

FROM THE SIDELINES: A DECONSTRUCTIONIST VIEW OF CIRCULAR 230

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I just arrived back home yesterday from the May meeting of the ABA Tax Section. As usual, I attended the panels organized by the Standards of Tax Practice Committee, whose programs seem to have been permanently relegated to late Saturday afternoon. Notwithstanding the wearisome time slot, however, the crowd spilled out into the hallways, drawn as they were to the hottest topic at the meeting: Two of the panels organized by the committee (well, really all three) discussed the recent changes to Circular 230.¹

This was the second time in a month that I attended a program concerning Circular 230, and, each time, the discussions among the panelists and the audience involved much hand-wringing over the potentially far-reaching impact of a few short paragraphs in the Code of Federal Regulations. I must admit that I am fascinated by the give and take between the practicing tax bar and the government over the new written tax advice rules. But, as an academic, I can afford to be fascinated, because I have the luxury of viewing this debate from the sidelines, being someone who will neither have to apply nor enforce these rules in practice.

What fascinates me about the complaints from practitioners and the alternately reassuring and woodenly literal interpretations of the government is that we are watching deconstruction in action.

¹ T.D. 9165, 2005-4 I.R.B. 357; T.D. 9201, 70 Fed. Reg. 28,824 (May 19, 2005).

I know that just using the word “deconstruction” will cause many of you simply to shut down and stop reading. For non-academics, “deconstruction” may not be a familiar concept or may seem too theoretical to waste time trying to grasp. For academics, “deconstruction” is, for the most part, a dirty word associated with a bleakly nihilistic view of things.² If, however, you’ve made it this far and either of these descriptions applies to you, please put aside your preconceptions about deconstruction and read on, because I think that you will find the particular deconstructive practice explored below to be more familiar than, and not nearly as nihilistic as, you might expect.

Some Background on Deconstruction

In the legal literature, “deconstruction” has two distinct meanings. Colloquially, deconstruction signifies “stinging criticism” and is used as “another expression for ‘trashing,’ that is, showing why legal doctrines are self-contradictory, ideologically biased, or indeterminate.”³ Here, however, I use deconstruction in its second, more technical sense. When used in this sense, deconstruction refers to “a methodology, an interpretive tool”⁴ that “is the brainchild of Jacques Derrida,”⁵ a French philosopher who, I am sad to say, recently passed away.⁶

² Deborah A. Geier, “Textualism and Tax Cases,” 66 *Temple L. Rev.* 445, 446 (1993)

³ J. M. Balkin, “Deconstructive Practice and Legal Theory,” 96 *Yale L.J.* 743, 743–44 (1987).

⁴ Vivian Grosswald Curran, “Deconstruction, Structuralism, Antisemitism and the Law,” 36 *B.C. L. Rev.* 1, 4 (1994). Whether deconstruction is a philosophical perspective or a methodology “is hotly contested by deconstruction’s critics in the legal field (as well as by some of its antifoundationalist proponents in the legal field).” *Id.* at 19 n.43. For more on this point, see Anthony C. Infanti, “A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity,” 26 *Whittier L. Rev.* 707, 747 n.162 (2005).

⁵ Curran, *supra* note 4, at 6.

⁶ For an obituary, see Jonathan Kandell, “Jacques Derrida, Abstruse Theorist, Dies in Paris at 74,” *New York Times*, Oct. 10, 2004, § 1, p. 1. For a nice tribute to Derrida, see Mark C. Taylor, “What Derrida Really Meant,” *New York Times*, Oct. 14, 2004, p. A29.

One of the deconstructive practices employed by Derrida (and other deconstructionists) is the “liberation of the text from the author.”⁷ I’ll warn you that, at first glance, this practice will seem quite radical because it calls into question well-accepted approaches to interpreting texts such as the Internal Revenue Code. But, once explained and understood, the notion behind the liberation of the text from the author should seem normal and natural⁸—and should make us wonder why the well-accepted approaches were ever accepted at all.

When engaging in statutory construction (including construction of the Code),⁹ lawyers employ a number of different methods that share a common goal: ascertaining the intent of the enacting legislature.¹⁰ To ascertain this legislative intent, some lawyers (most notably Justice Scalia) employ a literalist or textualist approach that looks to the plain language of the statute,¹¹ others employ an originalist approach that looks to the imagined intent of the enacting legislature,¹² and yet others employ a purposivist approach that “looks to the purpose or structure of the statute as a whole when

⁷ Balkin, *supra* note 3, at 746. For descriptions and demonstrations of other deconstructive practices, see Infanti, *supra* note 4, at 752–83, and Anthony C. Infanti, “Tax Protest, ‘A Homosexual,’ and Frivolity: A Deconstructionist Meditation,” 24 *St. Louis U. Pub. L. Rev.* 21 (2005).

⁸ In fact, as I’ve explained elsewhere, the notion behind the liberation of the text from the author “is broadly consistent with the dynamic approach to statutory interpretation described by William Eskridge.” Infanti, *supra* note 4, at 784; see William N. Eskridge, Jr., “Dynamic Statutory Interpretation,” 135 *U. Pa. L. Rev.* 1479, 1506–11 (1987).

