METRO ATLANTA CHAMBER

# HOUSE BILL 538 TALKING POINTS

*The power to tax is the power to destroy. Taxpayers deserve a level playing field.*

Taxpayers challenging administrative interpretations of Georgia tax laws face an uphill battle as federal judicial doctrine often requires Georgia courts, including the Tax Tribunal, to defer to the Department of Revenue's interpretation of ambiguous statutes.

House Bill 538 would eliminate this formulaic deference to the DOR's regulations and interpretations, thereby allowing qualified judges to exercise their duties to interpret the laws and fulfill the mission of the Georgia Tax Tribunal as an impartial forum for taxpayers to challenge determinations of the Georgia DOR. The provisions in House Bill 538 are similar to actions recently taken by other states and would strengthen Georgia's attractive business climate. This proposed legislation likely has no fiscal impact.

**_Chevron_ and Similar Deference in Tax Controversies Creates an Unfair Playing Field**

- *Chevron* deference is a judicially-created doctrine requiring courts to accept an administrative agency's interpretation of an ambiguous statute if the interpretation is merely reasonable.
    - Deference to the agency's interpretation is mandated even if that interpretation is not the best or most plausible interpretation of statutory meaning or legislative intent.
- *Chevron* deference stems from the 1984 SCOTUS case and involves a two-part test:
    - First, the court must determine whether the statute has a plain meaning. If so, the inquiry ends and no deference is granted.
    - If the statute is ambiguous, the court must uphold the interpretation if it is reasonable.
- *Chevron* and similar deference standards are often applied in state tax controversies. Georgia is one of approximately 14 states that confer "strong deference" to agency interpretations.
    - For example, the Georgia Tax Tribunal ruled against a taxpayer regarding a jobs tax credit based on strong deference to the DOR's regulation. *Sewon America, Inc. v. Riley,* No. 1627180 (Jan. 24, 2017).

**Recognition at the Federal Level and in Other States that _Chevron_ is Suspect Law**

- Although *Chevron*-type deference has always been viewed with skepticism, there has recently been increased attention at the federal level regarding abandoning *Chevron* deference.
- In 2016 and 2017, the U.S. House of Representatives passed the Separation of Powers Restoration Act, which would have required federal courts to decide all questions of law and statutory interpretation *de novo* – effectively overturning *Chevron* and related deference doctrines.
- Critics of *Chevron*, including a number of current SCOTUS Justices, have argued that *Chevron* deference violates separation of powers principles, conflicts with the Administrative Procedure Act, and raises Due Process concerns.
    - Justices Gorsuch, Kavanaugh, Thomas, and Roberts have all publicly expressed their disapproval or skepticism of the doctrine in recent years.
- In *Kisor v. Wilkie*, SCOTUS narrowly upheld the doctrine of *Auer* deference, which requires deference to an agency's interpretation of its own ambiguous regulations, but significantly limited the application of the doctrine. No. 18-5 (Jun. 26, 2019).
    - Justice Kavanaugh, in his concurring opinion, framed the issue well when he wrote "[u]mpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules. So too here."
- Due Process concerns regarding *Chevron* and similar deference are more pronounced in tax controversies where the DOR is both a party to the litigation and the agency being deferred to.

- Justice Gorsuch and others consider it a delegation of interpretive and policymaking authority by Congress to the administrative agency.
- In 2018, four states (Arizona, Florida, Mississippi and Wisconsin) abandoned deference to administrative agency interpretations via legislation, ballot initiative, or judicial ruling.
    - Arizona passed legislation amending the state's Administrative Procedure Act to abandon deference to state agencies. H.B. 2238, 53rd Leg, 2nd Reg. Sess. (Ariz. 2018).
    - Florida voters passed a ballot initiative during the November 2018 general election to amend the state constitution to prohibit state courts from deferring to administrative agencies' interpretations of a statute or rule. Florida Amendment 6 (2018).
    - The Mississippi Supreme Court abrogated a line of state cases establishing Mississippi's version of *Chevron* deference, citing the strict separation of powers mandated by the Mississippi Constitution as well as the state courts' inconsistent and contradictory implementation of deference. *King v. Miss. Military Dept.*, 245 So.3d 404 (Miss. 2018).
    - The Wisconsin supreme court abandoned deference based on statutory and constitutional concerns, restoring the intermediate "due weight" standard which weighs the agency's experience, technical competence, and specialize knowledge without deference. *Tetra Tech EC, Inc. v. Wisc. Dept. of Revenue*, 914 N.W.2d 21 (Wisc. 2018). The state legislature subsequently codified the decision. 2017-2018 Wis. Act 369, Section 35, 80 (enacted Dec. 14, 2018).

**Proposed Legislation**

- House Bill 538 would accomplish the following:
    - Remove *Chevron* and similar doctrines of administrative deference in all matters regarding taxes administered by the DOR, including centrally assessed property tax.
    - Allow the Tax Tribunal and Superior Court to exercise their own judgment as to when and to what extent weight should be given to the DOR's interpretations.
    - Allow the Tax Tribunal to fulfill its purpose as an independent agency separate from the DOR, created to increase public confidence in the fairness of the state tax system.
- House Bill 538's abandonment of administrative deference in tax cases would not mean that taxpayers necessarily win when challenging a determination of the DOR. As demonstrated in *Tetra Tech*, where Wisconsin Supreme Court eliminated administrative deference yet still ruled against the taxpayer on the merits of the case.
- House Bill 538 would have no impact on deference to regulations issued by administrative agencies other than the DOR.
- House Bill 538 removes obstacles to economic development, exemplifies Georgia's commitment as an attractive state for business, and puts Georgia in front of a national trend.

**Conclusion**

Passage of House Bill 538 is the logical next step in establishing tax fairness in Georgia, following the creation of the Georgia Tax Tribunal in 2012. Other states have already acted to eliminate deference to administrative agency interpretations in a broad context, and this proposed legislation would further enhance Georgia's status as a fair and equitable place to live and do business. Ending *Chevron* and similar deference in tax controversies is not only the proper choice from a legal standpoint, but also from an economic development and fairness perspective.