The Supreme Court's 2023 Term Creates Uncertainty in the Tax Arena

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Near the end of its 2023 Term, the Supreme Court issued opinions in three cases that will have a major impact on taxpayers. Only one, *Moore*,[1] is a tax case. The other two, *Loper Bright Enterprises v. Raimondo*[2] and *Corner Post v. Board of Governors of the Federal Reserve System*,[3] are administrative law cases that make it easier to successfully challenge Treasury Regulations. This article will examine the Supreme Court's opinion in these cases and their potential implications for tax administration.

I. *Moore:* The Mandatory Repatriation Tax Survives Supreme Court Scrutiny but Leaves the Realization Question for Another Day

Moore upheld the constitutionality of the Mandatory Repatriation Tax ("MRT"). The MRT was a key provision of the reformation of the Subchapter F provisions of the Internal Revenue Code ("IRC"),[4] implemented by the 2017 Tax Cuts and Jobs Act ("TCJA"). Subchapter F requires U.S. shareholders of Controlled Foreign Corporations ("CFCs") to include in gross income their *pro rata* shares of the income of the CFC. A foreign corporation is a CFC if more than 50% of its stock is owned by U.S. shareholders. A "U.S. shareholder" is a U.S. person who owns at least 10% of a CFC's stock.

Prior to the TCJA, Subchapter F did not tax all of a CFC's active business income. This resulted in CFCs accumulating trillions of dollars in untaxed undistributed income. Most of these trillions were in CFCs owned by U.S.-based multinational corporations. To encourage U.S. corporations to repatriate the funds that had accumulated offshore, the TCJA provides a domestic corporation that own 10% or more of a foreign corporation a 100% deduction for the portion of dividends received from the foreign corporation attributable to previously "undistributed foreign earnings."[5] The MRT was a one-time tax on a U.S. shareholder's *pro rata* share of previously untaxed earnings of the CFC that accumulated from 1986 to 2017.

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A. The Moores' Investment in a CFC and Their Refund Claim

In 2005, a friend of the Moores started a corporation in India named KisanKraft Machine Tools Private Ltd. The Moores invested $40,000 in KisanKraft in 2006 and received 13% of its stock. Because over 50% of KisanKraft's stock was owned by U.S. persons, it was a CFC. By 2017, their share of KisanKraft's accumulated undistributed income was $508,000.

On their joint income tax return for 2017, the Moores included in gross income their *pro rata* share of KisanKraft's gross income, including their share of its accumulated income. They paid the tax and then sought a refund. They claimed that the MRT is an unapportioned direct tax and that it is impermissibly retroactive in violation of the Due Process Clause of the Fifth Amendment.

B. Proceedings in the Lower Courts

The Moores filed a refund suit in the U.S. District Court in Seattle, raising both the argument that the MRT is an unapportioned direct tax and that it violates the Due Process Clause. The District Court granted the Government's motion to dismiss.[6] The court held that the MRT is an income tax and, thus, does not have to be apportioned, and that it is not impermissibly retroactive.

The Ninth Circuit affirmed the District Court.[7] The Ninth Circuit held that "realization" is not required by the Constitution and that Congress can attribute to a shareholder his *pro rata* share of a corporation's income. It also rejected the Moores' claim that the MRT's retroactive period is "impermissibly long."

The Moores filed a petition for certiorari on one issue: was the MRT an unapportioned direct tax? The Supreme Court granted certiorari.

C. The Question Before the Court

Article I, §2 of the Constitution provides that "direct Taxes shall be apportioned among the several States which may be included within this Union," while Article I, §8 provides that "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, … but all Duties, Imposts and Excises shall be uniform throughout the United States." In *Pollock v. Farmers' Loan & Trust Co.*,[8] the Supreme Court held that taxes on income derived from property were direct taxes requiring apportionment. In reaction, the 16th Amendment to the Constitution was ratified. It provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The Moores claimed that the MRT was a direct tax that was not apportioned and thus violated the constitutional prohibition on unapportioned direct taxes. The Moores and the United States framed the question before the Court differently. The Moores framed the question as:

> Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.

According to the Moores, income cannot be taxed unless it is realized, which requires the taxpayer to have actually received cash or other items of value. Since KisanKraft never distributed the amounts that the Moores were taxed on, the MRT was not an income tax under the 16th Amendment. It was, therefore, a direct tax that was unconstitutional because it was not apportioned.

