Who Trumps Whom: When Can Taxpayers Ignore IRS Guidance?

ABA Joint Tax/RPTE Fall Conference
September 13, 2007

Panel Discussion

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I. Overview of Agency Deference

Agencies promulgate a plethora of guidance each year in the form of regulations, rulings, procedures, notices, chief counsel and field service advice, manual provisions, and more. The validity of these pronouncements has been a constant source of friction between taxpayers and the IRS. In 1984 in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* the Supreme Court announced a two-step approach to determine the validity of an administrative regulation. Step one asks if the statute is clear and unambiguous. If so, that is the end of the matter and the regulation must give effect to Congress's unambiguously expressed intent. However, if the statute is silent or ambiguous, step two holds the regulation binding if it is based on a permissible construction of the statute.[1]

In 2001 the Supreme Court clarified the limits of *Chevron* deference in *United States v. Mead* and explained that when Congress's delegation of authority is *implicit* rather than *explicit*, the agency's regulation must be *reasonable*.[2] Thus it seems to have provided a different standard of *Chevron* deference for interpretive regulations, giving them a harder look than legislative regulations. Where an administrative pronouncement is not entitled to *Chevron* deference, such as the tariff ruling issued by the U.S. Customs Service in *Mead*, the Court looked to factors such as those enumerated in *Skidmore v. Swift & Co*., including the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and other factors which give it the power to persuade, if lacking the power to control.[3]

Courts and scholars continue to disagree on whether and how these deference standards apply to interpretive tax regulations promulgated under the general authority of IRC Sec. 7805(a). Some courts apply *Chevron*. But other courts apply factors enunciated in *National Muffler Dealers Association v. United States,* which are similar to the *Skidmore* factors.[4] This panel will explore the teachings of *Chevron*, *Mead*, *Skidmore*, *National Muffler*, and their progeny.

A. Legislative v. Interpretive Regulations

Tax regulations are generally categorized as either legislative or interpretive. A regulation is legislative if it is promulgated under a specific grant of authority contained in the statute itself, such as IRC Sec. 1502, which provides "The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return……" While it should be clear from

[1] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 840-844 (1984).
[2] United States v. Mead, 533 U.S. 218, 225 (2001).
[3] Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[4] National Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979).

the statute whether it is legislative or interpretive, it isn't always so. On the other hand, interpretive regulations are issued under Treasury's general rulemaking authority of IRC Sec. 7805, which provides 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 the internal revenue."

Once it is determined that *Chevron* deference is due, a legislative regulation is entitled to the highest amount of deference. As long as it is not arbitrary or capricious, or manifestly contrary to the underlying statute, the courts are required to sustain it.[5] Interpretive tax regulations that are entitled to *Chevron* deference must be *reasonable*. Other administrative pronouncements that are not entitled to *Chevron* deference are still entitled to respect, however. Courts give them weight according to a variety of factors such as those enumerated in *Skidmore* or *National Muffler*. These factors have produced a spectrum of judicial responses from great respect at one end to near indifference at the other.

B. Chevron's Two-Step

Chevron holds that "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."[6] That is, the plain meaning of the statute controls. For example, in *Gitlitz v. Commissioner* the Supreme Court found the statute unambiguous despite a deeply divided circuit below and thus never reached the issue of deference.[7] But if the statute is silent or ambiguous, Congress left a gap for the agency to fill and step two asks whether the agency's answer is based on a permissible construction of the statute.

In addition, the Court distinguished regulations issued under explicit and implicit delegations of authority. It held that "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." The Court also noted that "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." [emphasis added] On that basis the Court analyzed the EPA general authority regulation and concluded that it was reasonable and a "permissible construction of the statute."

