The notion of "Administrative Practice" in U.S. Federal Tax Law

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1. Introduction

This article will address the concept of "administrative practice" in the federal tax administration of the United States of America. After a brief summary of the various administrative instruments which constitute the core of tax administrative practice, the article will consider whether a distinction can be drawn between statutory interpretative practice and administrative practice as developed by the competent agencies in the absence of clear statutory guidelines.

By way of introduction, it is helpful to understand how U.S. Federal tax administration is undertaken by the Internal Revenue Service ("IRS") in accordance with three principal sources of authority; statutory, administrative and judicial. Statutory authority for administrative practice includes the legislation enacted in the Internal Revenue Code of 1986 (Title 26 of U.S. Code)[2], the tax treaties and all relevant aspects of the legislative history. Administrative authority includes Treasury Regulations, Revenue and Letter Rulings, Revenue Procedures, Technical Advice Memoranda, Chief Counsel Advice Memorandums and the Internal Revenue Manual. Judicial authority is the body of case law developed by the Supreme Court and the twelve different Courts of Appeal, as well as the U.S. Court of Federal Claims and the U.S. Tax Court.[3] This essay will only consider the second of these sources, administrative authority.

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[2] *Internal Revenue Code, Title 26 of U.S. Code*.

[3] See generally, Michael I. Saltzman, Leslie Book, *IRS Practice & Procedure* (2010, Thomson RIA) ¶ 3.01; Boris I. Bittker & Lawrence Lokken, *Federal Taxation Income, Estate & Gifts* (2011, Thomson RIA) ¶ 110.1; John Bourdeau, Paul Coltoff et. als, 35 American Jurisprudence 2d*, Federal Tax Enforcement,* (Nov. 2011).

2. Treasury Regulations

By far the most important component of administrative tax law consists of the regulations promulgated by the Secretary of the Treasury under Congressional delegation.[4] Treasury Regulations are encompassed within the general principles of administrative law regulating agency lawmaking. Agency regulations may either have the force of law (and are then defined as "legislative rules") or not (in which case they are defined as "interpretative rules"). According to the Administrative Procedure Act of 1946, only legislative rules are subject to the "notice and comment process" [5] while "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice"[6] are exempt. On the other hand, legislative rules are reviewed under a deferential *Chevron*[7] standard[8] while interpretative rules are set to a higher standard of review under the *Skidmore* test.[9]

Until the recent Supreme Court judgment in *Mayo Foundation*[10], Treasury Regulations were not subject to ordinary administrative rules but were subject to a higher degree of judicial deference.[11] In fact, administrative tax practice did

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[4] 26 U.S.C.A. § 7805 (West). See generally, Westlaw Editorial, *Mertens Law of Federal Income Taxation*, § 1:6, (2012);; 20 Federal Procedure, Lawyer's Edition, § 48:181, (Dec. 2011).

[5] The notice-and-comment process is regulated by 5 U.S.C.A. § 553 (b) and ensures that "notice of [the] proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include :
a) a statement of the time, place and nature of public rule making proceedings;
b) reference to the legal authority under which the rule is proposed and either the terms or substance of the proposed rule or a description of the subjects and issues involved."

[6] 5 U.S.C.A. § 553 b(A).

[7] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)*.

[8] The Chevron doctrine considers whether 1) Congress has expressly considered the particular matter at hand. If this is the case, the agency must defer to the "unambiguously expressed intent of Congress" and cannot apply its own discretion in issuing a legislative rule. If Congress has not expressed itself on the matter, legislative regulations must be consistent with a "permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)*.

[9] The Skidmore test considers the weight given to a particular aspect of an interpretative rule in light of the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co., 323 U.S. 134 (1944)*,323 U.S. 134 (1944). Interpretative rules are distinguished by legislative rules depending on whether it appears (1) that Congress "delegated authority to the agency generally to make rules carrying the force of law" and whether (2) "the agency interpretation claiming deference was promulgated in exercise of that authority." *United States v. Mead Corp.,* 533 U.S. 218 (2001).

[10] *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 178 L. Ed. 2d 588 (2011).

