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Four Things Every Tax Adviser Should Know About Loper Bright

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Introduction

Everyone is talking about *Loper Bright*[1] for a good reason. On June 28, 2024, the Supreme Court fundamentally changed the approach federal courts use to decide disputes about whether an agency has properly interpreted a statute. The old paradigm of *Chevron* deference to any permissible or reasonable agency interpretation has been replaced. The new paradigm directs federal courts to determine the best interpretation of a statute when reviewing an agency's interpretation.

Why does this matter? For starters, the IRS considers one of its main functions to be interpreting statutes to effectuate an express delegation from Congress by resolving statutory ambiguities and filling in statutory gaps. *Chevron* required courts to defer to an agency's permissible or reasonable interpretation of a statute to resolve ambiguities or fill in gaps. After *Loper Bright*, an IRS interpretation will withstand judicial scrutiny only if it is the “best” interpretation of the statute.

As tax advisers continue to absorb the effects of the *Loper Bright* paradigm, four key points emerge when considering how a court might arrive at the best interpretation.

Courts Will Consider Agency Expertise

From the beginning, our judicial system recognized agency interpretations as valuable, but *Chevron* deference took it much further by requiring courts to give deference to reasonable agency interpretations. Eliminating the *Chevron* deference standard raises the question of whether courts should consider agency interpretations. *Loper Bright* squarely addressed this issue, recognizing the historical and pre-*Chevron* deference practice of considering agency interpretations when appropriate:

> Courts . . . may — as they have from the start — seek aid from the interpretations of those responsible for implementing particular statutes. . . . Such interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,” consistent with the APA [Administrative Procedure Act].[2]

The Supreme Court explicitly recognized that an agency's interpretation might be helpful to a court, but that is not the same as directing courts to defer to that interpretation. Going forward, courts will employ the “full

interpretive toolkit," often referred to as the rules of statutory construction, to ascertain the best interpretation of a statute. Agency interpretations based on expertise will only be one factor in the analysis rather than the controlling factor.

The Tax Court wasted no time, issuing a detailed opinion in *Varian* that explains how it will approach statutory interpretation post-*Loper Bright*.[3] The procedural status of *Varian* is interesting. Before the release of the *Loper Bright* opinion, the parties filed cross-motions for partial summary judgment. The government argued *Chevron* deference should apply. After initial briefing, but before *Varian* was decided, *Loper Bright* overruled *Chevron* deference. In light of this development, the Tax Court invited the parties to file supplemental briefs addressing *Loper Bright*.[4]

Varian involved the government's argument that an agency's regulation was the best interpretation of statutory provisions enacted by Congress. In rejecting that argument, the Tax Court used the conceptual approach outlined in *Loper Bright*. The court applied tools of statutory construction, including a plain-meaning analysis, the use of dictionary definitions, giving effect to all the words in a statute, avoiding contradictions with other provisions, and presuming Congress meant what it said in the statutory text.

In finding against the government in *Varian*, the Tax Court considered, but rejected, the IRS's expertise as controlling:

> In reaching this conclusion, we have given "[c]areful attention to the judgment of the Executive Branch." . . . The Executive's views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." . . ."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."

This passage suggests that the Tax Court will make case-by-case determinations of what weight to give agency judgments.

Varian is a useful example for the tax adviser community because it illustrates how the Tax Court may apply *Loper Bright* in reviewing an IRS regulation and how it may apply general statutory and regulatory rules of construction to determine the best interpretation of a statute.

Courts May Consider Consistency

Agency interpretations that are issued close in time to a statute's enactment and involve consistent interpretations over time could be particularly useful for a court. Contextual information, such as historical and political circumstances from when a tax statute is issued, might inform an agency's interpretation and might become part of a court's statutory analysis. Consistent IRS interpretations of code provisions over time can sometimes be helpful indicators for courts and provide taxpayers with

positions they can rely on with confidence. In contrast, an ad hoc IRS interpretation tailored to a specific case should not be expected to carry a penumbra of reliability.