Where *Chevron* deference is due, the agency's interpretation is given the force of law even if it is inconsistent with its own prior announcements or issued many years after the statute was enacted. In *Smiley v. Citibank*, the regulation was issued 100 years after

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[5] United States v. Mead, 533 U.S. 218 (2001).
[6] Chevron USA, Inc., 467 U.S. at 842-843.
[7] Gitlitz v. Comm'r, 531 U.S. 206 (2001) (The Third, Seventh and Eleventh Circuits held in favor of the taxpayer and the 6th did not. Note that Congress subsequently amended IRC § 108 to close the perceived loophole.)

the enactment of the underlying statute and the court said the validity is not undermined by the lapse in time.[8]

C. Mead and Skidmore Deference

The Supreme Court clarified the limits of *Chevron* deference in *United States v. Mead* and held that in order for *Chevron* deference to apply, two conditions must be satisfied: (1) Congress must have intended to confer authority on the agency to issue interpretations having force-of-law effect and (2) the particular interpretation must be issued in the type of format that Congress contemplated would be eligible for the *Chevron* standard.[9] It also elaborated on the distinction that *Chevron* made between regulations issued under express authority, which should be analyzed under an *arbitrary and capricious* standard from those issued under implicit delegations of authority, which should be analyzed for *reasonableness.*

Mead held that while "Congress [] may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap, [] it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is *reasonable*."

Finally, the Court concluded that while some agency interpretations are not entitled to *Chevron* deference, they are still due respect and should be analyzed according to their *persuasiveness* under *Skidmore v. Swift & Co.*[10] Under the *Skidmore* standard, the weight accorded to an administrative judgment "will depend 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."

D. National Cable v. Brand X

In 2005, the Supreme Court applied *Chevron* deference to a general authority regulation in *National Cable and Telecommunications Ass'n. v. Brand X Internet Services* and held that agencies acting under *Chevron* authority can overrule prior court interpretations of an ambiguous statute - "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the

[8] Smiley v. Citibank, 517 U.S. 735 (1996).
[9] United States v. Mead, 533 U.S. 218 (2001).
[10] Skidmore v. Swift & Co., 323 U.S. 134 (1944) (invalidated a Fair Labor Standards' Administrator's Bulletin defining waiting time of firefighters as not work subject to overtime pay based on its power to persuade.)

statute and thus leaves no room for agency discretion."[11] In other words, a *Chevron* regulation can trump a prior judicial holding, unless the court found the statute unambiguous, in which case Congress left no gap for the agency to fill. Otherwise, if the agency could simply write a new regulation for every case it loses in litigation, the agency would be the ultimate interpretive authority for all regulations.

However, the Sixth Circuit recently held in *Gerson v. Commisisoner* that *Brand X* does not apply where there are conflicting prior judicial holdings, even if one of them holds the statute clear and unambiguous. Thus, in the face of conflicting judicial interpretations, the Sixth Circuit upheld an interpretive regulation that was contrary to an Eight Circuit decision, despite the Eight Circuit's holding that the statute unambiguous.[12] *Gerson* explained that *Brand X* stands for the proposition that agencies can change policies and not that they are frozen out by prior judicial interpretations. Binding agencies to court rulings would "preclud[e] agencies from revising unwise judicial constructions of ambiguous statutes." Further, none of the prior holdings found that the statute was "so clear that it foreclosed regulation." However, the Sixth Circuit admitted that "The full significance of *Brand X* remains unclear."

E. National Muffler Deference

There is almost a seemingly separate line of Supreme Court cases addressing deference to interpretive tax regulations. The Supreme Court and other courts have generally deferred to interpretive tax regulations so long as they are "reasonable" under the *National Muffler* standard, which is very similar to the *Skidmore* persuasiveness standard. *National Muffler Association v. United States* holds that courts should defer to a regulation "if found to 'implement the congressional mandate in some reasonable manner,'" (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967).)[13]

In determining whether a regulation carries out the congressional mandate in a proper manner, *National Muffler* held that the courts should look to see whether it *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 regulations has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress had devoted to the regulation during subsequent re-enactments of the statute."[14] Congress is presumed to be aware of an administrative or judicial