The United States framed the question as:

> Whether the MRT is a "tax[] on incomes, from whatever source derived," U.S. Const. Amend. XVI, within the meaning of the Sixteenth Amendment.

The United States argued that (a) the MRT is a tax on income, (b) realization is not a constitutional requirement for an income tax, and (c) even if it is, the income that was taxed was realized by KisanKraft. It also argued if the MRT was not an income tax, it was constitutional as an excise tax, which does not have to be apportioned.

In the opening paragraphs of the majority opinion, the Court phrased the question before it as "whether that 2017 tax (known as the Mandatory Repatriation Tax or MRT) is constitutional under Article I, §§8 and 9 and the Sixteenth Amendment." It also phrased the question before it as:

> So the precise and narrow question that the Court addresses today is whether Congress may attribute an entity's realized and undistributed income to the entity's shareholders or partners, and then tax the shareholders or partners on their portions of that income.

The Court answered "yes" to both phrasings of the question.

D. The Court's Opinion

The majority opinion was written by Justice Kavanaugh and joined by Chief Justice Roberts and Associate Justices Kagan and Sotomayor. Justice Jackson wrote a concurring opinion joining the majority. Justice Barrett wrote an opinion (joined by Justice Alito) concurring in the result. Justice Thomas, joined by Justice Gorsuch, dissented.

The majority opinion initially noted that Congress had long treated partnerships and some corporations as passthroughs, taxing the partners or shareholders, but not the entity, on their *pro rata* shares of the entity's income. Since 1962, Congress has treated CFCs as passthrough entities with respect to certain types of income and taxed their U.S. shareholders on their *pro rata* shares of such income. The Moores conceded that these passthrough taxes are constitutional.

The majority outlined the history of taxation in the United States. Under the Articles of Confederation, the national Government had to rely on contributions from the states for its revenues. Because this was a major hindrance to the operations of a federal Government, the Founders granted Congress "an expansive taxing power" that included the ability to lay both direct and indirect taxes. Direct taxes, which are imposed on persons and property, were rarely enacted since these must be proportioned among the states based on population. No direct tax has been enacted since the Civil War.

Indirect taxes, on the other hand, are those imposed on activities and transactions. The constitutional requirement is that indirect taxes be uniform throughout the United States. During the Civil War, Congress enacted an income tax that was held to be a constitutional indirect tax. The *Pollock v Farmers' Loan & Trust Co.* case held that a tax on income derived from property was a direct tax that needed to be apportioned. The Sixteenth Amendment confirmed the pre-*Pollock* understanding that a tax on income was an indirect tax.

The majority next addressed the Moores' contention that the MRT is a tax on property that is unconstitutional because it is not apportioned. The Moores argued that realization only occurs when "gains come into the taxpayer's coffers" and that they were being taxed on income they did not realize. This argument ignored that KisanKraft realized the income, which the MRT attributed to the Moores.

The majority emphasized it was not addressing the constitutionality of (a) a tax on both an entity and its shareholders or partners on the entity's undistributed income; (ii) taxes on holdings, wealth, or net worth; or (iii) taxes on appreciation. The majority stated its

> precedents had established a clear rule that directly contradicts the Moores' argument in this case. That line of precedent remains good law to this day. Indeed, since then, it has gone without serious question in both Congress and the federal courts that Congress can attribute the undistributed income of an entity to the entity's shareholders or partners, and tax the shareholders or partners on their *pro rata* share of the entity's undistributed income.

Based on this precedent, the Courts of Appeal had rejected constitutional challenges to Subpart F as bordering on frivolous.

The lynchpin of the Moores' argument was *Eisner v. Macomber.*[9] The issue before the Court in that case was whether the Sixteenth Amendment empowers Congress to tax as income a stock dividend issued to shareholders in proportion to their stock. The Court ruled in the negative and held that for Sixteenth Amendment purposes, income is limited to income realized and that declaring a stock dividend "is no more than a book adjustment."

The majority found Moores' reliance on *Macomber* misplaced. The stock dividend in that case did not represent any economic gain, either realized or unrealized. The majority stated that since the MRT taxes income that was realized by the corporation, it did not need to address the U.S.' claim that the Sixteenth Amendment does not require realization. The Moores' claim that *Macomber* means that a tax attributing a corporation's income to its shareholders is not an income tax was "implausible" attribution was not an issue in *Macomber* and subsequent Supreme Court decisions made clear that Congress has the power to tax a shareholder or a partner on the undistributed income of the entity. *Macomber* "does not proscribe attribution and thus has no bearing on the attribution issues in this case."

