Challenging IRS Regulations: The Supreme Court's *Mayo* Decision

By Bruce Givner and Ken Barish

Bruce Givner and Ken Barish discuss the Supreme Court *Mayo* decision and examine the historical deference courts have given to the different types of Treasury Regulations.

The recent unanimous decision of the U.S. Supreme Court in *Mayo Foundation for Medical Education and Research*[1] has given the IRS more regulatory authority. The Supreme Court, in this much followed and discussed decision, has given great deference to both interpretative and administrative regulations promulgated by the IRS to explain and interpret the Internal Revenue Code ("Code").

Introduction

What approach should be followed when the meaning of the tax law is unclear? Soon after the 16th Amendment to the Constitution made the income tax a permanent fixture in the U.S. tax system,[2] the Supreme Court indicated that when the meaning of the tax law is uncertain, taxpayers should receive the benefit of the doubt.[3] Later the Supreme Court concluded that courts should determine the meaning of uncertain legislation without giving either party a preference.[4] Now the Court grants a preference to the government under the mantle of deference, whether that deference is to a regulation, a revenue ruling or even an argument made by the government during litigation.[5]

Regulations

Regulations constitute the primary source for guidance as to the IRS's position regarding the interpretation of the Code.[6] The IRS issues two types of regulations. The first are legislative regulations. These are mandated by Congress under a specific section of the Code and give the IRS a specific grant of regulatory authority. For example, Code Sec. 414(o) relating to employee benefit plans, requires "The Secretary [of the Treasury to] prescribe such regulations … as may be necessary to prevent the avoidance of any employee benefit requirements listed [above]." The second and broader type are issued under Code Sec. 7805(a), which authorizes the Treasury to "prescribe all needful rules and regulations [to enforce the Internal Revenue Code], including all rules and regulations as may be necessary by reason of any alternation of law in relation to internal revenue." These are known as "interpretive regulations." "They contain the Service's interpretation of the various sections of the Code and serve to guide the personnel of the Service as well as the taxpaying public in the application of the law."[7] The history of deference to regulations is not limited to Treasury Regulations, and the history is muddled as to whether there is a distinction in the level of deference accorded to the two types of Treasury Regulations.

Deference Before *Chevron*: The Reenactment Doctrine

One of the earliest Supreme Court decisions involving deference to a Treasury Regulation was *R.C. Winmill*.[8] The taxpayer deducted from his gross income brokerage commissions incurred in buying securities. The government disallowed the deductions because they were properly chargeable to capital. The regulation, issued under the 1932 Act, followed the regulations issued under the 1916 Act. The Court noted that "it

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is significant that Congress substantially retained the original taxing provisions on which these regulations have rested."[9] Its statement about re-enactment has been cited many times:

> Treasury Regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.[10]

H.O. Correll[11] cited *Winmill* in evaluating a regulation under Code Sec. 162(a)(2). The statute allows the deduction of "traveling expenses (including amounts expended for meals and lodging …) while away from home in the pursuit of a trade or business … ." The Commissioner had interpreted the key phrase "away from home" as excluding trips requiring neither sleep nor rest[12] even before the enactment of the 1954 Code. The taxpayer left his home early in the morning, ate breakfast and lunch on the road, and returned home in time for dinner. He objected to the Commissioner's definition of the limiting phrase "away from home," so he paid the tax, sued for a refund and got a sympathetic jury award which was affirmed on Appeal. The Supreme Court noted the long-standing nature of the regulation and that it would have "the effect of law" as indicated in *Winmill*. However, it went further with language that provides a bridge to the modern interpretation of the deference given the IRS in interpreting tax laws:

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> Alternatives to the Commissioner's sleep or rest rule are, of course, available. Improvements might be imagined. But we do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code.[13] In this area of limitless factual variations, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments." The role of the judiciary in cases of this sort begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner. Because the rule challenged here has not been shown deficient on that score, the Court of Appeals should have sustained its validity.[14]

