The 'No Surplusage' Canon In State and Local Tax Cases

by Steve R. Johnson

Previous installments of this column have examined numerous canons or conventions of statutory interpretation in their application to state and local tax controversies. This installment considers another canon: the precept that courts should prefer interpretations that render no part of a statute superfluous. A recent treatise phrased the principle thus:

> If possible, every word and every provision [of an enactment] is to be given effect. . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.[1]

The first part below describes the canon generally. The second part identifies the reasons advanced for the precept, the objections lodged against it, and the limitations on it. The third part gives examples of the canon in state and local tax cases, both cases in which its assertion was successful and cases in which its use failed.

The Canon Generally

This principle of statutory construction is of ancient vintage, so much so that it once was known by its Latin styling "*verba cum effectu sunt accipienda*."[2] The principle was recognized by leading figures in American law, such as Chief Justice John Marshall and Judge Thomas M. Cooley, from early in our legal history.[3]

The U.S. Supreme Court has applied the rule in numerous cases involving the construction of both tax[4] and nontax[5] statutes. The Court has called it "one of the most basic interpretive canons"[6] and a "cardinal rule of statutory interpretation."[7]

The canon figured in two tax cases decided by the Supreme Court in its most recent term. In *United States v. Home Concrete & Supply, LLC*, the Court reaffirmed an earlier decision holding that the six-year limitations period on assessment does not apply to situations in which the taxpayer overstated her basis in property. The government argued that a later statutory change had eroded the earlier decision. The Court rejected that argument. The Court noted the "canon that statutes should be read to avoid making any provision 'superfluous, void, or insignificant,'" but observed that its interpretation did not leave the amended provision "without work to do."[8]

Later, in *National Fed. of Independent Bus. v. Sebelius* (the healthcare case), the canon appeared

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[1]Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

[2]"Words are to be taken as having an effect." Ulpian, *Digesta* 2.7.5.2 (third century A.D. Roman jurist).

[3]*Sturges v. Crowninshield*, 17 U.S. 122, 202 (1819) (per Marshall, C.J.); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 58 (1868); *see also Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879).

[4]*E.g., Hall v. United States,* 132 S. Ct. 1882, 1890 (2012); *Hibbs v. Winn,* 542 U.S. 88, 101 (2004).

[5]*E.g., New Process Steel, L.P. v. NLRB,* 130 S. Ct. 2635, 2640 (2010); *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

[6]*Corley v. United States*, 556 U.S. 303, 314-315 (2009).

[7]*Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality op.); *see also Fortec Constructors v. United States,* 760 F.2d 1288, 1292 (Fed. Cir. 1985) (describing the canon as a "well accepted and basic principle").

[8]*United States v. Home Concrete & Supply, LLC,* 132 S. Ct. 1836, 1841-1842 (2012) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

in two contexts. First, a threshold question was whether on-the-merits review of the constitutionality of the legislation was precluded by the federal Anti-Injunction Act.[9] One argument in favor of preclusion was that the applicable legislation provided that the shared responsibility payment that enforced the mandate that individuals buy medical insurance "shall be assessed and collected in the same manner as" specific assessable penalties, which in turn are "assessed and collected in the same manner as taxes."[10] The Court unanimously rejected that argument, in part on the basis of the "no surplusage" canon.[11]

Second, a majority of the Court rejected the contention that the commerce clause of the U.S. Constitution gives Congress the power to compel individuals to buy medical insurance. Chief Justice John Roberts emphasized that this clause allows Congress to "*regulate* Commerce," adding: "The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to '*regulate*' something included the power to create it, many of the provisions of the Constitution would be superfluous."[12]

The no surplusage principle also has featured in countless state cases.[13] Those include tax cases[14] as well as nontax cases.[15] In most instances, the principle is of judicial inspiration. In some jurisdictions, however, it is enacted in a statutory provision.[16]

[9]IRC section 7421(a) (providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person").

[10]IRC sections 5000A(g)(1) and 6671(a).

[11]*National Fed. of Independent Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2656 (2012) (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.) (noting that other parts of the code "provided *both* that a particular payment shall be 'assessed and collected' in the same manner as a tax *and* that no suit shall be maintained to restrain the assessment or collection of the payment. . . . The latter directive would be superfluous if the former invoked the Anti-Injunction Act.") (emphasis in original).

