

Nikki Dobay (00:00):

Hello, and welcome to GeTtin' SALTy, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay shareholder in the Sacramento, California and Portland, Oregon offices. I am very pleased to have a SALT legend here today for this conversation. Joining me is Marilyn Wethekam. Marilyn is now Of Council with the Council on State Taxation. That's a lot of councils, Marilyn, but Marilyn has a long and distinguished career pre-cost, both in-house and with one of the major SALT law firms. So Marilyn, thank you so much for joining me today.

Marilyn Wethekam (00:39):

Well, thank you Nikki for having me. I'm looking forward to this.

Nikki Dobay (00:43):

Well, you just did this little presentation at NESTOA, the FTA Northeastern Regional meeting, on the case Loper Bright Enterprises, and I thought your presentation was very good and very insightful with respect to what the case says and then the potential SALT implications of this case, which we will get to. So thank you again for coming here and talking about Loper with me. So I am going to ask you to just kick it off and talk a little bit about the case and what was really at issue in that case, and then we'll get into the fallout and the potential SALT implications.

Marilyn Wethekam (01:21):

Sure. Great. Thanks. Loper Bright was one of the most watched cases in this term, came down on June 28th, and it all dealt with what was finally referred to as Chevron deference. And so maybe to set the stage, we ought to explain a little bit what Chevron deference is and then we'll get into what the case did.

(01:45):

It's a doctrine that came out of a 1984 decision, a Supreme Court decision, that really addressed how the federal courts were to address ambiguous or silent statutes and what weight was really supposed to be given to the way that the agency interpreted those statutes. So the court in Chevron sets out a two-step process. If Congress has addressed the issue, you stop there, particularly if the agency's interpretation is contrary to whatever Congress has set forth in the statute. If the statute is ambiguous or silent, the court said a court shouldn't impose its own interpretation. You have to defer strict deference to the agency's interpretation as long as that was permissible construction of the statute. Now, I don't think they ever really defined that phrase, but that was the test. And from day one, I think most people bristled at this.

(02:41):

It was not a test just for tax, it was a test for any agency interpretation. And the courts over the 40 years have been whittling away at it. So what we see in Loper is the final death knell to Chevron deference. And basically, I don't think the Supreme Court, if you understand what they say in their decision, has used the Chevron test since 2016. That seems to flow through the decision.

Nikki Dobay (03:07):

Is that because they were finding that the agency's interpretations weren't permissible or they were just finding a way around Chevron generally?

Marilyn Wethekam (03:17):

I think in general, we were chipping away at it. They were finding a different analysis to get around this deference of an ambiguous or silent statute. I think they were using the fact that if that a statute of Congress had specifically delegated authority to an agency, then they had the delegation of authority and Chevron didn't apply.

Nikki Dobay ([03:40](#)):

Got it.

Marilyn Wethekam ([03:40](#)):

So I think there were workarounds is the easiest way to explain it, I would say.

Nikki Dobay ([03:45](#)):

But what Loper does is really put the nail in the coffin. So Chevron is dead.

Marilyn Wethekam ([03:53](#)):

I think Chevron is dead, and I think Loper did do that. I think Loper, by way of background, was a case that dealt with a regulation for commercial fishermen and a very complicated, I thought tax was complicated, commercial fishing apparently is as well.

Nikki Dobay ([04:14](#)):

Well, I was just thinking, I reread it last night and I will say I reread it with, Marilyn gave some great visuals of her self-reading the case for the first time at this, and I'll let her share those if she'd like throughout this podcast. But I reread it last night, and I was also struck, one, by the places where you had extreme reactions, but two, that I skipped a lot of the commercial fishing parts because I was like, "I don't need to learn something new. We deal with an area that's complicated enough."

Marilyn Wethekam ([04:47](#)):

In the end, after you get through the commercial fishing part, which is a slog, to your decision, it comes down to the point where the court says the department did not have the authority to interpret the regulation the way it was interpreted, and that an observer on a commercial fishing boat, the commercial fishing captain or the owner of the boat did not have to pay for that observer, end of story. But what it does is it strikes down Chevron deference, and they make that perfectly clear. Chief Justice Roberts is the author of the opinion, and it looks to me as I read it, Nikki, I'd be interested in hearing what you have to say about this since you just reread it. It looks to me that they defaulted back to a Skidmore type approach. So now we just wiped out 40 years of jurisprudence.

([05:34](#)):

Skidmore is a 1944 case, so now we're back 80 years, and Skidmore, prior to Skidmore being decided, there was cases out there I believe that you would defer to an agency on the factualized side, but you wouldn't defer to them on the interpretation of the statute. So now along comes Skidmore, which kind of combines those two concepts together. And basically in Skidmore it says that the interpretation of an agency is based on the specialized knowledge or experience of that agency, and therefore you can rely on it both by a judge and by the parties of the case.