To sum up this part of its decision, the majority stated that "Congress may tax either (i) the entity or (ii) its shareholders or partners" on the income of the entity.

Having discussed why its precedent supports the determination that the MRT is not a direct tax that needs to be apportioned, the majority next traced the history of "long-standing Congressional practices" to tax shareholders and partners of business entities on the entities' undistributed income. The majority found that these "long-standing" Congressional practices reinforced Supreme Court precedent.

The majority found unconvincing the Moores' attempts to distinguish the MRT from the partnership, S corporation, and Subpart F taxes, all of which the Moores conceded were constitutional. The majority found their attempts to distinguish unconvincing. First, the Moores' claim that at the time the Sixteenth Amendment was

ratified partnerships were not viewed as distinct from their partners was "false." At the time of ratification, many states taxed partnerships directly on their income and partnerships were often viewed as entities separate from their partners, including in bankruptcy.

Second, the Moores' claim that S corporation taxation was constitutional because the shareholders had to consent to be taxed at the shareholder level ignored that if subsequently minority shareholders no longer want the corporation to be taxed as an S corporation, they cannot change that treatment and that consent would not eliminate the constitutional apportionment requirement if the Moores were correct.

Third, the Moores attempt to distinguish Subpart F taxes by claiming that it applied a "doctrine of constructive realization," a term no case ever used. According to the majority, if there was a "doctrine of constructive realization," it would mean that the MRT is a tax on constructively realized income and, thus, constitutional.

The majority then raised an *in terrorem* assertion that if the Moores' argument concerning realization was carried to its logical conclusion large swaths of the IRC would be unconstitutional, which would deprive the Government and the American people of trillions in lost revenue. The majority did not explain how it arrived at the multi-trillion-dollar figure. If realization was required, Congress could tax all corporations and partnerships at the entity level, in which case shareholders and partners could not reduce their income by flow-through losses. If the income of entities was taxed at the maximum rate for individuals, the tax loss would probably be minimal, especially when you factor in that the shareholders and partners would be taxable on any distribution of present or accumulated earnings and profits we are not aware of any quantification of the economic effect of accepting the Moores' argument, but in theory a determination of the constitutionality of a tax should not be impacted by its potential economic effect. But the Supreme Court does not live in a Cloud Cuckoo Land.[10] It was aware of the major restructuring of the tax laws that could result from accepting the Moores' realization argument.

The majority then critiqued the concurring and dissenting opinion and emphasized how narrow its holding was:

> For their part, the dissent and the opinion concurring in the judgment focus primarily on the realization issue—namely, whether realization is required for an income tax. We do not decide that question today. When they reach the attribution question that we do decide, the separate opinions disagree with our reading of some of the Court's precedents. We respect their views. But as we thoroughly explained above, we read the Court's precedents differently. That said, we emphasize that our holding today is narrow. It is limited to: (i) taxation of the shareholders of an entity, (ii) on the undistributed income realized by the entity, (iii) which has been attributed to the shareholders, (iv) when the entity itself has not been taxed on that income. In other words, our holding applies when Congress treats the entity as a pass-through.

The majority opinion emphasized that it did not need to resolve the issue of whether realization was a constitutional requirement to decide the case. It affirmed the judgment of the Ninth Circuit.

E. The Concurring and Dissenting Opinions

Justice Jackson wrote a concurring opinion joining in the judgment but expressing her view that there was no constitutional requirement that income had to be realized to be constitutionally taxed under the Sixteenth Amendment. Even if the Moores were correct about realization, the Court would have to address the U.S.' argument that the MRT is an excise tax that is not subject to apportionment.

Justice Barrett's concurring opinion stated there is a constitutional requirement that income be realized for it to be subject to tax. The Sixteenth Amendment allows a tax without apportionment on income "from whatever source derived." "Derived" and "realized" are synonymous, and Supreme Court decisions use these terms interchangeably. The Constitution does not give Congress power to attribute carte blanche a corporation's income to its shareholders and the concurrence agrees with the majority that Congress cannot "arbitrarily" attribute corporate income to shareholders. The question of whether Congress can attribute the income of a closely held corporation is a difficult one that was "barely addressed" by the parties. Given the Moores' concession that Subpart F is constitutional and since the MRT is not meaningfully different, they failed to meet their burden of proving that they are entitled to a refund. On that ground, Justices Barrett and Alito concurred in affirming the judgment of the Ninth Circuit.[11]

The dissent argued that the Sixteen Amendment has a realization requirement and that this required that income be "derived," which means it must be received. Since the Moores did not receive any of KisanKraft's undistributed income, that income is not taxable to them. The dissent would thus reverse the Ninth Circuit.