[12]*Id.* at 2586 (emphasis in original).

[13]*See, e.g.,* Norman J. Singer and J.D. Shambie Singer, 2A *Sutherland Statutes and Statutory Construction* section 46.6 (updated Dec. 2011) (citing cases).

[14]*E.g., Bean Dredging, LLC v. Alabama Dep't of Revenue,* 855 So.2d 513, 517 (Ala. 2003); *Montgomery Cty. v. Maryland Econ. Dev. Corp.,* 40 A.3d 1066, 1077 (Md. Spec'l App. 2012); *City of Port Huron v. State Tax Comm'n,* 2012 WL 933604, at *3 (Mich. App., Mar. 20, 2012); *Marshall v. Commonwealth,* 41 A.3d 67, 75 n.14 (Pa. Cmwlth 2012); *CFRE, LLC v. Greenville Cty. Assessor,* 716 S.E.2d 877, 881 (S.C. 2011); *City of Houston v. Hotels.com, LP*, 357 S.W.3d 706, 711 (Texas App. 2011).

[15]*E.g., People v. Owens*, 219 P.3d 379, 382 (Colo. App. Apr. 16, 2009).

[16]*E.g.*, Minn. Stat. 645.16; Or. Rev. Stat. 174.010; Pa. Consol. Stat. sections 1921(a) and 1922(2).

Rationales, Objections, and Limits

As we have seen in previous installments, some canons are linguistic in nature in that they use common characteristics of expression as lenses through which to discern the meaning the legislature was attempting to convey through the statute it wrote. Other canons are substantive in that they seek to protect established values or preserve legitimate relationships between branches of the government.

The no surplusage canon has been explained and defended in both those regards. Linguistically, the legislator as speaker "is presumed to, as in fact he does, choose his words deliberately intending that every word shall have a binding effect."[17] Substantively, textualist judges believe that with few exceptions, the role of courts is to apply statutes as they are written and not to alter them. To those jurists, "the surplusage canon holds that it is no more the court's function to revise by subtraction than addition."[18]

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Neither of those rationales commands universal support, however. A former colleague of mine has challenged the reality of the linguistic justification:

> Statutes are not always carefully drafted. Legal drafters often include redundant language on purpose to cover any unforeseen gaps or simply for no good reason at all. And legislators are not likely to waste time or energy arguing to remove redundancy when there are more important issues to address. Thus, the presumptions [underlying the canon] simply do not match political reality.[19]

Of course, examples of obvious redundancy are abundant in everyday life. Every airline passenger can recite the injunction not to "destroy, disable, or tamper with" the smoke detectors. It would be hard to destroy or disable an appliance without tampering with it. Whether for solemnity, emphasis, belt-and-suspenders caution, or just sloppiness, speakers often engage in verbal superfluity.

[17]Ernst Freund, "Interpretation of Statutes," 65 *U. Pa. L. Rev.* 207, 218 (1917); *see also, United States v. Butler,* 297 U.S. 1, 65 (1936); *State v. Sweat*, 665 S.E.2d 645, 651 (S.C. App. 2008), *aff'd*, 688 S.E.2d 569 (S.C. 2010).

[18]Scalia and Garner, *supra* note 1, at 174.

[19]Linda D. Jellum, *Mastering Statutory Interpretation* 104 (2008).

Regarding the other rationale, not all judges are disciplined textualists. Thousands of state and federal cases have endorsed the notion that "the cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature."[20] For some judges, that means objective intent to be discerned from the statute itself. For many others, however, it is subjective intent to be gleaned from whatever intrinsic or extrinsic resources may be at hand.[21] Particularly for judges of the second persuasion, neither adding to nor subtracting from statutory text is a mortal sin. Thus, "like all other canons, this one must be applied with judgment and discretion, and with careful regard to context. It cannot always be dispositive because (as with most canons) the underlying proposition is not invariably true."[22] Accordingly, courts have treated statutory terms as surplusage under various circumstances, including when:

- the text, structure, or context reveal a clear meaning;
- the word was the product of legislative inadvertence or a typographical or clerical error;
- excision is necessary to give the statute "meaning, effect, or intelligibility";
- applying all the language would lead to an absurd or irrational result;
- excision is necessary to harmonize other provisions;
- the words in question "are entirely foreign to the subject matter of the enactment"; or
- it is apparent from the body or the caption of the statute that the term is surplusage.[23]

State-Local Tax Examples

To illustrate operation of the no surplusage canon, we now consider five tax cases. The canon was significant to the outcome in cases from New Jersey, Massachusetts, and Louisiana. It was avoided or overcome in cases from Hawaii and California.