([06:10](#)):

But where Skidmore differentiates from Chevron is that it basically says the weight and reliance depends upon a number of things. How experienced the agency's consideration was, how detailed that

consideration was, and how it measures up with earlier rulings or prior rulings of the agency. Justice Roberts cites Skidmore five or six times in his decision. So my takeaway is Skidmore seems to be the default and Skidmore isn't, when we get into the state tax implications of it, skidmore is not all that different than what I would say statutory construction rules are. I think where you were going with the Loper Bright decision is there are a number of statements by Justice Roberts that are a bit concerning, particularly if you've spent your entire career in an agency.

[\(07:03\)](#):

And one of them is that agencies have no special competence in resolving statutory ambiguities, only the courts do, and therefore they exercise their independent legal judgment. To your point, what I said last week was as I was reading this, unfortunately I was drinking coffee and I came very close to spitting it out. It's very difficult for someone who has been in an agency and devoted their entire life to a specialized field to all of a sudden be told, "I think you have no special competence in resolving these ambiguities." The court did recognize, to give them some credit, the court did recognize that Congress could, in this case, have specifically delegated to the agency the ability to interpret the statute, and it was not in this particular, but there seems to be a little bit of a wiggle room, if you want to phrase it that way, should Congress want to go that way.

Nikki Dobay [\(07:59\)](#):

Yeah, I would agree. It seems like Skidmore becomes the new go-to test, and that very much does seem to say the court is going to weigh essentially all the facts and circumstances related to what the agency knows and the textual language and what it has before that. So it really pushes everything back to the court to make that ultimate decision. And there could be facts and circumstances that would allow a court to give the agency more deference, but that is no longer the default. And so I do think that's the world, the post-Loper world we live in.

Marilyn Wethekam [\(08:43\)](#):

I agree. I think the post-Loper world we live in is going to be determined by how much weight a court wants to give to an agency's interpretation, and that is going to vary court by court. Loper does say this only applies to federal regulations. However, I personally don't think that's the case. I think you have an issue, you have 40 years of jurisprudence that has just been overruled. I find it very difficult to believe that a state court isn't going to look at that and say, "Well, if the US Supreme Court just said this, why wouldn't we either adopt it or at least accept some of the analysis in Loper?"

Nikki Dobay [\(09:22\)](#):

Well, another thing that the court said that I think you said you were struck by when you were reading with that coffee was that agencies are inherently political and courts are not.

Marilyn Wethekam [\(09:33\)](#):

Yes.

Nikki Dobay [\(09:34\)](#):

Okay. We could all pause and think about that for a minute. We won't share our political views on that, but this makes it, well, I will say it, courts are inherently political, especially at the state level where we either have elected judges or judges that are, I don't want to say protecting the FISC, but the state FISC is definitely perhaps somewhere in their mind as they're ruling on a tax case. And so I think where there

were many practitioners that didn't love deference, it did provide some guardrails that we knew we were working within and we had to navigate. And now it is kind of wide open.

[\(10:17\)](#):

And so I think you're going to have more progressive judges that maybe will still provide that deference, and you're going to have more conservative judges that are going to lean in favor of the taxpayer. But what that will lead to in many situations is zero uniformity and guidance when it comes to what the heck you're supposed to tell your client and how you're supposed to advise them. So if putting your private practice hat back on Marilyn, can you share any insights for the, I'm trying to choose my words lightly, for those with not as much experience as you in the SALT arena, how would you navigate this with clients?

Marilyn Wethekam [\(10:59\)](#):

Well, a couple things. One, the comment you're referring to is what the government argued in Loper was that by taking the deference away from an agency, that you weren't going to have uniform application of regulations, and two, that you were shifting the politics, what you've just referred to Nikki, over to the courts. And the quote that did send me kind of over the edge is that basically federal court decisions are neutral in their application of law and politics do not enter into them.

[\(11:33\)](#):

And you've just hit on that and you've also hit on the fact that, putting my prior hat back on, there are a lot of taxpayers that really do like certainty and regulations do give you certainty and they give you the opportunity to file a return and know where you're going, particularly if you're doing reserves and things like that. So that's important. But there are some regulations that have expanded the statute maybe beyond the scope of the statute. I guess what you're asking for is what I would do today. I think you have to evaluate the reg and then you look at the statute and you make a determination as to whether or not it exceeds the statutory authority. A lot of regulations really just mimic the statutory language.