[11] "it was widely believed by the tax community… that tax regulations were subject to an agency-specific regime that was sui generis. The belief that tax was somehow different or special in the deference to be applied to Treasury regulations was commonly referred to as tax exceptionalism."

not distinguish between interpretative and legislative rules but rather drew a line between "specific authority regulations" and "general authority" regulations. Specific authority regulations encompassed those regulations promulgated pursuant to a specific delegation by Congress (often a statutory section) and were granted "controlling deference".[12] General authority regulations were enacted in the absence of Congressional legislation and were, for all intents and purposes, equated to interpretative rules in terms of the applicable degree of judicial deference.[13]

Under the new federal standard enunciated in *Mayo,* "we are not inclined to carve out an approach to administrative review good for tax law only… [t]he principles underlying our decision in *Chevron* apply with full force in the tax context."[14] Applying the *Chevron* doctrine to Treasury Regulations will *de facto* insulate legislative rules from judicial review. In fact, a Treasury Regulation will now be "upheld if it is simply a reasonable construction of the statute."[15] Under this new standard, even if the Treasury regulation is inconsistent with a prior judicial decision on the matter, the same Court will defer to the agency's determination and will not give weight to its prior ruling.[16]

Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537 (2006).

[12] Specific authority regulations (also called legislative regulations) were granted the force of law unless they either 1) exceeded the scope of the Treasury's delegated authority, 2) were contrary to other legislation, 3) were unreasonable. Erin M. Collins & Edward M. Robbins, Jr., *Internal Revenue Service Practice and Procedure Deskbook,* ¶1-7 (Practising Law Institute, 2010).

[13] The distinction between general and specific authority was approved in federal case law. *Rowan Cos., Inc and Vogel Fertilizer. Rowan Companies, Inc. v. United States,* 452 U.S. 247, 101 S. Ct. 2288, (1981); *U.S. V. Vogel Fertilizer Co.,* 455 U.S. 16, 102 S. Ct. 821, (1982). General authority were entitled to less deference than Specific Authority regulations being "merely persuasive." The interaction of *sui generis* administrative tax rules with the general principles of administrative law was source of uncertainty as, for example, general authority regulations could be classified as "legislative rules" for administrative law purposes but then be subject to the non-deferential standard of review of *National Muffler* rather than the deferential *Chevron* analysis. *Nat'l Muffler Dealers Ass'n, Inc. v. U.S.,* 440 U.S. 472 99 S. Ct. 1304, 59 L. Ed. 2d 519 (1979).

[14] *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713, 178 L. Ed. 2d 588 (2011).

[15] "Now, for all practical purposes taxpayers must hope that a court rules that the underlying statute is unambiguous under step one of Chevron, because once the analysis moves to step two of Chevron, it is overwhelmingly likely that the challenge to the regulation will fail." Roger Dorsey, *Mayo and the End of 'Tax Exceptionalism' in Judicial Deference,* 87 Practical Tax Strategies 63, Aug. 2011 at 68.

[16] Mayo introduced the *Brand X* principle where "an agency [may] … override what a court believes to be the best interpretation [of an] ambiguous statute" [and in this new agency determination, it will still be subject to *Chevron* deference.] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005). Collins & Robbins, *op.cit.,* at ¶1-9.

Homologizing Treasury Regulations with general principles of administrative law erases the general and specific authority rule distinction. To a certain extent, the former distinction had drawn the line precisely at the difference between practice a result of interpretation of the laws (specific authority) and regulations promulgating a consistent administrative practice in the absence of Congressional intent (general authority.) The application of the Chevron doctrine in this field shifts concerns from statutory interpretation to administrative delegation with an inquiry on the reasonableness of the agency's determination and on whether the action was directly authorized by Congress.

3. Procedural Regulations

Procedural Regulations are promulgated by the Commissioner of Internal Revenue for the purpose of governing the "conduct of the agents of the Service in the performance of their duty"[17] Unlike Treasury Regulations, Procedural Regulations are not subject to the notice-and-comment requirements,[18] may be retroactive[19] and are not binding on the IRS.[20] *Luhring v Glotzbach*[21] held that Procedural Regulations could only be "directory and not mandatory in legal effect, because if they were mandatory, they would operate to curtail the higher authority of the Secretary of Treasury [when issuing Treasury Regulations.]"[22] As such, procedural regulations – a centralized form of administrative practice issued by the Commissioner in the absence of statutory authority on the matter - cannot be challenged by a taxpayer in court. On the other hand, if a taxpayer can prove that Procedural Regulations are inconsistent with statutory legislation or Treasury Regulations they will be overruled and considered ineffective.