Agency Expertise

The more common basis for deference before *Chevron* was predicated upon the expertise of the administrative agency. One such early Supreme Court decision did not involve Treasury Regulations. In *Skidmore v. Swift & Co.*,[15] the issue was whether waiting time spent by firefighters was "working time" under the Fair Labor Standards Act. The lower courts had ruled against the firefighters. The Supreme Court reversed, relying, in part, on the rulings of the Administrator of the Fair Labor Standards Act. Congress had not given the Administrator authority, comparable to that given to the Commissioner of the IRS, to promulgate regulations.[16] Despite that, the Supreme Court decided to give great weight to the Administrator's interpretation of the situation. "There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. … But the administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[17]

National Muffler

The most important pre-*Chevron* case was *National Muffler Dealers Association*.[18] The Association confined its membership to dealers franchised by Midas. It sought exemption from federal income tax under Code Sec. 501(c)(6) as a "business league." The Treasury Regulation required that the activities of a business league "should be directed to the improvement of business conditions of one or more lines of business."[19] The IRS rejected the Association's application, and the Association amended its bylaws to eliminate the requirement that its members be Midas franchisees. However, the Association neither recruited nor acquired any non-Midas members. In response to the suit for refund, both the District Court for the Southern District of New York and the Second Circuit held for the IRS. The Second Circuit felt that it had to determine the meaning of a "line of business" and relied on the maxim *noscitur a sociis* ("it is known from its associates"). It looked at the general characteristics of the organizations with which business leagues were grouped in the statute—chambers of commerce and boards of trade—and agreed with the IRS's determination that the Association's purpose was too narrow to satisfy the line of business test. There had been an earlier contrary decision in the Seventh

Circuit,[20] so the Supreme Court felt constrained to resolve the conflict.

The Supreme Court first noted that the term "business league" has no definition outside of the statute. Therefore, "this Court customarily defers to the regulation, which, if found to implement the congressional mandate in some reasonable manner, must be upheld."[21] The Court cited the Code Sec. 7805(a) delegation of authority and the need to have the rules written by "masters of the subject … who will be responsible for putting the rules into effect."[22] The Court then articulated a list of factors which has been cited many times since:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent reenactments of the statute.[23]

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The Court then noted that the "language [of the regulation] has stood almost without change for half a century through several reenactments and one amendment of the statute."[24] The Court concluded that although "the Commissioner's reading of §501(c)(6) [is] perhaps … not the only possible one … [it] merits serious deference."[25]

The Association argued that the regulation is not entitled to deference because it is actually contrary to the first regulation that was in force from 1919 to 1929. However, the Court said it "would be reluctant to adopt the rigid view that an agency may not alter its interpretation in light of administrative experience."[26]

In sum, *National Muffler* upheld an interpretive regulation because its construction of the statute, while "not the only possible one, … does bear a fair relationship to the … statute, … reflects the views of those who sought its enactment, … matches the purpose they articulated [and] has stood for 50 years … ." This has been viewed as giving the courts the ability to review a broad range of factors in weighing a regulation's reasonableness, as a result of which interpretive regulations received a lesser level of deference when faced with a taxpayer challenge.

The Earthquake: *Chevron* (1984)

Chevron v. Natural Resources Defense Council, Inc.[27] involved an interpretive regulation promulgated by the Environmental Protection Agency (EPA). The Clean Air Act did not explicitly define a key term—source—and the legislative history did not address the issue. The Court began by enunciating what has become known as the *Chevron* test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
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> The power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.
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> *Morton v. Ruiz,* 415 U. S. 199, 415 U. S. 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a

> statutory provision for a reasonable interpretation made by the administrator of an agency.[28]

During President Reagan's administration, the EPA changed the key definition. As a result, the National Resources Defense Council (NRDC) argued that "the EPA's interpretation is not entitled to deference, because it represented a sharp break with prior interpretations of the Act."[29] The Court's memorable language is as follows:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

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> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." *TVA v. Hill*, 437 U.S. 153, 195 (1978). 467 U.S. 865, 866.

The Supreme Court held that the EPA's "interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference … ." The *Chevron* two-part test effected an expansion in agency authority not only be creating greater latitude for agencies to change their interpretations, but also by granting increased deference.