New Jersey

New Jersey imposes a transfer inheritance tax. Before Grace Frost died in June 2000, her attorney embezzled more than $250,000 from her. Her estate received a compensatory payment in December 2002 on account of the embezzlement. That receipt generated transfer inheritance tax liability, which was paid under an amended return. Interest also was payable to the state for that liability. The question in the case was whether that interest accrued from eight months after the date of Grace's death or two months after the estate received the compensatory payment.

The earlier date was the date generally provided by New Jersey Statute 54:35. The estate argued for the later date on the ground that post-death settlements are contingent future estates and so fall within the special rule under New Jersey Statute 54:36-5. In *Estate of Frost v. Division of Tax'n*, the court rejected that contention in part because of the no surplusage principle. The court noted that another statutory exception (enacted after the contingent future estates exception) involved amounts recovered for the wrongful death of a person. The court reasoned that accepting the estate's "interpretation would render the [later enacted] provision excluding wrongful death settlements . . . superfluous, as it would already have been covered under the section regarding contingent future estates."[24]

Massachusetts

The question in *Verizon New England Inc. v. Board of Assessors of Newton* involved the power of local assessors to assess property taxes after decision by the appellate tax board but before expiration of the time for appeal of that decision. The taxpayer denied that this power existed because no final decision exists before the expiration. The assessors countered that each decision issued by the board constitutes a final decision on which assessment could be based.

The court noted that standing alone, the text of the relevant decision could credibly support either party's position. In part because of our canon, however, the court held for the taxpayer. The court noted another statute, stating: "Upon dismissal of an appeal, the decision of the board shall thereupon have full force and effect." The court concluded: "If, as the [assessors] suggest, the board's decision were effective upon its issuance, we would have to conclude that the last sentence was unnecessary surplusage

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[20]*Sloan v. Hardee*, 640 S.E.2d 457, 459 (S.C. 2007).

[21]*See* Steve R. Johnson, "The Two Kinds of Legislative Intent," *State Tax Notes,* Mar. 30, 2009, p. 1045, *Doc 2009-5906*, or *2009 STT 59-3*.

[22]Scalia and Garner, *supra* note 1, at 176.

[23]Singer and Singer, *supra* note 13, section 47:37; *see also Farmers Ins. Exch. v. Superior Ct.*, 137 Cal. App. 4th 842, 858 (2006); *In re Estate of Smith,* 467 A.2d 1274, 1280 (Del. Chan. 1983).

[24]*Estate of Frost v. Division of Tax'n*, 22 N.J. Tax 537, 549 (2005). (For the decision, see *Doc 2005-24652* or *2005 STT 239-27*.)

[sic]. That is the kind of conclusion we almost never reach, . . . and we do not reach it here."[25]

Louisiana

The question in *McLane Southern, Inc. v. Bridges* was whether a wholesale dealer of smokeless tobacco products was liable for excise tax under Louisiana's Tobacco Tax Law. In 1932 the Legislature enacted revised statutes 47:85 and 47:841, rendering the sale, use, or distribution of tobacco products taxable, defining tobacco products, and imposing the tax on dealers. In 2000 the Legislature amended one of the statutes to add smokeless tobacco to the list of taxable products, but it did not amend the other statute. Consequently, the taxpayer maintained, the law did not define who (dealers or others) is liable for payment of the tax.

The Louisiana Supreme Court held against the taxpayer, saying that if it were to accept McLane's argument, neither McLane nor anyone else would be liable for the tax, which would render the Legislature's addition of smokeless tobacco to the list of taxable products meaningless and superfluous "from the moment it was enacted."[26]

The court undoubtedly reached the correct result. However, it blurred the rationale. There is another canon — more or less separate from the no surplusage canon — known as the presumption against ineffectiveness, that is, that interpretations that render a statute ineffective are to be avoided.[27] The Louisiana court's rationale seems to partake more of the rule against ineffectiveness than the rule against surplusage.