[\(12:17\)](#):

We don't provide a great deal of guidance. So I think it's a mixed bag. I do think going forward, you're going to see more challenges to regulations based on Loper. There are already 12 or 14 states I think that have legislation, either case law or legislation that say there's no difference to the agency. Those states that had an administrative procedure act similar to the Federal Administrative Procedure Act, they may have a Loper issue because it's section 706 of the federal APA that caused all of this, that was the trigger for it. So those states may have an issue and you may have an opportunity to challenge a regulation. There's going to be more challenges. That's bottom line.

Nikki Dobay [\(13:01\)](#):

Yeah, I feel like that's a bit of a trick question because one, it depends on the state. It depends what, do they have one of these statutes that says no deference? Do they have something else specifically on point, they follow the APA, and what do their court cases say? Because each state's going to have their own line of court cases regarding deference, agency deference generally.

Marilyn Wethekam [\(13:24\)](#):

Well, and you also have to meld this deference concept with state statutory construction statutes and case law, and you know, at least for a tax perspective, exemptions are generally strictly construed against the taxpayer or the party trying to exempt something. And exclusions or imposition sections are generally construed against the taxing authority, so ambiguities in the statute generally. Now you have

to figure out what you're dealing with because I've been involved in situations where the first argument is whether we're dealing with an exclusion or an exemption. So you have to get over that hurdle first. But there are some guardrails around it in the statute of construction.

Nikki Dobay ([14:04](#)):

So I think we've been kind of dancing around it, so I'll just ask the question directly so we don't leave our podcast listeners hanging. Does Loper Bright have a direct impact on state tax cases? My sense is it has an indirect impact, but you're going to have to go through all the things that we just talked about and as you also said, but there's definitely going to be folks that look at this, and I don't want to say see an opportunity, but see the ability to raise issues that maybe weren't there before.

Marilyn Wethekam ([14:40](#)):

I agree. I don't think there's a direct impact, but I think we would be naive to say there isn't going to be some sort of an indirect impact. I think there's opportunities out there depending upon how the regulation's been drafted or the statute's been drafted. I think there's going to be issues with respect to how future legislation is drafted. I mean, certainly you could be much tighter, which makes it much more difficult as business models evolve if the legislation is based on a model that was in existence at the time and you're two years down the road. So I think you're going to see different types of legislation potentially, which is going to require more resources on the part of tax departments as well as taxpayers being involved in it. So you have that issue, I believe. I think you have maybe more issues with respect to how you draft regulations and delegation of authority by legislatures to the taxing authorities to draft regulations.

Nikki Dobay ([15:43](#)):

Yes. I think there's definitely going to be a litigation piece of this that plays out, and it's going to be a scatter shot across the board because we're going to have a bunch of state judges that are, and very competent state judges that are going to have to now dig into this deference issue and make decisions there. So that's one. I'm a person that more lives in the legislative land, often, and I think you're absolutely right.

([16:08](#)):

I think from a taxpayer business perspective, you're going to want to be a lot more exacting when it comes to legislation that we're drafting on our side. Probably that's the same thing for the agencies as they're drafting language, but it does make it a lot more difficult to get legislators to understand and pass. So we could see a lot less legislation passing, but it would be much more detailed. And then we're in a world, and this just popped into my head, but think about the market-based sourcing regulations. I mean, every state statute, it's usually one, maybe two sentences that provides the authority for market-based sourcing. I don't know about Illinois's rules on this, but I know in the MTC rules and California's rules and Massachusetts rules, these are regulations that are 80-some pages. How do you go from two sentences to 80 pages without crossing a line if there's no deference?

Marilyn Wethekam ([17:12](#)):

I think you've hit part of the nail on the head. Illinois's are not 80 pages, thank the Lord. But they do expand the statute. The statute is not that detailed. The statute was open-ended, and most of them, Illinois as others that I've seen, are open-ended statutes that really say to the agency, "You implement it."

([17:33](#)):

Now, if in fact they have that specific delegation, we may be okay. I think a better example is, at the federal level, 482 I think is only a couple paragraphs. There are a 160-some odd pages of regulations that implement section 482. There's going to be questions with that. I think you see that, I mean, you have something comparable with that at the state level. Market-based sourcing is one, back statutes are another, just on the income tax side. I'm sure there are comparable on the transaction tax side where the statute is not overly clear and it's delegated to the agency. I can think of some local ordinances, one in Chicago.

Nikki Dobay ([18:18](#)):

Oh dear, we're going to get into the locals?

