, we specifically reject the assertion by the Department that every ambiguity in a tax refund statute must lead to automatic tax liability. The taxpayer still carries the burden of proof which, although high, is not per se insurmountable. In fact, the Commission in Dairyland, while finding ambiguity in the former version of this statute, did not rule against the taxpayer. See *Dairyland Harvestore, Inc. v. Dep't of Revenue*, 151 Wis. 2d 799, 447 N.W.2d 56 (Ct. App. 1989).

13. Wyoming

***Colorado Interstate Gas Co. v. Wyoming Dep't of Revenue*, 20 P.3d 528, 531 (Wyo. 2001):** "The Department's valuations for state-assessed property are presumed valid, accurate, and correct. *Chicago Burlington & Quincy Railroad Company v. Bruch*, 400 P.2d 494, 499 (Wyo. 1965). This presumption can only be overcome by credible evidence to the contrary. *Id.* In the absence of evidence to the contrary, we presume that the officials charged with establishing value exercised honest judgment in accordance with the applicable rules, regulations, and other directives that have passed public scrutiny, either through legislative enactment or agency rule-making, or both. *Id.*"
"The petitioner has the initial burden to present sufficient credible evidence to overcome the presumption, and a mere difference of opinion as to value is not sufficient. *Teton Valley Ranch v. State Board of Equalization*, 735 P.2d 107, 113 (Wyo. 1987). If the petitioner successfully overcomes the presumption, then the Board is required to equally weigh the evidence of all parties and measure it against the appropriate burden of proof. [*Basin Electric Power Cooperative, Inc. v. Department of Revenue*, 970 P.2d 841, 851 (Wyo. 1998)]. Once the presumption is successfully overcome, the burden of going forward shifts to the DOR to defend its valuation. *Id.* The petitioner, however, by challenging the valuation, bears the ultimate burden of persuasion to prove by a preponderance of the evidence that the valuation was not derived in accordance with the required constitutional and statutory requirements for valuing state-assessed property. *Id.*"

***Britt v. Fremont Cty. Assessor*, 126 P.3d 117, 125 (Wyo. 2006): "**A strong presumption favors the Assessor's valuation. 'In the absence of evidence to the contrary, we presume that the officials charged with establishing value exercised honest judgment in accordance with the applicable rules, regulations, and other directives that have passed public scrutiny, either through legislative enactment or agency rule-making, or both." *Amoco Production Co. v. Dept. of Revenue*, 94 P.3d 430, 435 (Wyo. 2004).

G. FACTORS RELATING TO DEFERENCE

a. Burden of Proof

i. Taxpayers always bear the burden of proof in civil tax cases. The main reason for this is the fact that the taxpayer has superior access to the relevant evidence. Thus, taxpayers may lose, not because the court has chosen to defer to the agency's view, but because the taxpayer has failed to shoulder her burden of proof.

ii. Rebuttable Presumptions: The tax agency will prevail if the taxpayer fails to present sufficient evidence to dispel the presumption. (i.e. presumption of domicile under Utah Code §59-10-136). The law as to this type of agency advantage has developed independently of deference doctrine although the two may lead to similar outcomes and some conceptual commonalities exist.