Prior *Chevron* Cases Often Still Good Law

Loper Bright did not automatically overturn prior cases decided under *Chevron* deference, which are still considered precedents under the judicial doctrine of *stare decisis*. Some cases decided under *Chevron* deference, such as when a statute is no longer in effect, might have no future impact. For other cases, such as those dealing with the IRS's determination that stock options should be included in cost sharing, *Loper Bright* significantly increases the agency's risk of litigation. Taxpayers will argue that cases decided under *Chevron* deference should be overturned and that courts should establish new precedents based on the best interpretation of a statute.

A. Recent Tax Court Rulings Under *Loper Bright*

In *YA Global*,[5] the Tax Court addressed two questions about the effects of *Loper Bright*. First, it considered how to determine whether *Chevron* deference was implicit in a prior opinion. Second, it rejected an IRS argument that *Chevron* deference is necessarily irrelevant if the taxpayer did not raise a regulation validity argument in the previous proceedings.

The Tax Court issued an opinion in *YA Global* in 2023, deciding some but not all issues in the case. Shortly after *Loper Bright*, but before the Tax Court decided the remaining issues in *YA Global*, the taxpayer promptly filed a motion for reconsideration of the 2023 decision, arguing that *Loper Bright* changed the result.

In its recent opinion denying the taxpayer's motion for reconsideration, the Tax Court recognized that *Chevron* could be implicitly controlling law and said: “That our prior Opinion did not cite *Chevron* does not mean that *Chevron* was not *implicit* controlling law” (emphasis in original).[6] This raises the question of when *Chevron* deference is implicit in a court's decision. The court in *YA Global* answered that question by saying:

> But *Chevron* would have been implicit controlling law only if, in reaching the conclusion in question, we relied on a construction of a relevant Code provision adopted by the Treasury Department that, while permissible, was not the interpretation we would have adopted in the absence of the agency's interpretation.

In other words, the court suggests that *Chevron* is implicitly controlling law that should be challenged when the previous decision involved a permissible agency interpretation that is not the best interpretation of the statute.

In a footnote, the Tax Court rejected without explanation the IRS's argument that *Chevron* deference (and presumably *Loper Bright*) is necessarily irrelevant because the taxpayer did not challenge the validity of regulations.[7] Rejection of this argument makes sense. In a pre-*Loper Bright* scenario, all parties and a court might have accepted that a

permissible (but not the best) agency interpretation should not be challenged under *Chevron* deference. After *Loper Bright*, parties and courts will no longer tolerate that outcome. As of this writing, the period for *YA Global* to file an appeal has not expired. Whether the taxpayer will file an appeal and, if so, whether *Loper Bright* will be a part of it will be determined in the future.

On November 5, 2024, the Tax Court issued an order in *Schwarz*[8] with an important difference from *YA Global*. In *Schwarz*, like *YA Global*, the Tax Court had issued an opinion before *Loper Bright*; and before a final decision was entered, the taxpayer filed a motion for reconsideration. In contrast to *YA Global*, however, in its original May 2024 opinion, the court relied on an IRS regulation. The recent *Schwarz* order recognized this reliance on the regulation and requested that the parties address enumerated *Loper Bright*-related issues through further briefing so it can reconsider its original opinion. The *Schwarz* case will be interesting to watch.

B. Substantial Variance Doctrine

Another issue federal district courts will face is how to apply the substantial variance doctrine in the context of claims for refunds filed before the issuance of *Loper Bright*. While there are exceptions, generally substantial variance is a doctrine that can prohibit arguments in a tax refund suit that vary substantially from the claim for refund filed with the IRS. The primary reason for the application of the variance doctrine is to prevent the government from being caught off guard in litigation.

In *Haliburton*,[9] the government seeks to dismiss[10] two counts in a refund suit. The refund claim was filed in 2018, years before the *Loper Bright* opinion was issued. *Haliburton* argues that a section 162 regulation is not valid, citing *Loper Bright*. The government argues that the substantial variance doctrine should be applied.

Because courts are now tasked with determining the best agency interpretation, it seems contrary to the principles of *Loper Bright* that a court could hand the IRS a win in a refund suit based on the variance doctrine without conducting a best-interpretation analysis. *Loper Bright* is clear that courts are to find the best meaning of a statute. At the very least, the application of the substantial variance doctrine in this context smacks of a “gotcha” type technicality for the government that runs against public policy.