Marilyn Wethekam ([18:21](#)):

Well, I think you have to, I mean [inaudible 00:18:23] stop at the state, but there's an ordinance in Chicago that the way that they have dealt with it is not amend the ordinance because a business model's changing. They just keep issuing rulings that push it to the next level to cover the business model. Under Loper, I think there's a question as to whether or not that would pass Loper muster. I mean, what deference do you have to give to an agency when they haven't amended the statute, they just keep interpreting it.

Nikki Dobay ([18:54](#)):

Yes. And there's, in Portland for example, that happened. They were doing it by ordinance, but unfortunately Portland, they don't have charter authority to actually tax. So they have to have voter approval, but they like to just do things by ordinance and they've been challenged under those, just their authority provisions. But this takes it to that next level.

([19:17](#)):

And I think the final question I would ask on this is you mentioned it, taxpayers like guidance, many taxpayers like certainty. There's a lot of things out there by those folks that we often are on the other side of in debates that like to talk about how much gray we like and all the loopholes we like to exploit. But the clients I work with do really want certainty. They just want to know, they want to pay the right amount of tax, but what number do they need to put on the page so that they're not going to have to litigate this or go back later and pay a bunch more?

([19:53](#)):

I think we've seen lawsuits, we saw the AAMC case in California that took aim at the FTB's Public Law 86272 guidance, which was a pretty bold move by the FTB I will say, but we saw the FTB's hands get slapped for just issuing this without going through the APA process. We see another challenge in New York, although that's a little different. Will Loper and these types of challenges have a chilling effect on the state agencies when it comes to providing guidance, which maybe isn't necessarily what the business community wants either.

Marilyn Wethekam ([20:32](#)):

That is a great question and I think it's going to depend on how the court, the state court looks at Loper. Chevron deference, there's case law from the late-1990's and early 2000's that indicated that Chevron deference only applied to regulations. It did not apply to what we would call subregulations, which I think is what you're talking about, bulletins and rulings and that type of thing. So technically, Chevron didn't apply to it. I think if I were an agency, I might take a harder look at how I issue those, but I think

that's really going to depend on how a state court looks at the Loper analysis. But you're right, taxpayers do like certainty. You need it for a lot of reasons, and not everyone wants to challenge regulation.

Nikki Dobay ([21:24](#)):

It's a long slog. So Marilyn, any final thoughts on this decision before we get to the real fun of this podcast?

Marilyn Wethekam ([21:34](#)):

Okay, my final thought would be it may be too early to tell as to what the real outcome of this decision's going to be on state taxes. It's barely two months old. I don't think, you've seen challenges of it already at the federal level. I don't know if there's been any challenge anyone's raised it at the state level. So I think this one is one that may have to play out for a while before we really see what the implications are at the state level.

Nikki Dobay ([22:00](#)):

I'm seeing a session at a cost meeting in 2025 into 2026, Loper, where are we at now? So I'll just throw that one over. All right, so the super fun part, the surprise non-tax question, yesterday was National Dog Day. So I know you're a dog lover. So before I ask my actual question, I want you to tell us about your dog. He has a very special name.

Marilyn Wethekam ([22:26](#)):

My dog is a Golden Doodle whose name is Barclay, and he is named after this, I'm a state tax geek, and this is going to prove it. He is named after the Barclays Bank case, Barclays versus the Franchise Tax Board, the 1994 US Supreme Court case that upheld worldwide combined reporting for foreign parents.

Nikki Dobay ([22:48](#)):

I mean, honestly, it's kind of an ironic name since it upheld worldwide, but we'll just leave that out there. But for National Dog Day, did you and Barkley do anything special? We'll talk about my dogs first so the listeners know, there's Rosie and Frankie. Our dogs are named after grape varietals, wine grape varietals, so they all know that. So Rosie is actually with her dog sitter because Frankie got spayed last week. So we call, her dog sitter is Club Lola. So Rosie's having time with her bestie at Club Lola while Frankie Heals. And Frankie was pretty mellow yesterday because she's still recovering, but we had a nice walk and she did get some pate with her pills in it. So she's not struggling. She's doing just fine. So what did you and Barclay do for National Dog Day?

Marilyn Wethekam ([23:38](#)):

So for National Dog Day, we do what we do every morning. We take about a two mile walk down along the beach in Lake Michigan's beach in the suburb I live in. And then we grilled chicken last night and we shared grilled chicken and he didn't like the vegetables, so he just ate the chicken.

Nikki Dobay ([23:59](#)):

Well, ours do eat vegetables, but well, Marilyn, thank you so much for being here. I also realized I didn't ask the question at the beginning, which is how you got into SALT, but we'll do that next time, because I'm sure you'll be back. But thank you for this great conversation and thank you for the listeners for

checking out the podcast. Information for both Marilyn and myself will be in the show notes, and I will be with you again on the next GeTtin' SALTy.