F. The Impact of *Moore*

Given how narrowly drawn the Supreme Court's decision was in Moore, it was undoubtedly a compromise decision. If the Court held that realization was a constitutional requirement, Justice Jackson would not have joined. If it held that it was not a requirement, Justices Barrett and Alito would not have concurred, and one of the justices who joined the majority may have dissented, in which case the MRT tax would have been unconstitutional and, with it, potentially the taxes imposed by Subchapter K (partnerships), Subchapter S (S corporations), and subpart F (CFCs) would probably be ruled unconstitutional, as would such things as mark-to-market and original issue discount provisions of the IRC.

What do we know for certain: although the Court said it was not ruling on the issue of taxing both an entity and its shareholders/partners on undistributed income of the corporation, a majority of justices would probably find such a tax unconstitutional. Similarly, a majority would probably find a wealth tax unconstitutional.

Whether and in what circumstances a tax on the appreciation in value of a taxpayer's assets would be unconstitutional is not clear. The Court listed as provisions that would be unconstitutional if it bought into the Moores' realization argument (a) the mark-to-market provisions of Code Sec. 1256(a) that tax increases in value of certain options and futures contracts and (b) the original issue discount provisions of Code Sec. 1252, *et seq*. that tax persons holding debt instruments ratably on the excess of the stated redemption price of a debt instrument over its issue price.

At present, the provisions of Subchapters K (partnerships) and S (small business corporations) and of subpart F of Subchapter N (CFCs) appear safe, and the total upending of major portions of the Internal Revenue Code is avoided. Whether the Court will recognize a realization requirement as constitutionally mandated for a tax on income will need to wait for another day, possibly in a case involving the mark-to-market or original issue discount provisions of the IRC. But the issues raised in *Moore* suggest we are in for an uncertain future regarding many provisions of the IRC.

II. Toppling *Chevron*: The Supreme Court's Landmark Shift in Judicial Deference

Forty years ago, the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[12] articulated a new test for determining the deference to be given to an agency's interpretation of a statute. The *Chevron* Doctrine, as it came to be known, became a fixture of federal jurisprudence. In *Mayo Foundation for Medical Education & Research*,[13] the Court refused "to carve out an approach to administrative review good for tax law only"[14] and held that *Chevron's* deferential standard applied to tax regulations.

On the next to the last day of its 2023 Term, the Supreme Court issued its consolidated decision in *Loper Bright Enterprises v. Raimondo*[15] and *Relentless, Inc.*,[16] overturning *Chevron*. The decision was along party lines, with the six Republican-appointed justices voting to overturn *Chevron* and the three Democratic-appointed justices dissenting.[17]

The Court's decision poses the question: *Quo Vadis*? Where do we go from here and what does this mean for tax regulations?

A. The *Chevron* Doctrine

Chevron involved a challenge to an Environmental Protection Agency (EPA) regulation defining "stationary source." Under the Clean Air Act, the EPA was required to review any project that would create a major source of air pollution from a stationary source. The EPA initially interpreted "stationary source" broadly, but under the Reagan administration, it issued a new regulation giving the term a narrow interpretation. The Natural Resources Defense Council ("NRDC") successfully challenged the EPA's approval of a project by *Chevron* under the new regulation, with the D.C. Circuit determining that the new regulation was invalid. The Supreme Court reversed, holding that the regulation was valid. In its decision, the *Chevron* Court adopted a two-step analysis to determine if a court should defer to an agency's interpretation of a statute that it administers: First, a court must determine if the statute is ambiguous or has gaps. If the answer is no, then the court must give effect to the unambiguously expressed intent of Congress. Second, if the answer is yes, then a court determines whether the agency's interpretation is reasonable or permissible. If it is, the court must defer to the agency's interpretation.