Agencies like the IRS had an easier burden under *Chevron* deference, but those days are over. The same fate may be coming for the government's use of the variance doctrine in cases in which an IRS interpretation is at issue. It seems that the IRS and the Justice Department's Tax Division, which is charged with defending most refund suits, can expect continued growth in regulation validity challenges. The government raising the variance doctrine in cases like *Haliburton* could lead to a significant limitation of the variance doctrine, and we look forward to seeing how the courts will approach and decide the issue.

When Close Scrutiny Is Unlikely

When a statute clearly directs an agency to fill in the details with regulations, scrutiny by a court is unlikely if the regulations fall within that grant of authority. A clear delegation of authority to promulgate regulations is not the same as a statute that directs or limits an agency's actions. For instance, section 482 describes broad authority for the IRS to make adjustments in connection with certain commonly controlled organizations, trades or businesses, but section 482 has no clear expression of a delegation of authority to promulgate regulations. Similarly, section 7803(e) establishes the IRS Independent Office of Appeals, among other things, but nowhere delegates to Treasury the ability to carve out issues for consideration at Appeals, such as whether a statute is unconstitutional, or a regulation, notice, or revenue procedure is invalid.[11]

I expect the IRS will lean heavily on section 7805(a), which provides in part that “the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.” In this post-*Loper Bright* environment, it's likely that the IRS's proposed interpretation of this statute having conferred authority to promulgate regulations for any tax statute will be the subject of many disputes in court.

Conclusion

As the tax adviser community absorbs the effect of *Loper Bright*'s death blow to *Chevron* deference, attention is now shifting to the analysis of how courts are determining the best interpretation of a statute, and recent cases indicate the rules of statutory construction will take center stage. So far, cases involving arguments based on *Loper Bright* fall into three categories: (1) current and future cases yet to be decided, (2) cases, like *YA Global* and *Schwarz*, decided but still pending before the trial court (for example, awaiting computations for final decision), and (3) cases involving arguments to overrule prior precedent that explicitly or implicitly relied on *Chevron*. While we have a few glimmers of the Tax Court's approach in cases decided in the last few months, it feels like just the beginning of what will likely be years of tax litigation addressing the “best interpretation test” of *Loper Bright*.

FOOTNOTES

[1] *Loper Bright Enterprises Inc. v. Raimondo*, 144 S. Ct. 2244 (2024), *overruling Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[2] *Loper Bright*, 144 S. Ct. 2244.

[3] *Varian Medical Systems v. Commissioner*, 163 T.C. No. 4 (2024). Twelve Tax Court judges agreed with Judge Emin Toro's opinion with no dissent.

[4] Petitioner's Motion for Partial Summary Judgment, *Varian*, No. 8435-23 (T.C. Sept. 27, 2023); and Brief in Support of Respondent's Cross-Motion for Partial Summary Judgment and Response to Petitioner's Motion for

Partial Summary Judgment, *Varian*, No. 8435-23 (T.C. Dec. 4, 2023). Supplemental briefs: Respondent's Response to Court Order, *Varian*, No. 8435-23 (T.C. July 29, 2024); and Petitioner's Supplemental Brief in Support of Petitioner's Motion for Partial Summary Judgment and in Opposition to Respondent's Cross-Motion for Partial Summary Judgment, *Varian*, No. 8435-23(July 29, 2024).

[5] Order Denying Motion for Reconsideration, *YA Global v. Commissioner*, Nos. 14546-15 and 28751-15 (T.C. Aug. 27, 2024).

[6] *Id.*

[7] *Id.* at n.3.

[8] Order, *Schwarz v. Commissioner*, No. 12347-20 (T.C. Nov. 5, 2024).

[9] Complaint, *Haliburton Co. v. United States*, No. 4:24-cv-02149 (S.D. Texas June 6, 2024).

[10] United States' amended motion to dismiss, *Haliburton*, No. 4:24-cv-02149 (S.D. Texas Nov. 21, 2024).

[11] *See* prop. reg. section 301.7803(2)(c)(18)-(20).