⁹ 1 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 4.2.1 at 4-17 (3rd ed. 1999) (“Since all statutes are sisters under the skin, the courts employ the usual tools of statutory construction to interpret the Code.”).

¹⁰ 2A Norman J. Singer, *Statutes and Statutory Construction* § 45:05 (6th ed. 2000); Michael Livingston, “Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes,” 69 *Tex. L. Rev.* 819, 845 (1991).

¹¹ See, e.g., *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (Scalia, J., delivering the opinion of the court) (“‘Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.’” (quoting *Park ’N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985))).

¹² See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–22 (1983).

interpreting individual provisions within the statutory framework.”¹³ Sharing the common goal of ascertaining legislative intent, each of these approaches “implies that some readings of the Code will be correct (i.e., they will reflect the intent of the legislature) while others will be incorrect (i.e., they will not reflect the intent of the legislature).”¹⁴

In the following exemplary passage, Jonathan Culler nicely explains why deconstructionists question these conventional approaches to separating correct from incorrect readings of a text such as the Code:

“When one attempts to formulate the distinction between reading and misreading, one inevitably relies on some notion of identity and difference. Reading and understanding preserve or reproduce a content or meaning, maintain its identity, while misunderstanding and misreading distort it; they produce or introduce a difference. But one can argue that in fact the transformation or modification of meaning that characterizes misunderstanding is also at work in what we call understanding. If a text can be understood, it can in principle be understood repeatedly, by different readers in different circumstances. These acts of reading or understanding are not, of course, identical. They involve modifications and differences, but differences which are deemed not to matter. We can thus say, in a formulation more valid than its converse, that understanding is a special case of misunderstanding, a particular deviation or determination of misunderstanding. It is misunderstanding whose misses do not matter. The interpretive operations at work in a generalized misunderstanding or misreading give rise both to what we call understanding and to what we call misunderstanding.

“The claim that all readings are misreadings can also be justified by the most familiar aspects of critical and interpretive practice. Given the complexities of texts, the reversibility of tropes, the extendability of context, and the necessity for a reading to select and organize, every reading can be shown to be partial. Interpreters are able to discover features and implications of a text that previous interpreters neglected or distorted. They can use the text to show that previous readings are in fact misreadings, but their own readings will be found wanting by later interpreters, who may astutely identify the dubious presuppositions or particular forms of blindness to which they testify. The history of readings

¹³ Infanti, *supra* note 4, at 785; *see, e.g.*, Deborah A. Geier, “Interpreting Tax Legislation: The Role of Purpose,” 2 *Fla. Tax Rev.* 492, *passim* (1995).

¹⁴ Infanti, *supra* note 4, at 786.

is a history of misreadings, though under certain circumstances these misreadings can be and may have been accepted as readings.”¹⁵

For these reasons, deconstructionists eschew the conventional search for authorial intention and reject the notion that texts have a single correct interpretation. In lieu of searching for the one true meaning of a text, “deconstructionists embrace an idea that Derrida refers to as the ‘free ‘play’ of the text.’ ”¹⁶ Because, as Culler points out, each reading of a text is not identical, deconstructionists view a text as breaking free from its author at the moment of its creation so that it can take on new meanings in different contexts.

In other words, “a single text is susceptible of a multiplicity of meanings.”¹⁷ In recognizing the possibility of more than one valid interpretation of a text, deconstructionists acknowledge and value each reader’s contribution, as interpreter, “in creating the interpretation from the point of departure of the multitude of relations of signification engendered by the text.”¹⁸ Moreover, deconstructionists view the relevant interpretational context as boundless; indeed, Derrida has famously—and cryptically—stated that “[t]here is nothing outside of the text.”¹⁹

This brief description of the free play of the text should not, however, be taken to mean that deconstruction validates any and all interpretations of a text. Derrida himself has noted that, although “[r]eading is transformational[,] . . . this transformation cannot

¹⁵ Balkin, *supra* note 3, at 774–75 (quoting Jonathan Culler, *On Deconstruction: Theory and Criticism After Structuralism* 176 (1982)).

¹⁶ Infanti, *supra* note 4, at 789 (quoting Balkin, *supra* note 3, at 777).

¹⁷ *Id.* at 790.

¹⁸ Curran, *supra* note 4, at 17.

¹⁹ Jacques Derrida, *Of Grammatology* 158 (Gayatri Chakravorty Spivak trans., 1997) (“*There is nothing outside of the text* [there is no outside-text; *il n’y a pas de hors-texte*.”); see also *id.* at 160–61 (describing the reader as within her history and culture and that history and culture as within the reader).

be executed however one wishes. It requires protocols of reading.”²⁰ Consequently, deconstruction “engenders only a certain (or perhaps, rather, uncertain) number of valid interpretations”²¹ because “our reading must be intrinsic and remain within the text.”²²

What deconstructionists find so interesting in this idea of the liberation of the text from its author is the resulting ability to explore the gap that is created “between what the author commands by her language and what the language performs—the uncontrollable incongruity in human language and thought.”²³