B. The Supreme Court's Rationale for Overturning *Chevron*

The majority began its analysis with a historical overview. Prior to *Chevron*, the federal courts were recognized as the final arbiters of the interpretation of federal statutes. This continued to be the case after the growth of the federal administrative bureaucracy when it was understood that

the courts were to decide questions of law, exercising independent judgment, even though factual determinations of administrative agencies were not arbitrary and were based on evidence following a fair hearing were binding on the courts. During this period, agency interpretations and opinions made in pursuance of official duties were given deference based on the thoroughness of the agency's consideration, the validity of its reasoning, and other factors that would give them "power to persuade, if lacking the power to control."[18]

The Administrative Procedures Act ("APA"),[19] which was not considered by the *Chevron* Court, leaves questions of law to the courts. Section 706 of the APA directs reviewing courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." According to the *Loper Bright* majority, neither *Chevron* nor any subsequent Supreme Court decision attempted to reconcile *Chevron* with the APA.

Chevron's justifying presumption is that when a statute was ambiguous, Congress meant for the agency to interpret the ambiguity. According to the *Loper Bright* majority, this presumption does not reflect reality. Statutory ambiguities are often unintentional. They do not necessarily signal a congressional intent that agencies, rather than courts, should resolve these interpretive questions. Indeed, many ambiguities arise without any deliberate intent, and it falls to the judiciary to interpret these uncertainties.

In place of *Chevron*'s broad deference, the majority insisted on a thorough judicial examination of ambiguous statutes. Instead of merely deeming a party's reading "permissible," courts must employ every interpretive tool at their disposal to discern the best reading of the statute. The aim is not simply to find an acceptable interpretation but to arrive at the correct one—the interpretation the court would have reached independently of the agency's involvement.

Moreover, the majority questioned the notion that agencies possess unique expertise in resolving statutory ambiguities. Such competence is properly within the purview of the judiciary. The Framers of our Constitution envisaged a judiciary capable of navigating and resolving these complexities with independent legal judgment, not one deferring to administrative interpretations by default.

The majority termed *Chevron*'s broad deference "misguided." It leads to deference in cases far removed from an agency's technical subject matter expertise. Even when ambiguities do involve technical matters, it does not follow that Congress intended to transfer interpretive power from courts to agencies. Instead, the judiciary must retain its role as the ultimate arbiter of statutory meaning.

While the majority acknowledged that an agency's interpretation can be informative, especially when it is grounded in technical expertise, such interpretations cannot bind the judiciary. A court must regard the agency's views as one among many considerations, valued for its expertise but not determinative. Judges must interpret statutes based on traditional tools of statutory construction, steering clear of policymaking, which is left to the political branches. By independently identifying and respecting delegations of authority, policing the boundaries of those delegations, and ensuring that agencies act within their statutory confines and in accordance with the APA, the judiciary fulfills its constitutional duty.

The majority acknowledged that some statutes "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme." In such cases, a court must continue, under the APA, "to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." This requires a reviewing court to define the boundaries of the agency's authority and ensure that the regulation reflects "reasoned decision making."

C. The Implications for Treasury Regulations

In the wake of *Loper Bright Enterprises*, courts may revert to standards predating *Chevron*, such as those in *Skidmore* and *Batterton*.[20] Under *Skidmore*, the weight accorded to an administrative judgment depends on its persuasiveness and consistency with earlier and later pronouncements. While legislative regulations, authorized by Congress, are granted a certain level of deference, other regulations, pure interpretative regulations, do not enjoy this deference. Under *Batterton*, where Congress has specifically delegated the power to prescribe standards, a court may only set a regulation aside if it exceeds the statutory authority or is arbitrary, capricious, or "otherwise not in accordance with law."

The Tax Court recently gave a glimpse of how it may apply *Loper Bright* in its recent decision in *Varian Medical Systems, Inc.*,[21] a case involving whether the effective date provisions of the TCJA entitled a fiscal year ("FY") taxpayer to a Code Sec. 245A dividends received deduction for Code Sec. 78 dividends the taxpayer was deemed to receive during a one-time "gap period." The court held that the unambiguous language of the statute entitled the petitioner to the deduction. As a result, a Treasury Regulation designed to prevent the deduction for FY taxpayers did not apply.

Since the unambiguous statutory language trumped the regulation, *Loper Bright* did not affect the result.