Post-*Chevron* Decisions

There were many noteworthy decisions in the aftermath of *Chevron* using its two-step analysis. In *Smiley v. Citibank (South Dakota)*[30] the Court, in making the threshold *Chevron* inquiry, emphasized that the different readings that the statute had received in the Supreme Courts of New Jersey and California was a strong indication of ambiguity.[31] It further indicated that, in a nontax context, it would be inappropriate to disregard a post-transaction regulation in interpreting an ambiguous statute.

In *O.C. Hubert Est.*,[32] none of the various opinions explicitly addressed deference. A four-Justice plurality opinion[33] suggested that the Court's conclusion in an estate tax case could be overturned by new regulations, even though the statute was 50-years old. A three-Justice concurring opinion[34] rejected the IRS's argument due to a concession made by the IRS in Rev. Rul. 93-45 as to the meaning of an ambiguous regulation.[35] The IRS accepted the Court's invitation and issued the regulations in 1999.[36]

In *Haggar Apparel Co.*,[37] the respondent sought a refund for customs duties imposed on garments it shipped to this country from Mexico. The Customs Service, which is in the Treasury Department, denied a duty exemption under its regulation. The respondent brought suit in the Court of International Trade, which declined to treat the regulation as controlling and ruled in the respondent's favor. The Court of Appeals for the Federal Circuit affirmed, declining to analyze the regulation under *Chevron*. The Supreme Court applied *Chevron* despite the claim that the expertise of the Court of International Trade required otherwise and indicated that the Tax Court similarly must defer to Treasury Regulations:

> The customs regulations may not be disregarded. Application of the *Chevron* framework is the beginning of the legal analysis. Like other courts, the Court of International Trade must, when appropriate, give regulations *Chevron* deference. … The expertise of the Court of International Trade, somewhat like the expertise of the Tax Court, guides it in making complex determinations in a specialized area of the law; it is well positioned to evaluate customs regulations and their operation in light of the statutory

mandate to determine if the preconditions for *Chevron* deference are present.

Mead[38] was another case involving customs duties. Respondent's imported "day planners" were first classified as duty free then reclassified in a ruling letter as subject to tariff. The Court of International Trade granted the government summary judgment. The Federal Circuit found that the ruling letters, being churned out at the rate of 10,000 per year by 46 offices,[39] and not preceded by notice and comment as under the Administrative Procedure Act (APA), do not carry the force of law and are not entitled to deference. The Supreme Court noted that:

> The want of [the notice and comment procedure in the APA] here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded … .[40]

The Court went on to deny *Chevron* deference.[41] However, the Court then revived the *Skidmore* analysis that:

> An agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, 323 U.S. at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *Id.*, at 140.

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The Court then reversed to allow the *Skidmore* claim to be raised by the agency. Justice Scalia's dissent argued that the Court resurrected *Skidmore* which, in his view, was made irrelevant by *Chevron*:

> … the majority's approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore,* which sets forth a sliding scale of deference owed an agency's interpretation of a statute that is dependent "upon the thoroughness evident in [the agency's] 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"; in this way, the appropriate measure of deference will be accorded the "body of experience and informed judgment" that such interpretations often embody, 323 U.S. at 140. Justice Jackson's eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.
>
> It was possible to live with the indeterminacy of *Skidmore* deference in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability and endless litigation. To condemn a vast body of agency action to that regime (all except rule-making, formal [and informal?] adjudication, and whatever else might now and then be included within today's intentionally vague formulation of affirmative congressional intent to "delegate") is irresponsible.[42]

In *Swallows Holding, Ltd.*[43] the question was whether Congress's use of the word "manner" without a reference to "time" in Code Sec. 882(c)(2) allowed the IRS to impose a limitations period for claiming deductions in Code Sec. 882(c)(2). The Tax Court considered the regulation under *National Muffler*, concluded the regulation was invalid and agreed with the taxpayer that the IRS could not impose an 18-month time limit on claims for deductions.[44] The Third Circuit determined that the result would not be the same under *Chevron* and that the regulation should be given *Chevron* deference even if it is an interpretive regulation.[45] The Court was heavily influenced by the fact that the regulation was put through a public notice and comment period.[46]

The Most Recent Supreme Court Decision: *Mayo* (January 2011)