[17] Internal IRS management rules are promulgated by the Commissioner of Internal Revenue under 5 U.S.C.A § 301 "The head of an Executive department… may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business…"; Collins & Robbins, *op.cit.,* at ¶1-13.
[18] 5 U.S.C.A. § 553 b(A) rule making does not apply to "rules of agency organization, procedure or practice"
[19] Nota Bene, not all regulations which address matters of procedure are procedural regulations.
[20] *Luhring v. Glotzbach,* 304 F.2d 560, 565 (4th Cir. 1962); *Rosenberg v. Comm'r*, 450 F.2d 529, 533 (10th Cir. 1971); *Iowa Investors Baker v. Comm'r*, T.C. Memo 1992-490.
[21] *Luhring v. Glotzbach,* 304 F.2d 560, 565 (4th Cir. 1962).
[22] Collins & Robbins, *op.cit.,* at ¶1-13.

4. Internal Revenue Manual

The Internal Revenue Manual ("IRM") "is the primary, official source of IRS instructions to staff relating to the administration and operation of the Service."[23] An important case in the characterization of taxpayer-IRS relationship in the backdrop of the IRM has been the *United States v Caceres*[24] Supreme Court judgment of 1979. Similarly to Procedural Regulations, the Supreme Court held that a violation of the IRM by the IRS would not be an actionable wrong to taxpayers. In *Caceres, t*he taxpayer defendant had been accused of attempting to bribe an IRS agent based on evidence which an IRS agent had recorded in violation of the procedural regulations prescribed in the IRM.[25] The defendant moved to suppress the evidence but the Court held that since the IRM is not a constitutional requirement but is essentially a self-regulating code of conduct of a departmental agency, its violation does not automatically entail constitutional scrutiny.[26] The Court sidestepped the Due Process claim[27] arguing that the defendant had not relied on the regulations and consequently, that "he was not worse off than he would have been had the regulations been complied with."[28] On the other hand, the Court also recognized that in cases where the defendant can prove detrimental reliance on a particular agency rule "It does not necessarily follow [from the fact that the IRM was not a constitutional requirement] that the agency had no duty to obey [the IRM]." The exact scope of the Supreme Court's holding remains ambiguous but seems to support a weak duty of equitable estoppel capable of compelling the IRS to abide by the IRM in exceptional circumstances.[29]

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[23] Internal Revenue Manual, ¶1.11.2.2, (Thomson RIA, 2011).

[24] *U.S. v. Caceres*, 440 U.S. 741, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979).

[25] *U.S. v. Caceres,* at 743; Thomas W. Merrill, *The Accardi Principle*, 74 Geo. Wash. L. Rev. 569, 579 (2006).

[26] *U.S. v. Caceres,* at 749-751.

[27] U.S. Constitution, XIV Amendment, §1… "nor shall any State deprive any person of life, liberty, or property, without due process of law."

[28] Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 684 (1992).

[29] Schwartz, *op.cit.,* at 684, 686: "The Court does *not* hold that agencies are bound to their own regulations by the Due Process clause only when detrimental reliance can be shown. Instead... it is most plausible to interpret *Caceres* to require a showing of prejudice and reliance only when the Due Process Clause is invoked to provide *estoppel-like relief* to a party harmed by an agency violation of its own rules."

5. Alternative Forms of Administrative Practice

IRS letter rulings, revenue rulings and revenue procedures constitute additional forms of administrative practice issued on a centralized (national) level but in the absence of authoritative Congressional or Treasury regulation. This is because these IRS pronouncements affect the tax implications of single taxpayers rather than the generalized taxpaying base.

5.1. *Letter Rulings*

A Letter ruling (or Private Letter Ruling) is a "written determination issued to a taxpayer by an Associate office in response to a written inquiry from an individual … about its status for tax purposes or the tax effects of its acts or transactions, prior to the filing of returns… A letter ruling interprets and applies the tax laws to the taxpayer's specific set of facts and is given when appropriate in the interest of sound tax administration." [30] When a letter ruling is issued it is addressed to a particular taxpayer and determines conclusively the federal tax implications of the taxpayer's inquiry.[31] letter rulings are binding on the taxpayer (and conversely on the IRS in that particular case) insofar as the taxpayer satisfies the steps or requirements specified by the authorities in the letter.[32] However, letter rulings have no precedential value; they may not be relied upon in different transactions by either the taxpayer or IRS personnel.[33] As such, letter rulings present another instance of centralized administrative conduct issued to address particular facts (and as such, often in the absence of clear statutory regulation) but which is not binding (nor can be relied upon) by other taxpayers.