Nevertheless, because the Commissioner argued that its regulation was a "permissible reading," it should be given deference; the Court discussed *Loper Bright*'s application to Internal Revenue Service ("IRS") guidance:

> A "permissible" interpretation of a statute no longer prevails simply because an agency offers it to resolve a perceived ambiguity. *See id.* at 2266, 2273.
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> As the Supreme Court observed in *Loper Bright*, "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; `every statute's meaning is fixed at the time of enactment.'" *Id.* at 2266 (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)). And, in cases involving ambiguity, "instead of declaring a particular party's reading `permissible'..., courts [must] use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Id.* Put another way, "in an agency case as in any other...even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—the reading the court would have reached if no agency were involved." *Id.* (cleaned up).
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> In short, "[i]n the business of statutory interpretation, if it is not the best, it is not permissible." *Id.* And, as we have shown above, the best (indeed the unambiguous) reading of the provisions at issue here permits Varian's deduction.
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> In reaching this conclusion, we have given "[c]areful attention to the judgment of the Executive Branch." *Id.* at 2273. The Executive's views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" *Id.* at 2262. (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "The weight of such a judgment in a particular case," of course, "depend[s] upon the 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." *Id.* at 2259 (quoting *Skidmore*, 323 U.S. at 140).
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> Nevertheless, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* at 2273. It "remains the responsibility of the court to decide whether the law means what the agency says." *Id.* at 2261 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment)). Indeed, "Congress expects courts to do their ordinary job of interpreting statutes." *Id.* at 2267. "And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute." *Id.*

The Tax Court rejected the Commissioner's argument that giving the statute its plain meaning would be bad policy, since policy considerations and speculation about congressional intent cannot override the statute's unambiguous language.

The *Varian* opinion indicates that in the case of an ambiguous statute or one with gaps, it will apply *Skidmore* to determine a regulation's validity. The *Varian* opinion stated that since the statute was unambiguous "the regulation falls outside the boundaries of any authority that Congress may have delegated under Code Sec. 245A or 7805." Code Sec. 245A contained a special grant of rulemaking authority while Code Sec. 7805(a) is a general grant that authorizes the Secretary of Treasury to prescribe all needful rules and regulations for the enforcement of the Internal Revenue Code. The Supreme Court has recognized that this section gives the Commissioner "broad authority to prescribe [rules and regulations] for the enforcement of the tax laws … and it is up to him to choose the method that best implements the statutory mandate."[22] Regulations issued under the general mandate of Code Sec. 7805(a) are, however, entitled to "less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."[23]

In *National Muffler Dealer Ass'n Inc.*,[24] the Supreme Court applied a multifactor test similar to the *Skidmore* test to determine the validity of Treasury Regulations. The Supreme Court emphasized that it:[25]

> customarily defers to the regulation, which, "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld *United States v. Cartwright* 411 U.S. 546, 550, 93 S.Ct. 1713, 1716, 36 L.Ed.2d 528, 532 (1973), quoting *United States v. Correll*, 389 U.S. 299, 307, 88 S.Ct. 445, 449, 19 L.Ed.2d 537, 543 (1967).
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> We do this because "Congress has delegated to the [Secretary of the Treasury and his delegate, the] Commissioner [of Internal Revenue], not to the courts, the task of prescribing 'all needful rules and

> regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. §7805(a)." *United States v. Correll*, 389 U.S., at 307, 88 S.Ct. at 449. That delegation helps ensure that in "this area of limitless factual variations," ibid., like cases will be treated alike. It also helps guarantee that the rules will be written by "masters of the subject," *United States v. Moore*, 95 U.S. 760, 763, 24 L.Ed. 588, 589 (1878), who will be responsible for putting the rules into effect.

While the authors believe that the courts should apply pre-*Chevron* decisions to determining the validity of Treasury Regulations, since doing so would be consistent with *Loper Bright*'s mandate for situations where Congress has authorized an agency to fill in the details of a statutory scheme, we have to wait to see what the courts will do.

That *Loper Bright* changes the rules of administrative law is undeniable. Among the changes that can be expected are:

- *Increased Judicial Intervention*: Without *Chevron* deference, courts will now take a more active role in interpreting statutes where an agency has issued a regulation, which may lead to more regulations being invalidated.
- *Potential Inconsistent Application of Law*: Different courts may now interpret the same statute differently, leading to a patchwork of regulations across the country.
- *Increased Litigation*: We can expect a surge in challenges to agency rules and decisions, as parties seek to exploit the new uncertainty in administrative law.