[11] Nat'l Cable and Telecommunications Ass'n. v. Brand X Internet Services, 545 U.S. 967 (2005).
[12] Gerson v. Comm'r, 127 T.C. 139, *aff'd* 507 F.3d 435 (6th Cir. 2007), *cert denied* S. Ct. Dkt. No. 07-1064 (May 27, 2008) (Upholding the validity of Reg. § 26.2601-1(1)(i), which provides that an exercise, release or lapse of a power of appointment after Sept. 25, 1985 was "corpus added to the trust" in violation of the GST grandfather provision.)
[13] National Muffler Association v. United States, 440 U.S. 472 (1979) (whether Reg. § 1.501(c)(6)-1 defining a "business league" and so limiting it to only "industry wide" associations was valid to deny exemption under 501(c)(6) to a trade organization that limited its members to Midas dealers.)
[14] National Muffler, 440 U.S. at 477.

interpretation of a statute and adopts it with the force of law when it amends or substantially reenacts a statute without substantial change.

Most recently in *Boeing Co. v. United States* the Supreme Court confirmed that interpretive regulations issued under the general rulemaking authority of IRC Sec. 7805 are entitled to a weaker standard of deference than legislative regulations.[15] The Supreme Court relied on *Cottage Savings Association v. Commissioner*, which relied on *National Muffler*.[16] Thus the Court analyzed the regulation for it persuasiveness, looking specifically at its legislative history and the judicial reenactment doctrine. The *Boeing* Court also stated in dictum that the proposed regulations relied on by Boeing were of "little consequence given that they were nothing more than mere proposals."[17] The Court noted that even Treasury made it clear that "the proposed regulations were suggestions only and that whatever final regulations were ultimately adopted would govern."

F. Auer Deference

Where a regulation (rather than the statute) is found to be ambiguous, a court will generally give controlling deference to the agency's explanation under *Auer v. Robbins* as long as it is not plainly inconsistent with the regulation or erroneous.[18] The *Auer* Court used a two-step analysis similar to Chevron: first inquiring whether the regulation is ambiguous, and then inquiring whether the agency's proffered resolution of the ambiguity is abusive or clearly inappropriate.

The Supreme Court used an *Auer*-like analysis in resolving the ambiguity of an interpretive tax regulation in *Commissioner v. Hubert*, decided a month after *Auer*. In *Hubert* the parties disagreed over whether paying $1.5 million of administrative expenses from the income of a marital or charitable bequest was a "material limitation" under Treas. Reg. § 20.2056(b)-4(a) that would reduce the marital or charitable deduction.[19] Although the Court would normally have deferred to the Commissioner's definition of "material limitation," it was effectively preempted from doing so because the Commissioner adhered to the proposition that *any* diversion of postmortem income was material and never presented any evidence or argued that $1.5 million was quantitatively material. Had the Commissioner advanced a reasonable argument, she probably would have prevailed.

Since *Chevron*, *Mead*, and their progeny were decided, courts and commentators have expressed widely different views on their teachings, which this panel will explore.

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[15] Boeing Co. v. United States, 537 U.S. 437, 448 (2003).
[16] Id. at 448; Cottage Savings Assoc. v. Comm'r, 449 U.S. 554, 560-561 (2001); National Muffler v. Comm'r, 440 U.S. 442 (1979).
[17] Boeing Co. v. United States, 537 U.S. 437, 453 n. 13 (2003).
[18] Auer v. Robbins, 519 U.S. 452 (Feb, 19, 1997).
[19] Comm'r. v. Hubert, 520 U.S. 93 (Mar. 18,1997).

II. Discussion Points

Ambiguity

Q: *Chevron*'s step one asks whether the statute is sufficiently ambiguous to give the agency discretion to fill the gap. What determines whether a statute is sufficiently ambiguous? Do two conflicting, but both plausible, interpretations imply that the statute is ambiguous? Or do conflicting interpretations always imply some ambiguity? (*Brand X*, *Knight, Gerson,* and *Gitlitz*)

Q: Should the standard of deference differ depending on whether the statute is intentionally or unintentionally ambiguous? Intentional ambiguity might arise by the statute's use of broad and imprecise terms such as "commonly" or "manner." (*Swallows Holding*) Or it might arise when a statute poses a hypothetical situation causing uncertainty. (*Knight*) On the other hand, unintentional ambiguity arises because of poor grammar or word choice, such as the use of double negatives, passive voice, or unclear antecedents. (*Knight*) Does it make a difference how the ambiguity arises in determining how much deference to afford the agency?