Mayo Foundation for Medical Education and Research, et al.[47] involved a FICA tax (Social Security) dispute. In 2004, the IRS issued an interpretive regulation providing that an employee is a student, exempt from FICA, if the educational aspect of the relationship is "predominant." An employee whose normal work schedule is 40 hours or more per week is considered a full-time employee and, therefore, the educational aspect is not predominant.[48] In 2007, a Federal district court held the full-time employee rule inconsistent with Code Sec. 3121's unambiguous

text, which the court understood to dictate that "an employee is a 'student' so long as the educational aspect of his service predominates over the service aspect of the relationship with his employer."[49] The court also used the *National Muffler* test to invalidate the full-time employee exception.[50] In 2009, the Eighth Circuit reversed the lower court. Using the more deferential *Chevron* standard, it held that "the statute is silent or ambiguous on the question whether a medical resident working for the school full-time is a 'student' for purposes of Code Sec. 3121(b)(10), and that the Treasury's amended regulation (excluding full-time employees from the student exemption) "is a permissible interpretation of the statut[e]."[51]

The Supreme Court unanimously affirmed the Eighth Circuit's decision, agreeing that the full-time employee rule was a reasonable construction of the statue. Although it had previously used a less deferential standard for interpretive regulations, the Court indicated that the higher *Chevron* deference now seems appropriate "when it appears that Congress delegated the authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." In other words, analysis of the regulation does not depend upon whether the delegation from Congress was general or specific and on whether the regulation was issued by the IRS or some other administrative agency. *Chevron* provides more deference than *National Muffler* because the latter invalidate a regulation due to factors such as agency inconsistency, lapse of time between statutory change and the regulation, and the way the regulation evolved.

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The Newest Decision: *Grapevine Imports, Ltd.* (March 2011)

Grapevine Imports, Ltd.[52] was yet another in a long line of "Son of BOSS"[53] cases. The issue was whether the taxpayers' overstatement of basis in certain capital assets by means of the tax shelter was an understatement of income that would permit the IRS to use the six-year statute of limitations of Code Sec. 6501(e)(1)(A).[54] The lower court relied on the U.S. Supreme Court's decision in *Colony, Inc.*,[55] which reviewed the earlier version of the statute[56] and held that overstatement of basis was not an "omission of gross income," and so did not trigger the extended limitations period.[57] In a separate "Son of Boss" case, on similar facts, another panel of the same Court of Appeals for the Federal Circuit reached the same conclusion in *Salman Ranch*.[58] After the government's loss in *Salman Ranch*, the Treasury Department issued temporary regulations implementing its own interpretation of the statute of limitations and its interaction with *Colony*.[59] The Treasury later issued final regulations replacing the temporary regulations.[60]

The court began by restating *Chevron*'s two steps: (1) Is there an ambiguity in the statute such that an agency has room to interpret? (2) Is the agency's action a reasonable interpretation of Congress's intent?[61] The Court first distinguished the role of the Courts in *Colony* and *Salman Ranch* since the latter courts were trying to interpret a statute in light of the evidence and they both reached the same outcome, which was that the taxpayers' arguments against including overstated basis as an "omission" was stronger than the government's argument in favor. However, this Court found itself faced with a different task in light of *Chevron*: Was Congress's intent so clear as to foreclose any other interpretation? The Court found the statute ambiguous on this point then had no difficulty finding the regulation a reasonable interpretation of Congress's intent. The Court was able to avoid one issue which remains unclear in the immediate aftermath of *Mayo*: Is a regulation which does not have a notice and comment period entitled to *Chevron* deference? However, it handled with ease an issue which strikes some taxpayers as "unfair"—the retroactive effect of a regulation, especially one issued during the court of litigation. It found the language of Code Sec. 7805(b)[62] to constitute all the authority that the Treasury needs to issue such regulations.

Conclusion

Mayo will make it more difficult for taxpayers to successfully challenge IRS interpretive regulations. For the taxpayer to even have a chance to succeed, the taxpayer must argue that the statute is not ambiguous. Under the *Chevron* standard, the IRS's interpretation still bears a heavy burden. However, there are still many unknowns. The regulation in *Mayo* was issued only after the Administrative Procedure Act's notice and hearing process was followed. That process does not apply to interpretive regulations. Will the higher level of deference apply to temporary regulations (which normally do not go through the notice and comment period)? Will this higher level of deference apply to other forms of guidance issued by the IRS, *e.g.*, Revenue Rulings, Notices and Announcements?