The post-*Chevron* landscape may be uncertain, but one thing is clear: federal agencies, including the IRS, can no longer take for granted that their regulations will be upheld. Both litigants who challenge the regulations and the Government attorneys defending them will have to develop compelling legal arguments on why a regulation should or should not be upheld.

III. *Corner Post* Expands the Ability to Challenge Federal Regulations

Corner Post addressed when the statute of limitations for substantive challenges to a regulation begins. Under 28 USC §2401(a), a person has six years within which to file a civil suit against the U.S. Government. The issue in Corner Post, Inc. was whether a person who claims injury due to final agency action has six years from the date of injury or six years from the date of final agency action within which to file a lawsuit. The decision hinged on the word "accrues" in 28 USC §2401(a), which states:

> [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The case involved a challenge to a regulation issued by the Federal Reverse Board in 2011 setting the rates that could be charged a merchant for accepting payment *via* a debit card. Corner Post was incorporated in 2017 and began business in 2018, operating a truck stop and convenience store in Watford City, North Dakota. Since its opening, Corner Post has paid hundreds of thousands of dollars in debit card charges.

Upset at the charges, Corner Post joined a class action lawsuit in U.S. District Court in North Dakota challenging the regulation under the APA. The District Court dismissed the suit as time barred and the Eight Circuit affirmed.[26] Because there was a split in the courts of appeal, the Supreme Court granted certiorari. In a 6–3 decision,[27] the Court held that the right of action accrues on the date of injury, not on the date the regulation became final. Thus, Corner Post's suit was timely.

In reaching its decision, the Court focused on the language of the APA provisions concerning judicial review of agency action. Under APA §702, any person who "suffers a legal wrong" or is "adversely affected or aggrieved" by agency action can obtain judicial review. APA §704 limits judicial review to final agency action. Thus, to maintain an action under the appeal, a party must have been injured by final agency action, such as the issuance of a final regulation.

The Court then looked at the meaning of "accrue." The Court held that "accrue" had a well-settled legal meaning: a right accrues when it comes into being. According to the Court, it has historically recognized that the standard rule is that a right accrues when the plaintiff suffers an injury. Since Corner Post first suffered an injury in 2018, its suit against the Federal Reserve was filed within the six-year period and was timely.

Footnote 8 to the majority opinion appeared to recognize an exception to its holding in the case of procedural challenges to a regulation. It states:

> It also may be that some injuries can only be suffered by entities that existed at the time of the challenged action. Corner Post suggests that only parties that existed during the rulemaking process can claim to have been injured by a "procedural" shortcoming, like a deficient notice of proposed rulemaking. Reply Brief 18–19. We need not resolve that issue here because there is no dispute that Corner Post proffered an injury that does not depend on its having existed

> when the Board promulgated Regulation II: the rule's alleged conflict with the Durbin Amendment. The dissent's observation that "the claims in this case are procedural," post, at 18, is confused. Even if some of Corner Post's claims might be procedural, its central claim—that the regulation violates the statute—is a prototypical substantive challenge.

Many challenges to Treasury Regulations have been procedural, focusing on whether the IRS followed the notice and comment provisions of the APA. Under footnote 8, such challenges could be time barred if not raised within six years of the regulation becoming final, unless the Government waives the six-year period.

The dissent argued that accrue can have different meanings depending on the context and that with regard to "facial challenges" to agency rules and regulations, the cause of action accrues when the regulation becomes final. The definition of "accrue" adopted by the majority is only the "standard" rule and that term does not have "any definite technical meaning."

So, what does this mean for challenges to IRS regulations? For substantive challenges to regulations, a taxpayer has six years from the time the right first accrues to raise the issue. In the context of a deficiency case, the period begins to run when the statutory notice of deficiency is issued. In refund cases, it begins to run when the refund claim is denied. If procedural challenges must be asserted in a suit filed within six years of the regulation becoming final, this may create a problem in tax cases, since the Anti-Injunction Act ("AIA")[28] prohibits any suit to restrain the assessment or collection of a tax. Given that it often takes more than six years between a regulation becoming final and a case involving the regulation being filed in court, procedural challenges will often be time-barred unless the Government waives the six-year statute.[29]

