only gotten worse as a result of subsequent decisions.

Two of the problems with *Chevron* are the unpredictability of its application and the ease with which it can be manipulated by judges to accommodate results-oriented decision-making. *Home Concrete* exacerbates these problems.

There are two competing models as to the proper roles of courts and agencies. The "independent judgment" model puts courts at the center of statutory interpretation. *E.g., Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The Court rejected that approach in *Chevron*, following instead a model in which courts defer substantially, though not entirely, to agencies. *Brand X* followed the logic of that deferential model to a perhaps uncomfortable extreme.

Chevron became worse when, in *Mead* and other subsequent cases, the Court held that *Chevron* applies only sometimes in agency cases and when it rejected possible bright lines for when *Chevron* does and does not apply. *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

Home Concrete does to *Brand X* what *Mead* did to *Chevron*. The Court could have chosen a bright line, such as that *Brand X* authorizes agencies to overturn only decisions of the lower courts, not those of the Supreme Court. But (unsurprisingly given the fact that Justice Breyer wrote the opinion) the *Home Concrete* plurality eschewed this and all other bright lines.

Instead, if the plurality's approach holds in future cases, *Brand X* will require at least two separate inquiries: (1) whether the statute is ambiguous and (2) if it is, whether Congress intended to delegate to Treasury and the Service the power to fill the gap. *See* 132 S. Ct. at 1843–44. This makes decision-making less predictable and more readily manipulable.

Justice Scalia accused the *Home Concrete* plurality of "revising ***yet again*** the meaning of *Chevron*— and revising it ***yet again*** in a direction that will create confusion and uncertainty," thus making the Court's "judicial-review jurisprudence curiouser and curiouser." *Id.* at 1847 (emphasis in original), 1848. Sadly, that may be the most enduring legacy of *Home Concrete*. ■

Implications of *Home Concrete*

By William J. Wilkins*

I would like to make some personal comments on the Supreme Court's decision in *Home Concrete* and its implications for the guidance process. Supreme Court tax cases are always interesting and significant. We have now had our second Supreme Court decision in two years wrestling with the validity of tax regulations—the first being last year's *Mayo* decision.

Just as a refresher, *Mayo* upheld an IRS regulation by a 9–0 vote, and established that the two-step process described in a case called *Chevron* applies in testing validity of tax regulations—namely, if under Step 1 the statutory language is unclear and leaves gaps to be filled, then under Step 2 a court will defer to IRS interpretation expressed in a properly promulgated regulation, if the regulation represents one of the available reasonable interpretations. *Home Concrete* also involved the validity of a regulation, but in *Home Concrete* the government lost, by a 5–4 decision, and the regulation has been invalidated.

These cases mostly involved Son-of-Boss and other loss generator tax shelters that the IRS found and assessed between the end of the third year and the sixth year after the relevant returns were filed. These shelters attempted to create a high-basis, low-value asset that could be sold at a capital loss, which could either offset the taxpayer's real capital gain on a separate transaction, often the sale of a founder's stock in a successful business, or migrate the inflated basis to the gain asset before it was sold. The IRS argued that it should be able to use the extended six-year statute of limitations that applies when a taxpayer omits 25% of his gross income—in part because the Code's definition of gross income means proceeds minus basis in the case of an asset sale. The taxpayers argued that they should not be subject to the six-year statute because their basis inflation did not amount to "omitting" anything, and they pointed to a 1958 Supreme Court case named *Colony* for support.

The relevant statutory and regulatory background involves four key dates: 1939, when the 1939 Code was enacted with a 25% omission rule; 1954, when the 1954 Code was enacted with a similar 25% omission rule, but with several significant changes enacted against the background of similar litigation over whether misstated cost of inventory could invoke the extended statute; 1958, when the *Colony* court held that the 1939 statute should not be read to provide an extended statute in that case, which involved cost of inventory sold; and 2010, when the IRS finalized notice and comment regulations asserting its interpretation of the 1954 Code, under which inflated basis of non-inventory

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assets should make the extended statute available.

You will notice from this description that there are several factors which made this dispute a rather hot one. From the government side, certain consumers of a particularly obnoxious shelter were seeking to avoid the consequences that befell other shelter buyers, on the basis that the IRS did not find them in time. And remember from the Senate investigation and other materials that some of these transactions included strategies to make the tax return presentation look like there had been a sale of a single asset at close to break-even, instead of a large gain offset by a large loss. From the side of the taxpayers and their representatives, it appeared that the IRS was taking a position at odds with a Supreme Court decision construing 1939 Code language that was basically identical to the relevant 1954 Code language; was adopting regulations in mid-litigation to bootstrap its position after some significant court losses; and was adopting regulations that, to their eyes, re-opened a closed statute. I mention all of that in part so you can understand why a lot of people were pretty burned up about these cases. But I mainly mention it for the sake of pointing out that, despite being discussed in the oral arguments and the briefs, none of that sexy background stuff appeared to have any role in the decision that we actually got from the Supreme Court.