Will it apply to final regulations that have not gone through a notice and comment period? Will other courts follow the Federal Circuit's lead in *Grapevine* and give *Chevron* deference to regulations the IRS issues retroactively to supports its litigation positions?

The Supreme Court's decision in *Mayo* can be read as applying the *Chevron* standard of deference to IRS regulations, rather than the arguably lesser test enunciated in *National Muffler*. However, it can also be viewed as eliminating the interpretive versus legislative categorization in favor of an unambiguous versus ambiguous distinction. It can also be viewed as simplifying the number of factors courts must consider in reviewing an IRS regulation. This will make the task of taxpayers challenging regulations more difficult. However, there is still room to attack inappropriate IRS regulations and other guidance.

Endnotes

[1] *Mayo Foundation for Medical Education and Research,* SCt, 2011-1 USTC ¶50,143.

[2] The office of Commissioner of Internal Revenue was created by Congress by the Revenue Act of 1862. Act of July 1, 1862, Ch. CXIX, 12 Stat. 432.

[3] *F.L. Merriam*, SCt, 1 USTC ¶84, 263 US 179, 44 SCt 69. The case involved "certain legacies bequeathed to the defendants by the will of the late Alfred G. Vanderbilt." *Merriam*, 263 US, at 183. To illustrate how wealthy Mr. Vanderbilt was, the total value was nearly $2 million. The bequest at issue was "made to my said executors … in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees." *Merriam*, 263 US, at 184. The issue was "the meaning of the phrase which describes net income as 'including the income from but not the value of property acquired by … bequest … ' "*F.L. Merriam*, 263 US, at 184. The government "urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions." *Merriam*, 263 US, at 187. This is probably one of the first, if not the first, expressions of the substance over form doctrine. The court responded, however, that "in statutes levying taxes, the literal meaning of the words employed is most important, for such statues are not to be extended by implication beyond the clear import of the language used. *If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer*." [emphasis added] *Merriam*, 263 US, at 187, 188.

[4] *H.T. White Est.,* SCt, 38-2 USTC ¶9600, 305 US 281, 59 SCt 179. The issue was whether upon a corporate liquidation, the shareholders' losses from stock held for more than two years were ordinary losses, deductible in full from gross income or capital losses only 12.5 percent of which was deductible from tax. "Petitioner argues that the construction which we think correct leads to the harsh and absurd consequence that a small liquidating dividend is more disadvantageous to the taxpayer than no distribution at all in the case where the stock has become worthless. This is an argument, more properly addressed to Congress … But it is not persuasive that we should disregard the language and history of the pertinent sections, with consequences equally harsh and absurd, to adopt the construction for which petitioners contend. … We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be." *White Est.,* 305 US, at 292.

[5] Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 Real Prop. Prob. & Tr. J. 731 (Winter 2002).

[6] Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st[t] Century: A View from Within*, 46 Duq. L. Rev. 323, at 326. Reprinted together in the August 2009 issue of Taxes are Don Korb's article and Mitchell Rogovin's article, *The Four R's: Regulations, Rulings, Reliance, and Retroactivity: A View from Within*, which was originally published by CCH in 43 Taxes 756 (1965). The Treasury Department has been issuing income tax regulations since 1914. *See* Reg. §33; these original regulations consisted of a total of 170 pages.

[7] *Id.,* 46 Duq. L. Rev., at 326, 327.

[8] *R.C. Winmill*, SCt, 38-2 USTC ¶9550, 305 US 79, 59 SCt 45.

[9] *Winmill, supra* note 8, 305 US, at 82, 83.

[10] Winmill, supra note 8, 305 US, at 83; *Fribourg Navigation Co., Inc.,* SCt, 66-1 USTC ¶9280, 383 US 272, 283, 86 SCt 862.

[11] *H.O. Correll*, SCt, 68-1 USTC ¶9101, 389 US 299, 88 SCt 445.

[12] It was originally known as the overnight rule. *W.A. Bagley*, CA-1, 67-1 USTC ¶9300, 374 F2d 204, *cert. denied*, 389 US 1046, 88 SCt 761.