Q: In determining the ambiguity of a statute, must a court expressly declare it ambiguous or not? Or will words to the same effect suffice, such as the "direct import of the text is…", "the statute requires…", "the proper reading is...", or "the statute makes clear"? (*Knight, Gitlitz*)

Legislative v. Interpretive Regulations

Q: Does *Chevron* apply an arbitrary and capricious standard of deference to all tax regulations that are issued with public notice and comment, including those promulgated under the general authority of IRC § 7805(a), or only to those issued pursuant to a specific grant of authority (legislative regulations)? (*Chevron*, *Mead*, *Boeing*)

Q: *Mead* holds that a different level of deference should apply to regulations issued under an explicit delegation of authority than to those issued under an implicit delegation of authority. Are regulations issued pursuant to the general grant of authority in IRC § 7805(a) issued under an *explicit* or rather an *implicit* grant of authority?

Q: Did the *National Muffler* standard of deference for tax regulations survive *Chevron* and *Mead*?

Q: Why have the courts routinely applied the *National Muffler* standard of deference to interpretive tax regulations rather than the *Chevron or Mead* standards?

Q: Is there any substantive difference between *National Muffler* and *Skidmore* deference?

Judicial Reenactment Doctrine

Q: The Supreme Court in *National Muffler* included judicial reenactment as one of several factors that should be considered to determine whether a regulation is reasonable. The Tax Court used it to invalidate the regulation in *Swallows Holding*. If Congress reenacts a Code section after published guidance has been issued, what impact does the reenactment have on the validity of the guidance or the IRS' ability to change course?

Ambiguous Regulations

Q: How much deference should the courts afford ambiguous regulations? Should the agency be allowed to clarify its own meaning despite the obvious advantage of 20-20 hindsight and the ability to clarify the regulation to achieve the desired result? Or should ambiguity be construed against the drafter (*contra proferentem*)? (*Auer*, *Hubert*)

Proposed Regulations

Q: How much deference, if any, should the courts afford proposed regulations? (*Boeing*)

Temporary Regulations

Q: How much deference, if any, should the courts afford Temporary Regulations?

Rulings, Procedures, Notices, etc.

Q: What level of deference or respect, if any, should be given to rulings, procedures, notices, manual provisions, general counsel memoranda, field service advice, and other pronouncements not issued with public notice and comment? (*Mead, Roski, Kornman, Lunsford, Speltz)*

No Regulations

Q: Should the agency's litigating position be given any deference where the agency has not issued regulations under the statute? Or should the court simply impose its own interpretation of the statute? (*Knight*)

Lack of Uniform Judicial Views on Agency

Q: Should the Tax Court adopt a uniform view on the standard of deference that applies to tax regulations promulgated under IRC § 7805(a)?

Q: How do the views on agency deference vary among the U.S. Circuit Courts of Appeal and is there a clear trend?

Q: Has the Supreme Court clearly announced its position on the standard of deference that applies to interpretive tax regulations promulgated under the general authority of IRC § 7805(a)? (*Mead, Boeing*)

Different Standard for Tax Regulations Than for Other Regulations?

Q: Do or should courts apply a different standard of deference to tax regulations than to other regulations? If so, is it because of the extraordinary complexity of the Internal Revenue Code, the IRS's revenue-raising obligation, their penalty powers, the inherent adversarial relationship between the IRS and the taxpayer, or some other factors? (*Boeing, Swallows*)

Prior Court Decisions

Q: In *National Cable and Telecommunications Ass'n. v. Brand X Internet Services* the Supreme Court held that agencies may not overrule prior court decisions that were decided based on a clear and unambiguous statute. Does this also apply in the face of conflicting prior court decisions, where at least one court found the statute to be clear and unambiguous? (*Gerson*)

Q: Does *Brand X* also allow an agency to overrule a Supreme Court interpretation of an ambiguous statute?

Trends

Q: Is there a clear trend in the standard of deference that should be applied to interpretive tax regulations?

Q: Absent an egregious violation of Congressional intent that flies in the face of the statute, should taxpayers give up challenging interpretive tax regulations?

