Supreme Court Ruling In Loper Bright Changes Estate Planning

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Federal Agency Regulations on Ambiguous Laws No Longer Get Deference

A recent Supreme Court case will change the dynamic of key aspects of tax planning, including estate tax planning: Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024). There was also a companion case, Relentless v. Department of Commerce. As Ed Sullivan would say, this is "a really big show." While this may all seem a bit nuanced and technical, it could be valuable to understand how the tax ground rules have just changed.

Courts no longer must defer to the interpretation of ambiguous laws by governmental agencies. If Congress enacts a tax law that is ambiguous or unclear (how many tax laws are clear?), the Treasury Department's interpretation of that law in Regulations does not have to be deferred to by the courts. Instead, the courts themselves can interpret the ambiguous law.

Chevron Doctrine Overturned

For the past 40 years following the conclusions in an older landmark case, Chevron, the Courts would give great weight, or in legal parlance, "deference" to Regulations issued by governmental agencies that interpreted ambiguous Congressional legislation. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). This approach had been known as the "Chevron Doctrine."

Under Chevron, the IRS or another federal agency had to conform to any clear legislative statements when interpreting and applying a law. If the agency did so, then the courts gave deference to the agency when the law was ambiguous if the agency's interpretation was reasonable in resolving the legislative ambiguity. This gave substantial authority to guidance issued by administrative agencies. The Supreme Court has taken much of that authority back to the courts in Loper.

The Chevron doctrine was overturned in Loper. The Supreme Court stated that under Section 706 of the Administrative Procedure Act, courts must exercise independent legal judgment when deciding whether an agency has acted within its statutory authority in issuing Regulations. The courts may no longer defer to an agency's interpretation of the law simply because the statute is ambiguous.

What This Might Mean to Your Planning Generally

If the IRS challenges a tax position you took in your estate (or other tax), planning, the calculus of how you are fighting the IRS may now be different. Just because the IRS has a tax Regulation supporting its interpretation of the law on the position you took; it does not mean it will get the same result if your issue goes to court to resolve it. If the Regulation was not directed by the statute, it may receive less deference. If the court feels that the Treasury's interpretation of the statute is not reasonable, the court may be more apt to interpret the statute differently. That could be big.

Another impact of the Loper case might be that the IRS's approach to drafting and issuing tax Regulations may change. Since the agency cannot assume courts will give its Regulations deference, there may be a greater pressure or incentive for the IRS to solicit comments from taxpayers on proposed Regulations and give more consideration to reasonable comments from taxpayers. So, the impact over time could be more reasonable or even taxpayer-friendly interpretations of tax laws. The IRS might actively seek that so that if a Regulation interpreting the tax laws is challenged by a taxpayer in court, the IRS can demonstrate how their interpretation of that law was reasonable.

But before breaking out the tax-party hats, consider that tax laws are incredibly complex, and the IRS and Treasury do have expertise in understanding and interpreting tax laws enacted by Congress. Because these rules are so intricate and nuanced, the expertise at the Treasury and IRS will far outweigh that of most courts, so practically speaking, courts may still give considerable attention to what the Treasury and IRS have said.

There is another side to all of this too. If the courts no longer must give deference to Treasury Regulations interpreting tax laws, that may mean less certainty in what the tax laws mean. For example, if Regulations no longer receive deference in some cases the Treasury Department may issue what is called “sub-Regulatory” guidance. That is guidance and interpretations that are less relevant than Regulations. This could include Revenue Procedures, Revenue Rulings, IRS notices, etc. But Loper may also mean that when a new administration assumes power in Washington that Regulations issued by federal agencies during a prior administration may not be rewritten with the frequency that had become common.

While the dynamic in court to challenge a Treasury Regulation may have changed, the cost and time involved in pursuing such a remedy make that approach unpalatable for most taxpayers.

Finally, to preclude a flood of new cases examining prior court rulings the Supreme Court stated that if a prior pre-Loper case upheld the Regulations of a federal agency under the Chevron Doctrine, that case should not be reopened now.

Deference To Agencies Post-Loper

Now that Chevron is gone, what guidance is left on how much weight or deference should be given to the Regulations issued by an agency? The Supreme Court held in a pre-Chevron decision that an agency's interpretative Regulations should be given deference based on how persuasive they are. This is an individual case analysis evaluating rulings, interpretations, and opinions of the federal agency. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

How much deference is given to the Regulations of an administrative agency post-Loper may depend on what the particular statute itself says about regulations. It would seem that Regulations issued by the Treasury Department generally, i.e., without a specific direction to do so in the particular statute, would have less weight than before Loper. In contrast, if the particular law itself directs a governmental agency, such as the Treasury Department, to issue Regulations to interpret and provide details to implement the statute, which should still receive some deference after Loper. If the law directs the Treasury to issue guidance, then the Regulations interpreting that law may have different and greater deference afforded to them than a law that does not mandate that guidance be issued. So, different standards may apply to Regulations issued under different statutes. For example, if a tax law state: "The Secretary of Treasury shall, by regulation, prescribe procedures and standards consistent with this Section to provide guidance to taxpayers on the application of this law," that might be viewed as a broad delegation of authority to Treasury. In such a case, that Regulation might be tougher to challenge. But since this seems to be a new standard, what choice of words must appear in the statute to support a greater level of deference? The language across the many tax laws differs, leaving taxpayers and advisers in a quandary over which Regulation may have greater or lesser authority.