[13] Code Sec. 7805(a).

[14] *Correll, supra* note 11, 389 US, at 306, 307, citations omitted.

[15] *Skidmore v. Swift & Co.*, 323 US 134 (1944).

[16] Act Sec. 4(a) of the Fair Labor Standards Act of 1938 (P.L. 75-718).

[17] *Skidmore, supra* note 15, 323 US, at 139. Congress "did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings." *Skidmore, supra* note 15, at 137, 138. "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore, supra* note 15, at 140.

[18] *National Muffler Dealers Association*, SCt, 79-1 USTC ¶9264, 440 US 472.

[19] Reg. §1.501(c)(6)-1.

[20] *Pepsi-Cola Bottlers' Ass'n, Inc.*, CA-7, 66-2 USTC ¶9744, 369 F2d 250. (Upheld the exempt status of an association composed solely of bottlers of a single brand of soft drink, on the ground that the line of business requirement unreasonably narrowed the statute.)

[21] *National Muffler, supra* note 18, at 476, citations omitted.

[22] *National Muffler, supra* note 18, at 477, citations omitted.

[23] *Winmill, supra* note 8.

[24] *National Muffler, supra* note 18, at 483.

[25] *National Muffler, supra* note 18, at 484.

[26] *National Muffler, supra* note 18, at 486.

[27] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 US 837 (1984).

[28] *Id.*, at 843.

[29] *Id.*, at 862.

[30] *Smiley v. Citibank (S.D.), N.A*, 517 US 735

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ENDNOTES

(1996).

[31] *Id.*, at 739. *See* Gans, *supra* note 5, at 751.

[32] *O.C. Hubert Est.*, SCt, 97-1 USTC ¶60,261, 520 US 93, 117 SCt 1124.

[33] Justices Kennedy, Rehnquist, Stevens and Ginsburg.

[34] Justices O'Connor, Souter and Thomas.

[35] *Hubert Est.*, *supra* note 32, 520 US, at 117–118.

[36] T.D. 8846, Dec. 3, 1999. The primary change was the amendment of Reg. §20.2056(b)-4.

[37] *Haggar Apparel Co.*, 526 US 380 (1999).

[38] *Mead Corp.*, 533 US 218 (2001).

[39] *Id.*, at 233.

[40] *Id.*, at 231.

[41] *Id.*

[42] *Id.*, at 250.

[43] *Swallows Holding, Ltd.*, CA-3, 2008-1 USTC ¶50,188, 515 F3d 162.

[44] *Id.*, at 163.

[45] *Id.*, at 169.

[46] *Id.*

[47] *Mayo Foundation*, *supra* note 1.

[48] Reg. §31.3121(b)(10)-2(d)(3)(iii) (the full-time employee rule).

[49] *Mayo Foundation, supra* note 1.

[50] *Id.*

[51] *Mayo Foundation, supra* note 1.

[52] *Grapevine Imports, Ltd.*, FedCl, 2007-2 USTC ¶50,555, 77 FedCl 505.

[53] Basis and Options Sales Strategy, a tax shelter which the IRS labeled as "listed transactions" in Notice 2000-44, 2000-2 CB 255.

[54] Code Sec. 6501(e)(1)(A) (2004).

(e) Substantial omission of items.—Except as otherwise provided in subsection (c)—
(1) Income taxes.—In the case of any tax imposed by subtitle A—
(A) General rule.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—
(i) In the case of a trade or business, the term "gross income" means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and
(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.

[55] *Colony, Inc.*, SCt, 58-2 USTC ¶9593, 357 US 28, 78 SCt 1033.

[56] Code Sec. 275, 53 Stat. 1, 86–87 (1939).

§275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—
(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within 3 years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.
...
(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.

[57] *Grapevine Imports, supra* note 52.

[58] *Salman Ranch Ltd.*, CA-FC, 2009-2 USTC ¶50,528.

[59] Temporary Regs. §§301.6229(c)(2)-1T, 301.6501(e)-1T.

[60] Regs. §§301.6229(c)(2)-1, 301.6501(e)-1.

[61] *Chevron*, supra note 27, 467 US, at 842, 843.

[62] Code Sec. 7805(b)—Retroactivity of regulations or rulings.—The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

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