Procedural Issues

Q: When regulations bear on an issue in dispute, what initial steps should the taxpayer's representative take in handling a tax controversy matter?

Q: Does it matter whether the challenge to the regulation is made at the Appeals level or in litigation?

Q: What evidential issues arise when challenging a regulation in litigation?

Q: What procedural issues arise when challenging a regulation in litigation?

Q: How does challenging a regulation affect the settlement negotiations during litigation?

Q: Does challenging a regulation affect the possible imposition of preparer penalties under IRC § 6694?

III. Table of Authorities

Auer v. Robbins, 519 U.S. 452 (1997) – The Supreme Court held that an agency's interpretation of an ambiguous regulation is entitled to controlling deference as long as it is not plainly inconsistent with the regulation or plainly erroneous. The Court used a two-step analysis similar to *Chevron*: first inquiring whether the regulation is ambiguous, and then inquiring whether the agency's proffered resolution of the ambiguity is abusive or clearly inappropriate.

Boeing Co. v. United States, 537 U.S. 437 (2003) – The Supreme Court validated Treas. Reg. § 1.861-8(e)(3), which allocates research and development costs between foreign and domestic sales under the DISC and FSC rules in a manner that increased Boeing's taxable profits from export sales. The Court held that "Even if we regard the challenged regulation as interpretive because it was promulgated under IRC § 7805(a)'s general rulemaking grant rather than pursuant to a specific grant of authority, we must still treat the regulation with deference. See Cottage Sav. Ass'n v. Commissioner, 499 U.S. 554." Without mentioning *Chevron*, the Court proceeded to analyze the regulation for its persuasiveness on the basis of legislative history and the judicial reenactment doctrine, which are *National Muffler* factors.

Central Laborer's Pension v. Heinz, 541 U.S. 739 (2004) – The Supreme Court held that an interpretive tax regulation under ERISA, Treas. Reg. § 1.411(d)-4, which distinguished permissible from impermissible benefit cut-backs, had the force of law, despite that the IRS had taken inconsistent positions on the issue. The Court did not cite *Chevron*.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) – The Supreme Court upheld an Environmental Protection Agency general authority regulation implementing permit requirements pursuant to the Clean Air Act as a reasonable interpretation of the term "stationary source." The fact that the EPA has from time to time changed its interpretation of "source" does not mean that no deference should be accorded it. An agency must consider varying interpretations and the wisdom of its policy on a continuing basis to engage in informed rulemaking. The EPA's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference "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."

Commissioner v. Hubert, 520 U.S. 93 (1997) – The Supreme Court upheld the estate's position that it was not required to reduce its marital or charitable deduction for administrative expenses paid from income because the discretion to pay the expenses was not a "material limitation" on the surviving spouse's right to income under Treas. Reg. § 20.2056(b)–4(a). The regulation was ambiguous as to the meaning of "material limitation" and the government's position was meritless.

Cottage Savings Association v. Commissioner, 449 U.S. 554 (2001) – The Supreme Court upheld Treas. Reg. §1.1001-1 as a reasonable interpretation of "disposition of property" for gain or loss purposes under IRC §1001(a). Followed the *National Muffler* standard of deference for an interpretive regulation, giving weight to its consistency with landmark precedents, its continuation without substantial change, and because it applies to a substantially reenacted statute. "Since these cases were part of the contemporary legal context in which the substance of IRC §1001(a) was originally enacted, and since Congress has left their principles undisturbed through subsequent reenactments, it can be presumed that Congress intended to codify these principles in IRC §1001(a)."

Gerson v. Commissioner, 507 F.3d 435 (6th Cir. 2007) – The Sixth Circuit upheld the validity of Treas. Reg. § 26.2601-1(1)(i), which provides that an exercise, release or lapse of a power of appointment after Sept. 25, 1985 was "corpus added to the trust" in violation of the GST grandfather provision despite a prior judicial holding to the contrary. Held that the court was not constrained by *Brand X*'s prohibition on regulations trumping a prior court holding based on an unambiguous reading of the statute when there are conflicting prior judicial holdings.