Here is an example, Code Section 672(f)(6) states: "The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection, including regulations providing that paragraph (1) shall not apply in appropriate cases." That language would seem to suggest that Congress intended the Treasury Department to issue Regulations and so long as those Regulations are "necessary or appropriate" they should be respected to a greater degree than Regulations issued under the Treasury's own decision where not directed by Congress to do so. But what variations of language might have what level of weight in such an analysis?

How Might Loper Affect Specific Tax Planning Considerations?

Protective Claims. If you as a taxpayer had followed a tax Regulation issued by the Treasury Department, you should consult with your CPA to discuss whether you should file either an amended tax return or a protective claim for a tax refund in case that Regulation is held invalid post-Loper. If you wait too long the statute of limitations to file a refund claim might pass. The partial listing below of some of the many tax positions that might be affected suggests how many taxpayers might be affected by this. This will create considerable confusion, complexity and angst for taxpayers and CPAs trying to make these decisions.

Grantor Retained Annuity Trust ("GRAT"). With this technique a taxpayer makes a gift to a special type of trust, and that trust is required to pay a prescribed annuity back to the taxpayer for the number of years the trust is to last. Logic would seem that if the taxpayer died before the end of the GRAT the taxpayer's estate should include the value of the unpaid annuity payments, or the present value of those payments. The Treasury issued regulations requiring that a different amount be included in the decedent's estate. Might those rules be more susceptible to challenge post-Loper?

Life Insurance Split-Dollar Regulations. Detailed guidance was issued interpreting these laws. If there was no grant of express direction for the Treasury to issue guidance, might these decades-old Regulations be subject to challenge? Code Sec. 61 and 7872.

Secure Act. The Secure Act provided detailed rules on the tax treatment of retirement assets. But did those laws give the Treasury Authority to issue Regulations? For example, it appeared that during the ten-year period following the death of a plan holder, no required minimum distributions had to be made. However, the IRS has stated that they must be made. That creates additional tax costs to heirs and administrative burdens. Might Loper open the door to challenge that and perhaps other Secure Act Regulations? One of the complications is that different provisions have different language as to what if anything Treasury is directed to do.

Estate Liabilities. The Treasury issued complex rules requiring, among other matters, the application of present value techniques to value certain liabilities that affect a decedent's estate. Those proposed Regulations, for example, emasculate a planning technique called a Graegin loan. Using a Graegin loan a family entity might loan an illiquid estate funds to use to pay estate taxes. The interest on the entire term of such a non-prepayable loan might be deducted in full on the estate tax return without a reduction to reflect the present value of when those payments would actually be made. Are those rules now more susceptible to challenge? Regulations were issued under Code Section 2053 in 2009, providing guidance

on how claims against an estate are to be valued for purposes of an estate tax deduction. If you are filing an estate tax return now, should you claim that those Regulations are invalid as they go beyond the statute?

Estate Administration. The Treasury issued a Regulation dealing with the impact of post-death events on estate tax valuations. If there was a post-death judgment or settlement of the claim that needs to be factored into the analysis of the estate's deduction. Will these Regulatory restrictions hold up after Loper? T.D. 9468.

More Than Just Taxes

The Loper case involved fishing Regulation yet significantly impacted estate tax planning. The decision has wide-reaching ramifications and may have important implications for areas of the law that indirectly affect estate planning.

Corporate Transparency Act Reporting. For example, overruling Chevron deference may impact the Treasury Department, FinCEN regulations issued under the Corporate Transparency Act ("CTA"). That is a law that requires all small businesses, unless specifically exempt, to register as Reporting Companies with FinCEN and that their Beneficial Owners also register. The CTA has incredibly complex and burdensome implications for estates and especially trusts that own int4ersts in entities characterized as Reporting Companies. Might Loper have FinCEN back off some of its guidance? Might Loper improve the chances of the various business owners challenging the CTA?

Non-Compete Agreements. The Federal Trade Commission ("FTC") recently issued regulations banning non-competition agreements and other arrangements that are the functional equivalent of non-compete agreements. Those restrictions could prove onerous for families and closely held businesses that use restrictive arrangements to bind key employees to the company, even if those persons were generously compensated for agreeing. These Regulations could have a devastating impact on succession planning for these enterprises. Might Loper change the landscape for those businesses challenging the FTC rule?

Conclusion

The Supreme Court's holding in Loper may have a significant impact on the dynamic of taxpayer/IRS disagreements, now tax Regulations are issued, and more. Be certain to speak to your CPA about whether any current action might be advisable.