5.2. *Revenue Rulings*

Revenue rulings are "an official interpretation by the Service which has been published in the Internal Revenue Bulletin… issued only by the National Office and … published for the information and guidance of taxpayers, Internal

[30] Rev Proc. 2011-1, I.R.B. 1. Letter rulings are issued in narrow circumstances: 1) the issue must not be inherently factual and 2) the query must address the entire transaction and not merely a constituent part of it.
[31] C Collins & Robbins, *op.cit.,* at ¶1-15.
[32] 26 C.Fr. § 601.201(2).
[33] Treas. Reg. §601.201(1)(l). C Collins & Robbins, *op.cit.,* at ¶1-16.

Revenue Service officials, and other concerned."[34] Like Letter Rulings, Revenue Rulings are issued by a centralized department: the National Office. Yet, they differ insofar as revenue rulings are generalized in application while letter rulings are restricted to the particular taxpayer to whom the letter was addressed. However, despite the rulings' publication and generalized applicability, for administrative law purposes a revenue ruling has the value of being solely the Commissioner's interpretation of the "law as it relates to a given set of facts"[35] and, consequently, revenue rulings are not awarded the force of law. On the other hand, Revenue Rulings have precedential value in taxpayer-IRS litigation and are binding on the Revenue[36]– albeit not on a court in the judge's interpretation and construction of a federal tax statute.[37]

5.3. *Revenue Procedures*

Revenue Procedures are the official statements of the IRS on a particular aspect of federal tax filing and procedure. While these statements are publicized they are not binding on the IRS[38] as they are presumed to carry directory and not mandatory[39] instruction.

5.4. *Technical Advice Memoranda*

Technical Advice Memoranda ("TAMs") comprises the IRS's response to requests for "assistance on unclear questions of interpretation and application of tax laws to cases that are currently subject of examination or appeal."[40] TAMs are issued by the National Office – although submitted by the taxpayer in the local field office. Once issued, a TAM has a similar effect as a letter ruling; it has no precedential value for other cases. A TAM however will be binding on the local field office (from which the request had been first initiated) even if the technical advice operates to the favor of the taxpayer and not the administration. While

[34] Treas. Reg. §601.201(a)(6); Written statement issued to a taxpayer … by the National office which interprets and applies the tax laws to a specific set of facts. Treas. Reg. §601.201(a)(2).
[35] *In Omohundro v. United States.*, 300 F.3d 1065, 1068-69; Collins & Robbins, *op.cit.,* at ¶1-32.
[36] Revenue Procedure 89-15, 189-1 C.V. 814.
[37] *Stubbs, Overbeck and Assocs, Inc v. United States*, 445 F.2d 112 (5th Cir. 1971) ("a ruling is merely the opinion of a lawyer in the agency and must be accepted as such.")
[38] On the other hand, while not binding the "Service typically follows the revenue procedure." Collins & Robbins, *op.cit.,* at ¶1-33.
[39] *Chrysler Corp v Brown*, 441 U.S. 281, 302 (1979); *Christian v Comm'r*, 1994 T.C.M. 332.
[40] Collins & Robbins, *op.cit.,* at ¶1-33.

an Appeals Office may lodge a reconsideration of the TAM, in cases of conflict the opinion of the National Office will prevail and be considered final. [41] TAMs are yet another instance of centralized tax practice issued by the central office and binding on the peripheral administrations.

5.5. *Chief Counsel Advice*

The internal instructions issued to the IRS agents across the country are termed as Chief Counsel Advice ("CCA") and defined in the statute as "written advice or instruction… prepared by any national office component of the Office of Chief Counsel that is issued to field or service center employees of the IRS or regional or district employees of the Office of Chief Counsel, and conveys any legal interpretation of a revenue provision…"[42] Following successful Freedom-of-Information[43] litigation under an antecedent form of the current CCA (what was then defined as the Field Service Advice), a taxpayer is permitted to access and view a CCA. CCA's however, have a limited legal value insofar as they are not binding on either the IRS or the Courts' interpretation of federal tax legislation but merely comprise "part of the process by which government formulates law or policy."[44]