Gitlitz v. Commissioner, 531 U.S. 206 (2001) – The Supreme Court overturned the Tenth Circuit and found that IRC § 108 "makes clear" that discharge of indebtedness was an item of income that increases an S corporation shareholder's basis in his stock, despite conflicting interpretations by the Third, Seventh and Eleventh Circuits. There were no regulations addressing the issue for the year in dispute. Although the IRS issued proposed regulations after the case was appealed to the Tenth Circuit, the Supreme Court omitted any reference to them, finding the statute clear on its face.

Knight v. Commissioner, 128 S. Ct. 782 (2008) – The Supreme Court supplied its own definition of costs that "would not have been incurred if the property were not held in such trust or estate" under IRC § 67(e)(1) where there were no regulations and the circuits were split on the issue. The Court did not expressly declare the statute ambiguous or unambiguous. Rather, it used terms such as "the direct import of the text is…", "the statute requires…", and "the proper reading is..." to interpret the statute as meaning costs that individuals do not "commonly incur."

Kornman & Assoc., Inc. v. United States, 527 F.3d 443 (2008) – The Fifth Circuit affirmed the government's disallowance of losses in a "Son of BOSS" transaction where the parties disputed whether the obligation to close a short sale was a "liability" giving rise to basis under IRC § 752. Noting that there was no precise definition of "liability" in the statute, regulations, or legislative history, the Fifth Circuit looked to Rev. Rul. 95-26 and Rev. Rul. 95-45, which although not entitled to *Chevron* deference, were analyzed under *Skidmore* deference and found to be reasonable. The Court confirmed that revenue rulings are not entitled to *Chevron* deference because they lack notice-and-comment and because of the IRS's own divergent treatment of them. It also noted that taxpayers who disregard rulings are judged more leniently in penalty cases than those who disregard regulations.

Lunsford v. Comm'r, 117 T.C. 159 (2001) – The Tax Court declined to follow a Chief Counsel Advisory 200123060 granting a face-to-face conference to all requesting taxpayers because it states a goal, not a mandate. "Moreover, the usual view of this Court is that even revenue rulings, an official publication of respondent's (which the advisory is not), get no deference, since they are merely opinions of a lawyer in the agency. [] But see *United States v. Mead Corp*., 533 U.S. 218 (2001), for a discussion of the deference, less than *Chevron* deference, owed to certain agency interpretations of a statute."

National Cable and Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005) - 545 U.S. 967 (2005) – The Supreme Court applied *Chevron* deference to uphold an FCC regulation classifying broadband cable modem service as an "information service" rather than a "telecommunications service" and thus not subject to common carrier regulation. Also held that a court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.

National Muffler Dealers Association v. United States, 440 U.S. 472 (1979) – The Supreme Court upheld the validity of Treas. Reg. § 1.501(c)(6)-1, which defined a "business league" as an "industry wide" association and thus denied exemption under IRC § 501(c)(6) to a trade organization that limited its members to Midas dealers only. The term business league was "so general . . . as to render an interpretive regulation appropriate." In that case, the Court customarily defers to the regulation, which, "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld" (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967).) In determining whether a regulation carries out the congressional mandate in a proper manner, the court looks to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. It should consider whether it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent, the manner in which it evolved if it was issued later, 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 re-enactments of the statute.

Roski v. Commissioner, 128 T.C. 113 (2007) – The Tax Court invalidated an IRS manual provision requiring an estate to furnish a bond or special lien in every case when it receives an extension of time to pay the tax under IRC § 6166. Rather it was Congress's intent that the IRS determine on a case-by-case basis whether the government was at risk and use its discretion to determine whether a bond was required.

Skidmore v. Swift & Co. 323 U.S. 134 (1944) – The Supreme Court invalidated a Fair Labor Standards' Administrator's Bulletin defining "waiting time" of firefighters as not "work time" eligible for overtime. The Court held that while rulings, interpretations and opinions of the Administrator are not reached as a result of hearing adversary proceedings and are not controlling upon the courts by reason of their authority, they do

constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The deference afforded such a ruling will depend 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.

