

Deference Denied to IRS Notice Issued Post-Litigation

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Sometimes a loss in a discovery battle is really a win. That is certainly the outcome in *Sunoco, Inc. v. United States*, 2016 WL 334578 (Fed. Cl., No. 1:15-cv-00587, 10/6/16). In *Sunoco*, Judge Wheeler of the Court of Federal Claims denied Sunoco's motion to compel production of the background file documents for Notice 2015-56 (Aug. 15, 2015). The court, however, denied the motion on the grounds that the requested documents are unnecessary because the Notice is not entitled to *Skidmore* deference.

Under *Skidmore v. Swift*, courts may give deference to an agency's interpretation of its governing laws even when the agency does not use its rulemaking powers. In deciding whether to give deference to the agency's interpretation, courts consider the interpretation's "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." 323 U.S. 134, 139-140 (1944).

In June 2015, Sunoco filed a complaint seeking refunds for federal income taxes relating to the tax treatment of the alcohol fuel mixture credit. Sixty-five days after the complaint was filed, the Internal Revenue Service (IRS) issued Notice 2015-56 taking a position contrary to Sunoco's. The parties filed cross-motions for judgment on the pleadings and partial summary judgment. In its filings, the government claimed, among other things, that Notice 2015-56 was entitled to *Skidmore* deference. In response, Sunoco sought internal IRS documents relating to the issuance of Notice 2015-56 that it contended would assist the court in determining whether *Skidmore* deference was appropriate.

In denying *Skidmore* deference to Notice 2015-56, the court identified three factors – the timing of the Notice, the lack of authority and the inconsistency with prior IRS advice. The court found the Notice to be self-serving because it was issued when "it was actually litigating." Additionally, the Notice provided no authority for its position, which the court would have expected considering its finding that the position conflicted with the Internal Revenue Service's position in a Chief Counsel Advice issued two years earlier. Thus, the court denied Sunoco's motion to compel on the ground that it was moot because Notice 2015-56 is not entitled to deference.

In situations where the government is claiming deference to agency pronouncements, taxpayers should consider requesting the background files. These files might shed light on the matters considered by the government and provide a defense to the deference argument.

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