6. IRS Restructuring

As the summary of the various administrative procedures has highlighted, the notion of a "decentralized" federal organization is not well suited to define the current regime of tax administration. Part of this is due to the extensive reform of the IRS undertaken by the 1998 IRS Restructuring Act.[45] Prior to the 1998 legislation, the IRS was administered in geographic regions and district offices (at one time totaling 7 regions with 63 district offices). With the exception of a "ruling request or and administrative appeal, most taxpayer-practitioner contact

[41] Collins & Robbins, *op.cit.,* at ¶1-35.
[42] IRC §6110 (i).
[43] The Freedom of Information Act is U.S. leading statute granting citizens the access to public records.
[44] Collins & Robbins, *op.cit.,* at ¶1-39.
[45] Internal Revenue Service Restructuring and Reform Act of 1998, [Taxpayer Bill of Rights III], (Pub.L. 105-206), 112 Stat. 685, enacted on July 22, 1998.

with the IRS was done at the district level."[46] The Restructuring Act modified this geographical dimension into an operational-focus structure, with the administration divided in four segments: Wage and Investment, Small Business-Self Employed, large Business & International, Tax Exempt and Governmental Entities.[47]

For the purpose of providing "stability to the IRS so that it may move forward in a cogent, focused direction"[48] an Oversight Board was appointed with the task of overseeing the "IRS in its administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws."[49] Furthermore, numerous initiatives were undertaken on an administration-wide level to help provide "positional consistency and substantial coordination and review" including the Coordinated Examination Program, Industry Specialization Program, Market Segment Specialization Program, Industry Issue Focus Program, and Appeals Coordinated Issue Program all focusing on internal consistency and uniformity between the offices. [50]

7. A Duty of Consistency

While tax legislation and administration suggest a trend towards the centralized and uniform operation of the IRS there is still no constitutional protection for a taxpayer who alleges inconsistent treatment by the IRS. Consequently, there is no legally enforceable duty of "tax consistency on the Government"[51] enacted on a nationwide level. While the situation may have improved following the introduction of taxpayer-oriented services in the 1998 Act, the remarks of Professor Davis made over 40 years sound alarmingly up to date: "[the IRS may be] the worst offender against sound principles in the use of precedents… [Its] basic attitude is that because consistency is impossible, an effort to be

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[46] Collins & Robbins, *op.cit.,* at ¶3-5.

[47] Robert E. Meldman & Richard J. Sideman, *Federal Taxation Practice and Procedure* (2001, CCH) ¶102.

[48] 26 U.S.C.A. § 7802. Collins & Robbins, *op.cit.,* at ¶3-5.

[49] Collins & Robbins, *op.cit.,* at ¶3-9.

[50] David M. Richardson, Jerome Borison & Steve Johnson, *Civil Tax Procedure* 100, 130 (2d. ed. 2008).

[51] Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and Proposed Legislative Solution,* Tennessee Law Review, 563 (2010).

consistent is unnecessary; therefore it need not consider precedents, and it may depart from precedents without explaining why."[52]

Partly, the ease with which the IRS may depart from precedent is due to the inconsistent judicial response to the agency's conduct. Courts have varied extensively in their treatment of the issue, ranging from a "no duty of consistency"[53] to a "strong duty"[54] of consistency requirement. It was the inability of the courts to fashion a uniform common law principle which has inspired academics to propose a statutory duty in particular instances.[55]

8. Constitutional Protections

The federal constitution is applicable to protect taxpayers only in the most egregious instances of arbitrary and inconsistent agency practice. The Equal Protection Clause of the Fourteenth Amendments prohibits "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[56] However, for a taxpayer to avail himself of this protection, the agency's conduct must be more than an "error of judgment by officials… [there must be] something which in effect amounts to an intentional violation of the essential principle of practical uniformity."[57]

Alternatively, a taxpayer may have rights protected under the Fifth Amendment[58] if he can prove "selective prosecution"[59] that is, if the taxpayer can provide evidence that "others similarly situated generally have not been prosecuted, and… that the Government's prosecution of him is selective,

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[52] 2 Kenneth Culp Davis, *Administrative Law Treatise* §8:12 (2d ed. 1979).

[53] *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 133-34 (1936); *Temple v. Comm'r*, 62 F. App'x 605, 609 (6th Cir. 2003); *Mid-Continent Supply Co. v. Comm'r,* 571 F.2d 1371, 1376 (5th Cir. 1978); *Vons Cos. v. United States* 51 Fed. Cl. 1, 6-12 (2001).