Smiley v. Citibank, 517 U.S. 735 (1996) – The Supreme Court upheld an agency interpretation even though it was issued one hundred years after the enactment of the underlying statute, the agency had been inconsistent and it was issued after litigation had already broken out about the meaning of the statute.

Speltz v. Comm'r, T.C. Summary Opinion 2006-25 – The Tax Court held in favor of a sole proprietor who paid medical benefits for her employee-husband, excluded them from his income, and deducted them from the income of the proprietorship. In setting up the medical plan, Mrs. Speltz had relied upon an Internal Revenue Service Coordinated Issue Paper entitled "Health Insurance Deductibility for Self-Employed Individuals" and Rev. Rul. 71-588, which permitted the tax treatment she claimed. The Court noted in dicta that "Internal Revenue Service Coordinated Issue Papers and Revenue Rulings are generally not entitled to deference in this Court," citing *Lunsford v. Commissioner*.

Swallows Holding, Ltd. v. Commissioner, 515 F.3d 162 (3rd Cir. 2008) – The Third Circuit reversed the Tax Court and upheld the validity of Treas. Reg. § 1.882-4(a)(3)(i), which imposed an 18 month time requirement for a foreign corporation to file its return in order to avail itself of deductions associated with rental income earned in the United States. The Third Circuit analyzed the interpretive tax regulation under *Chevron* rather than *National Muffler* deference, which the Tax Court had used to invalidate it.

United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) – The Supreme Court upheld a longstanding revenue ruling that resolved an ambiguity in Treas. Reg. § 31.3111-3 providing that back pay is subject to FICA rates applicable in the year wages are paid rather than earned. It was a 61-year-old regulation implementing a 62-year-old statute and implemented the congressional mandate in a reasonable manner under *National Muffler*. "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" under *Cottage Savings*.

United States v. Mead, 533 U.S. 218 (2001) – The Supreme Court held that *Skidmore* rather than *Chevron* deference should apply to a Customs Service letter ruling that classified Mead's imported "day planners" as subject to a tariff rather than being duty free. The ruling was issued without notice-and-comment and there was no indication that Congress intended it to carry the force of law. Congress can delegate authority either expressly or implicitly. When Congress expressly delegates authority to an agency to interpret a specific statutory provision by regulation, the regulation is binding unless procedurally defective, *arbitrary or capricious*, or manifestly contrary to the statute. But when Congress implicitly delegates authority to an agency under the agency's generally

conferred authority or other such circumstances indicating Congress would expect the agency to speak with the force of law, the regulation is binding if it is *reasonable*. In the absence of an express or implicit delegation of authority, it should be analyzed under *Skidmore*, and its weight "will depend 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."

United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982) – The Supreme Court invalidated as unreasonable Treas. Reg. § 1.1563-1(a)(3), which defined "brother-sister controlled group" of corporations because the term had already been defined with considerable specificity by Congress. As such, the Commissioner's authority is more circumscribed than if Congress had used a term " 'so general . . . as to render an interpretive regulation appropriate.'" under *National Muffler*. Deference is afforded an agency construction if it "[implements] the congressional mandate in some reasonable manner." (quoting *Correll*) But this general principle only sets "the framework for judicial analysis; it does not displace it." The framework is refined by considering the source of the authority to promulgate the regulation. Here the regulation was promulgated under the general authority of IRC § 7805(a) and thus "we owe the interpretation 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."

Walton v. Commissioner, 115 T.C. 589 (2000) – The Tax Court held that Treas. Reg. § 25.2702-3(e), Example 5, was an unreasonable interpretation of IRC § 2702 because it valued the taxpayer's retained interest in a 2-year GRAT as an annuity for the *shorter* of the term certain or the period ending at her death, rather than for the 2-year term certain. The Court analyzed the interpretive tax regulation under *Chevron*, *National Muffler*, and *Vogel Fertilizer* and found that it did not harmonize with the statute's origin and purpose, which was to prevent the undervaluation of gifts in trust by valuing a retained interest at zero unless it is an annuity for a term of years. In Notice 2003-72, the IRS announced that it will follow *Walton.*