

# Loper Bright Chevron Deference Overruled

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# Loper Bright Chevron Deference Overruled

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# Loper Bright

Background and discussion

# Loper Bright

## Discussion by Professor Gans

Background and discussion



# Scope of Issue

Effect in tax world

Only affects validity of regulations

Does not affect sub-regulatory guidance (e.g., revenue rulings)

Prior law continues to apply: Skidmore deference

# Pro-Government v Pro-Taxpayer Regulations

Loper will now apply, instead of Chevron, in case of pro-government regulations

What about pro-taxpayer regulations?

not likely to enable the IRS to disavow taxpayer-friendly reg

See *Amgen*, No. 16017-21; No. 15631-22 (July 3, 2024) (due process issue); *Rauenhorst*, 119 TC 157

# Pre-Loper (Chevron) World

Two forms of deference re agency guidance on ambiguous statutes

Chevron

Mayo applied Chevron to 7805 reg

Skidmore

applied to all other guidance

# Chevron: How it Worked

If the court determined the Code was ambiguous, it was required to accept as “force of law” any reasonable resolution in the regulation

The agency’s interpretation did not even need to be what the court considered the best interpretation of the statute – but was instead required to uphold any reasonable one

The court was required to defer to the reg’s less-than-best interpretation

# Two Big “C’s”: Consistency and Contemporaneousness

What if the IRS had not been CONSISTENT?

Mayo: not relevant under Chevron

What if the regulation was not CONTEMPORANEOUS?

Mayo: not relevant under Chevron

In *Smiley*, 517 U.S. 735, it was issued 100 years after enactment and upheld under Chevron

# Declaring Victory by Regulation

What if the IRS lost in court?

Could it issue a regulation overruling the court – perhaps even the Supreme Court?

National Cable v Brand X, 545 US 967:

Based on Chevron, unless the court held the Code was unambiguous, the IRS could overrule the court and declare victory by regulation

# Declaring Victory by Regulation Under Chevron and Brand X

What about

Any IRS inconsistency?

irrelevant

Lack of contemporaneousness?

Irrelevant

Heat of litigation?

Irrelevant

# Skidmore Deference: IRS has Much Weaker Hand

Under Loper, Skidmore applies to regulations – Chevron is eliminated

Skidmore had applied in the case of sub-regulatory guidance

Webber, 144 TC 324 (deferring under Skidmore to revenue rulings)



# Skidmore

Ultimate question for the court:

What is the best reading of the Code?

Is the IRS's interpretation of the Code set forth in the reg persuasive?

Relevant factors:

agency consistency

contemporaneous

heat of litigation

# What Loper says about Skidmore

agency “interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance” consistent with the APA. Skidmore, 323 U.S. at 140, 65 S.Ct. 161. And interpretations issued **contemporaneously** with the statute at issue, and which have remained **consistent** over time, may be especially useful in determining the statute's meaning [emphasis supplied]”

# Loper (Skidmore) v Chevron: An Example

In 2009, new regulations under 2053 (TD 9468)

In determining deductibility of a claim against the estate, post-death settlement or judgment must be taken into account

Contrary court decisions – which had focused on date of death and Supreme Court decision in Ithaca Trust -- overruled by the regulation

Not contemporaneous with enactment

Under Chevron, challenge to the reg probably impossible

Under Loper/Skidmore, taxpayers would have an argument

# What about Regulation Issued under Specific Grant of Authority?

Section 7805 confers authority to issue regulations that interpret

What about a Code section that confers discretion?

See, e.g., sec 469(l):

“The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section, including regulations- ...”

# Specific Grants under Loper

Loper:

“when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in “ ‘reasoned decisionmaking’ ” within those boundaries.”

# Loper Passage on Discretionary Authority Distilled

Courts will review three issues

Is the delegation constitutional?

Gundy v U.S., 588 U.S. 128 (2019)

Is the agency's position within the scope of discretion conferred by the statute?

Did the agency comply with the APA?

reasoned decisionmaking and compliance with notice/comment

# Is this Loper Passage Chevron Redux?

I have seen suggestions to this effect

If so, Loper hasn't changed much

But, in my view, the Loper passage will only apply in the case of specific-grant regs, not regs issued under 7805

In Mayo, the Supreme Court gave Chevron deference to a 7805 reg

With Chevron overruled, I think the Court would now apply Skidmore

# Lissack Remand

In Lissack, on July 2<sup>nd</sup>, the Supreme Court vacated and remanded to the DC Circuit for reconsideration in light of Loper

DC Cir had applied Chevron to whistleblower statute (section 7623), which provides:

“The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for ...”

Given the specific grant, why did the Court vacate the decision?  
to consider if reg is within the scope of discretion granted?



# Is the IRS Position on Regulations Weaker under Loper?

Taxpayers have begun to make the argument

Partnership anti-abuse reg

In Tribune Media, taxpayer has made a supplemental filing arguing anti-abuse reg is invalid under Loper

IRS response:

the reg is nothing more than a codification of economic substance and Gregory v Helvering  
in effect, the reg adds nothing new

What about newly proposed basis shifting regs?

# Textualism and Loper

Is Loper in tension with textualism?

Major objective of textualism

Courts do not engage in policy as a general matter

Under Loper, courts will now be engaging in construction questions that implicate policy – questions that agencies had resolved as a policy matter under Chevron

# Loper is Part of Larger Anti-Deference Movement

Under *Auer v Robbins*, the courts would defer to an agency's reasonable resolution of ambiguity in a regulation

In *Kisor v Wilkie*, the Court in 2019 cut back on *Auer* – rendering it, in my view, inapplicable as a practical matter in tax case

Recent TC case that turns *Auer* upside down

SN *Worthington*, 162 TC No 10 (2024) (ambiguity in reg should be construed against IRS)

# What about New Administration Revising Regs?

Under Chevron, this was permissible (subject to APA requirements)

Lack of consistency and contemporaneousness should now preclude this under Loper

What if new administration withdraws pro-government reg and adopts instead a pro-taxpayer reg?

While perhaps no deference for new reg, who will have standing to challenge it?

# Loper Bright

## What Should Practitioners Do?

Panel discussion

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# Might Treasury's Approach to Regs Change?

- 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.

# Post-Loper Practitioners Should Consider...

- To what extent should practitioners (including tax preparers) consider filing claims for a refund where a regulation has a particular adverse consequence for the client?
- Should practitioners regularly advise clients that an adverse regulation, not previously upheld, should be considered?
- What if only one (lower) court has upheld the regulation?
- Could a practitioner be held liable for not advising a client to file a protective claim for refund?

# Some Specific Areas of Law to Consider

- **Anti-Clawback**. Are the anti-anti-clawback regulations valid? Will this affect advice given on using the temporary enhanced gift tax exemption?
- **IRAs**. Are the proposed regulations on payouts from IRAs and qualified plans under Section 401(a)(9) requiring payments during each of the ten years following an IRA owner's death valid?
- **GRATs** 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 perhaps 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.



# **Conclusion and Additional Information**

**Will the tax world change?**

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# Conclusion

- Practitioners should evaluate what Loper means to tax positions taken and to be taken.
- The estate planning profession will have to digest and analyze Loper and its implications.
- Consider communicating generally with clients about Loper and its possible implications.

# Additional information

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