[54] *Estate of McLendon v. Comm'r*, 135 F.3d 1017, 1025 (5th Cir. 1998); *Powell v. United States*, 945 F.2d 374, 377-78 (11th Cir. 1991); *United States v. Kaiser*, 363 U.S. 299, 308 (1960); *Rowe v. Comm'r*, 128 T.C. 13, 21-26 (2007) (Gale, J., concurring); id. at 27-28 (Goeke, J., concurring); *Rauenhorst v. Comm'r*, 119 T.C. 157, 170-71 (2002).

[55] Johnson, *An Irs Duty of Consistency*, *op.cit.*

[56] *Sunday Lake Iron Co. v. Twp. of Wakefield*, 247 U.S. 350, 352-53 (1918).

[57] *Sunday Lake Iron Co. v. Twp. of Wakefield*, 247 U.S. 350, 352-53 (1918).

[58] Amendments of the U.S. Constitution

[59] *United States v. Kahl*, 583 F.2d 1351, 1353 (5th Cir. 1978).

invidious, in bad faith or based on impermissible considerations such as race, religion, or his exercise of constitutional rights."[60]

One of the leading cases on the implications of the doctrine of uniformity dates to a time when International Business Machines and Remington were the sole competitors in the computer industry.[61] Remington Band had been accorded an exemption from excise taxes following a private letter ruling which IBM, once it filed the analogous request, was denied. IBM did not challenge the revocation of the excise tax exemption (as the private letter ruling to Remington had itself been incorrect in the interpretation of the applicable law) but argued that it had been unjustly treated insofar as Remington Band had enjoyed 6 years of improper exemption which IBM had seen itself denied in the retrospective application of the private letter ruling. The Court ruled in favor of IBM and held that the IRS had abused its discretion under § 7805 (b) when it retroactively applied the denial of IBM's excise tax demand solely to IBM. Despite the court's clear judgment, the case has been confined to the specific facts and is now contested as dubiously decided. [62]

9. Congressional Intervention to Restore Uniformity

In the absence of a judicially crafted duty of consistency (and because of the different jurisdictional competences of the various federal courts which prevent a single lower court from introducing a uniform nationwide standard), Congress often intervened to solve issues of patent inconsistency and ambiguity. One such case was the enactment of 26 U.S.C.A. § 132 for the regulation of fringe benefits in employment contracts. The Congressional Report of the Committee on Ways and Means on the Tax Reform Act of 1983 – the legislative report which proposed the legislation – identifies how "the administrators of the tax law have not had clear guidelines in this area, and hence taxpayers in identical situations have been treated differently."[63] As such, inconsistent treatment of taxpayers

[60] Johnson, *An Irs Duty of Consistency*, *op.cit.* at 575.
[61] *Int'l Bus. Machs. Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965).
[62] Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to be Consistent?*, 40 Tax Law Review 411, 422 (1985).
[63] Michael J. Graetz & Deborah Schenk, *Federal Income Taxation: Principles and Policies,* (Sixth Edition, 2009) 116.

may prompt Congressional legislation insofar as Congress believes it possible to draw a bright-line rule.

10. Interaction of State and Federal Law

As a final consideration, it is important to remember that the interaction between U.S. federal and state tax regimes adds an additional layer of complexity to the administration of federal tax statutes. Not only does the IRS have to strive to ensure a consistent treatment of taxpayers in a country of the dimension and population of roughly Western Europe, but it also has to account for the overlapping competences of state tax authorities. Generally, this has been possible through the centralization of federal tax (at regional and now national level) and because of the different tax bases of the federal and state administration. While state taxes vary significantly amongst them, in general, states have competence over property and sales taxes and set an income tax which is deductible by taxpayers for federal tax purposes. [64] Some states rely on the federal tax filings for their assessments leading once more to the steady path of fiscal centralization in the tax administration.

11. Conclusion

As this brief discussion of U.S. federal tax has highlighted, the notion of a decentralized tax administration is ill suited to define the current IRS administration. Administrative practice is characterized by a hierarchical competence-based operation rather than a geographically-limited administration. Insofar as consistent administrative practice has evolved in the absence of Congressional legislation it is always subject to the latter were Congress to legislate or delegate authorities to the Department of the Treasury.

[64] Howard Chernick & Jennifer Tennant, *Federal-State Tax Interactions in the United States and Canada,* Publius: The Journal of Federalism, 40 (3) 2010, 510.