Hawaii

County of Maui v. KM Hawaii Inc. was a property tax case involving valuation of the Hyatt Regency Maui's property. The taxpayer appealed the county's assessment to the state tax appeal court. The tax appeal court held for the taxpayer. Indeed, it determined a valuation even lower than that claimed by the taxpayer in its notice of appeal. The county appealed the decision, asserting that the court lacked jurisdiction to award judgment lower than the valuation the taxpayer claimed in its notice of appeal. The Hawaii Supreme Court held that the appeal court did have jurisdiction.

The case involved several statutes, one of which provided that the tax appeal court's jurisdiction is limited to the amount of valuation or taxes in dispute as shown on the one hand by the amount claimed by the taxpayer and on the other hand by the amount of the assessment. The supreme court concluded that this statute did not require a decision for the county.

Nonetheless, to avoid the no surplusage canon, the supreme court thought it necessary to find some work for this statute to do, some manner in which this statute did limit the lower court's jurisdiction. It settled on the following:

> We have held that the tax appeal court must base its conclusions upon evidence adduced. Accordingly, we hold that "the amount claimed by the taxpayer" means whatever amount is supported by evidence presented to [that court,] and that [the statute] limits the jurisdiction of [that court] to that amount.[28]

California

In *River Garden Retirement Home v. FTB*, the taxpayer claimed dividends received deductions for franchise tax purposes for tax years 1999 and 2000. The deduction statute was invalidated in 2003 under the commerce clause because it discriminated in favor of California corporations. The California Franchise Tax Board then denied the 1999 and 2000 deductions under a retroactive assessment remedy provided by a state statute. In relevant part, the statute permitted retroactive assessments "if any deduction, credit or exclusion . . . is finally adjudged discriminatory against a national banking association contrary to [15 U.S.C. section 548] . . . or is for any reason finally adjudged invalid, or discriminatory under the California Constitution, or the laws or the Constitution of the United States."

The taxpayer maintained that the statute pertained only to national banks, and it was not a national bank. The court properly rejected the taxpayer's contention because the statute was written in the disjunctive, referring to a tax that was discriminatory against national banks under section 548 or was invalid under the California Constitution or federal statutory or constitutional law. The situation did not fall into the statutory language before "or" that sets out the condition for national banks, but it did fall into the statutory language after "or."[29]

The taxpayer resisted that conclusion on the basis of the no surplusage canon, maintaining that if the material after the "or" embraces all taxpayers, "then the prior reference to national banking associations

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[25]*Verizon New England Inc. v. Board of Assessors of Newton*, 963 N.E.2d 1205, 1209 (2012); *review denied*, 967 N.E.2d 636 (Mass. 2012). (For the decision, see *Doc 2012-5793* or *2012 STT 55-8*.)

[26]*McLane Southern, Inc. v. Bridges,* 84 So.3d 479, 484 (La. 2012). (For the decision, see *Doc 2012-1624* or *2012 STT 18-14*.)

[27]*See, e.g.*, Scalia and Garner, *supra* note 1, at 63-65.

[28]*County of Maui v. KM Hawaii Inc.*, 915 P.2d 1349, 1356 (Haw. 1996) (citations and internal punctuation omitted), *reconsideration denied*, 917 P.2d 727 (Hawaii 1996).

[29]*River Garden Retirement Home v. FTB*, 186 Cal. App. 4th 922, 941 (2010). (For the decision, see *Doc 2010-15924* or *2010 STT 137-8*.)

would be mere surplusage because national banks would be covered by the latter provision."[30]

The court properly rejected that contention. It endorsed the canon as a general proposition but found it inapplicable to the belt-and-suspenders statute before it. The court stated:

> There is no rule prohibiting the Legislature from emphasizing a particular point notwithstanding the rule against surplusage. Nor is there a rule of statutory construction requiring courts to assume that the Legislature has used the most economical means of expression in drafting a statute. . . . Here the legislative drafters wished to emphasize the FTB's authority to recompute deductions, credits or exclusions that run afoul of 12 United States Code sections 548, while also more broadly recognizing that authority when a taxing provision fails under the state or federal constitutions or other federal law.[31] ☆

Interpretation Matters is a column by Steve R. Johnson, University Professor of Law at the Florida State University College of Law. He can be contacted at sjohnson@law.fsu.edu.

[30]*Id.* at 941-942.

[31]*Id.* at 942 (citations and internal punctuation omitted).