Deconstruction and Circular 230

Tax lawyers tend to recoil at the suggestion that a single text can engender a whole host of valid interpretations.²⁴ The uncertainty inherent in the possibility of an unwieldy multiplicity of differing and different interpretations is anathema to a group “who, for quite practical reasons, need to insist upon a defined and limited range of meanings regarding the words used in the Internal Revenue Code.”²⁵ But, both despite and because of its untidiness, the idea of the free play of the text has far more descriptive power than the tidier alternatives that may calm our minds, because it more accurately describes the reality of interpretation that we encounter on a daily basis.²⁶

The recent changes to Circular 230 exemplify the futility of searching for authorial intention and the one true meaning of a text. During the panel discussions that I attended at the ABA Tax Section meeting, the government seemed to be giving

²⁰ “Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta,” in Jacques Derrida, *Positions* 37, 63 (Alan Bass trans., 1981).

²¹ Curran, *supra* note 4, at 22.

²² Derrida, *supra* note 19, at 159.

²³ Balkin, *supra* note 3, at 779.

²⁴ See Geier, *supra* note 2, at 446–47.

²⁵ *Id.* at 447.

²⁶ For examples in the Code, see Infanti, *supra* note 4, at 790–92.

practitioners mixed signals about its intent. Whenever practitioners became upset about the potential impact of the new rules, the government representatives urged them to interpret the rules in a common sense fashion and not to worry about extreme interpretations of ambiguous language. Then minutes later, in answers to specific hypotheticals, the same government representatives espoused narrow interpretations of the exceptions and exclusions built into the recent changes to Circular 230 and broadly interpreted the scope of the new written advice rules.

When even a single representative of the government cannot speak about the changes to Circular 230 with one voice, how can we possibly expect the collective group of government personnel who drafted (not to mention those who will be applying) these rules to have a single view of their meaning? Under the circumstances, divining the government's true intent when it drafted the changes to Circular 230 is a futile endeavor. Rather, all that we can hope to do is to look to the text and context of Circular 230 for answers. We must reflect upon Circular 230 in a critical fashion—recognizing what the text says and interrogating what it has left unsaid. In this light, we must carefully interpret the text as best we can by using our intellect, knowledge, and experience.

When practitioners turn to this task, the potential for a single text to take on a multiplicity of meanings comes vividly to life. The recent wrangling between tax practitioners and the government has given rise to three (and possibly more) discernible approaches to interpreting the new standards for written tax advice: (1) the overly cautious approach, (2) the defiantly reasonable approach, and (3) the defiantly aggressive approach.

Many practitioners appear to be taking the overly cautious approach—or, at the very least, they are espousing this approach in public to bolster their argument that the government should relax the new rules because they are unduly broad and unduly burdensome. Taking somewhat of a cue from the government, these practitioners read the text of the new rules as expansively as possible, and they then speculate about all of the ways to protect themselves from such an expansive reading of Circular 230. To the latter end, many of the overly cautious practitioners have indicated that they (and/or their firms) intend to blanket their written correspondence with legends indicating that their advice cannot be relied upon for penalty protection.

Other practitioners bristle at the intrusion of the new Circular 230 rules on the relationships that they have worked so hard to develop with their clients. These practitioners have voiced their opposition to the overly cautious approach, and they refuse to include legends on every e-mail and letter that they write. Also taking somewhat of a cue from the government, these practitioners have advocated a defiantly “reasonable” interpretation of Circular 230 that would limit its impact on much of what they do on a daily basis.

I imagine that there is a third category of practitioners who will not be raising their voices at public fora to express their concerns about the changes to Circular 230. These practitioners likely engage in the types of activities at which those changes were aimed, or come very close to them. Given the general behavior associated with such activities, I imagine that these practitioners will take a defiantly aggressive approach to interpreting the new written tax advice rules in order to impede any adverse affect that those rules might have on their activities. Nonetheless, underscoring the admonition that

deconstruction does not validate any and all interpretations of a text, care should be exercised in assessing the validity of extreme versions of the defiantly aggressive approach, lest they fail to remain within the text of Circular 230.

Some Observations from the Sidelines

When texts leave their authors' hands, they have a tendency to take on lives of their own. Once liberated from its government authors, even Circular 230 took on a life of its own—it has acquired different meanings in different contexts for different people. For me, there is a spellbinding quality to this dance of deconstruction, as you watch the meaning of the new written advice rules morph from one form to another right before your eyes.

Unfortunately, when the text is one that regulates your own conduct, this tendency of texts to take on their own lives can be the source of a frightening consternation. That this process is natural and normal provides little solace to those who must live with the uncertainty engendered by the free play of a text such as Circular 230. But live with it they must. Because the threshold for punishment under the revised Circular 230 rules has been set so high—to be punished, a violation must be the result of willful, reckless, or grossly incompetent conduct²⁷—enforcement of the rules will be left largely to the self-policing of practitioners, who must “recognize the unavoidable limitations and inherent contradictions in the ideas and norms that guide our actions, and do so in a way that keeps them open to constant questioning and continual revision. There can be no ethical action without critical reflection.”²⁸

²⁷ 31 C.F.R. § 10.52 (as amended in 2004).

²⁸ Taylor, *supra* note 6.