In 2021, a unanimous Supreme Court in *CIC Services, LLC*[30] held that the AIA does not bar "a suit seeking to set aside an information reporting requirement that is backed by both civil tax penalties and criminal penalties." Part III of Chapter 51 of the Internal Revenue Code contains 64 separate provisions requiring the filing of information returns. Regulations for many of these sections were issued more than six years ago. Does that mean that a right to file suit and seek to obtain relief began to accrue for all taxpayers when the regulations were issued, regardless of any personal impact on many, if not most, taxpayers' returns? Could a business that recently was required to comply with information-reporting requirements bring a lawsuit challenging the validity of the regulation claiming that, based on *Corner Post, Inc.*, its complaint is timely and based on *CIC Services*, its suit is not barred by the AIA? The answer may not be clear, but with the tide winds changing, we can anticipate a wave of challenges to regulations and other rules issued by the IRS as we all head into uncharted waters in tax administration.

ENDNOTES

1 SCt, 2024-1 USTC ¶50,163, 603 US ___, 144 SCt 1680.
2 SCt, 603 US ___, 144 SCt 2244 (June 28, 2024).
3 SCt, 603 US ___, 144 SCt 2440 (July 1, 2024).
4 Code Secs. 951–965.
5 Code Sec. 245A.
6 *C.G. Moore*, 2020 WL 6299022 (WD WA Nov. 19, 2020).
7 CA-9, 36 F4th 930 (2022).
8 SCt, 158 US 601, 15 SCt 912 (1895).
9 SCt, 252 US 189, 40 SCt 189 (1920).
10 *See* Aristophones' *The Birds*.
11 If the Moores had not conceded that Subchapters K and S and Subpart F were constitutional, Justice Barret and Alito may not have concurred and the opinion would have been 5–4.
12 SCt, 467 US 837, 104 SCt 2778 (1984).
13 SCt, 2011-1 USTC ¶50,143, 562 US 44, 131 SCt 704, dealing with the questions of whether medical residents, who work more than 40 hours per week, qualify for the student exemption from Federal Insurance Contributions Act (FICA) taxes.
14 SCt, 2011-1 USTC ¶50,143, 562 US 44, 55.
15 SCt, 603 US ___, 144 SCt 2244 (2024); Docket No. 22-451 (June 28, 2024).
16 SCt, 603 US ___ (2024); Docket No. 22-1219 (June 28, 2024).
17 Associate Justice Jackson joined in the dissent only as to the *Relentless, Inc.* case. Having been a member of the D.C. Circuit when it decided *Loper Bright Ent.*, she did not participate in the consideration or decision of that case.
18 So-called *Skidmore* deference, after *Skidmore v. Swift & Co.*, SCt, 323 US 134, 65 SCt 161 (1944), which held that an agency's interpretive rule is entitled to deference only to the extent of its persuasive power.
19 5 USC §§500 *et seq*. The judicial review provisions of the APA are at 5 USC §§701–706.
20 *Batterton v. Francis,* SCt, 432 US 416, 97 SCt 2399 (1977).
21 163 TC No. 4, Dec. 62,497.
22 *F.L. Engle*, SCt, 84-1 USTC ¶9134, 464 US 206, 226-227, 104 SCt 597.
23 *Rowan Cos.*, SCt, 81-1 USTC ¶9479, 452 US 247, 253, 101 SCt 2288. Code provisions with specific grants of authority include Code Secs. 170(f)(9)(I) (contributions of split-dollar life insurance, endowment, and annuity contracts); 179(f)(11)(H) (qualified appraisals), 469(l) (passive activity losses); 471(a) (the use of inventories), 472(a) (the time and manner for use of LIFO), and 6001 (records, statements, returns).
24 SCt, 79-1 USTC ¶9264, 440 US 472, 99 SCt 1304.
25 SCt, 79-1 USTC ¶9264, 440 US 472, 476-477.
26 *North Dakota Retail Assn. v. Board of Governors of FRS*, 55 F4th 634 (2022).
27 As in *Loper Bright Enterprises*, the Court split along party lines, with the six Republican appointees in the majority and the three Democratic appointees in the minority.
28 Code Sec. 7421.
29 *K.F. Wong*, SCt, 575 US 402, 135 SCt 1625 (2021), holding that 28 USC §2401 is not jurisdictional and, thus, can be waived. For a more detailed discussion of this question, *see* Morse, "How Late Is Too Late to Challenge Old Tax Regs?" Tax Notes, August 12, 2024.
30 CA-6, 2021-1 USTC ¶50,150, 593 US 209, 141 SCt 1582.