So, what was the decision? Well, it was a 5–4 loss for the government. The consequences in the cases where this issue had been pending will be that, unless the government has an alternative statute of limitations argument, the taxpayers will win and get the benefit of Son-of-Boss losses. Those are serious consequences, but that's not why I'm here talking about the case. What all of us are interested in is, what is the meaning of this decision for future tax administration, future IRS guidance, and future litigation challenging the validity of guidance?

To figure that out, we have to go beyond who won and who lost and look at the opinions. In this particular case, there were three opinions, and all of them are relevant in figuring out what happens next.

While it may seem like it's going backwards, I'd like to start with the dissent, because it sets the stage for the rest of the description. Justice Kennedy wrote the dissent, and Justices Ginsburg, Sotomayor, and Kagan joined. The dissent adopted most of what the government argued. It pointed out that Congress enacted the 1954 Code several years before *Colony*, and that the changes Congress made to surrounding provisions established a strong argument that Congress assumed that the extended statute did apply to overstatements of basis in non-inventory assets. The dissent argued that these surrounding changes made the 1954 Code version sufficiently different from the 1939 Code version that the IRS was within its interpretive powers to adopt the regulation in question.

The majority opinion disagreed with this interpretation of the 1954 Code. It focused on the fact that the words construed in *Colony* were practically identical to the operative provision in the 1954 Code version. In the parts of the opinion that dealt with statutory interpretation, regulations aside, the majority just disagreed with the dissent as to the significance of the 1954 Code changes. While the dissent said that the changes were meaningful and strongly favored the government's interpretation, the majority said that arguments based on the 1954 changes were too fragile to bear the weight that the government sought to place on them.

So, if we had just been dealing with statutory interpretation, we could have just stopped there. But there was the 2010 regulation to deal with, and that is the interesting part.

As background, there was a 2005 Supreme Court case named *Brand X* that validated another agency's regulations and raised the issue of whether an agency could regulate a statutory interpretation that differed from prior court decisions. The Court said, yes it could, unless the prior court decision was based on the premise that the statute was so clear that no other interpretation was permissible. This highlighted the tension between *Chevron* principles and the rule of *stare decisis*. The *Brand X* majority said, it must be the case that the agency interpretation controls regardless of timing; otherwise, the outcome would depend on whether a court spoke first or the agency spoke first. Justice Scalia wrote a sharply worded dissent, arguing that the majority opinion makes judicial decisions subject to reversal by executive officers.

Home Concrete presented this *stare decisis* issue in a very interesting context, if you take the majority view that *Colony* should be read as an interpretation of the relevant provision of the 1954 Code. First, is there anything special about the prior court decision being a Supreme Court decision? And second, if the prior decision was a pre-*Brand X* decision, and even more so if it was a pre-*Chevron* decision, how do you know if the statutory interpretation was because the statute was unambiguous—which later opinions might address because of the *Chevron* significance but earlier opinions would not?

Here, we need to look at how the majority got the necessary five votes. For Justice Scalia, the statutory interpretation was enough by itself, because his concurrence took the position that the Court should overrule *Brand X*. The portion of the opinion dealing with the regulation that Justice Scalia was willing to join has one operative sentence, which reads as follows: "In our view, *Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency."

For the other four Justices in the majority, who did not accept Justice

Scalia's invitation to overrule *Brand X*, the next logical step was to look at the wording of the *Colony* opinion and the context in which it was decided. The four-Justice plurality part of the opinion, written by Justice Breyer, expressly embraces the statement of *Brand X* that a prior judicial construction does not trump a different agency construction, unless the prior judicial construction reflects an unambiguous statute. However, the plurality opinion goes on to find that the *Colony* opinion was intended to be a definitive statutory interpretation. In so doing, it points to the fact that the Court knew the IRS was arguing the opposite interpretation; and to words in *Colony* indicating that the taxpayer had the better argument, based both on the text of the statute and on the *Colony* Court's review of the legislative history. It is interesting that the plurality opinion analyzes not only the statutory language but also the *Colony* opinion's use of legislative history and other contextual factors to decide that the *Colony* Court intended its interpretation to be definitive. It's unclear whether the plurality opinion is analyzing *Colony* in its Step 1 analysis of the clarity of the statute, or as part of its Step 2 analysis of whether the agency interpretation is reasonable. It looks to me more like a Step 1 analysis, since the *Chevron* language cited to support the analysis was to the effect that if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention must be given effect.

So on the questions I raised earlier, I think we should read *Home Concrete* to say that, yes, it is something special when the Supreme Court has interpreted a statute first. As was pointed out in the oral arguments, most of the time a case gets to the Supreme Court, there is some ambiguity, particularly when there has been a Circuit split. I sense that the Court is reluctant to say that any ambiguity remains after the highest Court in the land interprets the statute. The plurality opinion tries to nuance this point a bit by talking about there being no statutory gaps that Congress wants the agency to fill, but remember that sentence I just read: "In our view, *Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency."

That sentence is the part of the opinion with the five votes, and it definitely has the tone of "we have spoken; resistance is futile." So, although maybe some exceptions exist, I think we will find that pretty much all pre-*Chevron* Supreme Court decisions should be read as final determinations that cannot be changed through regulations. For post-*Chevron* cases, we will have to look for whether the word "ambiguous" is used, because, as Justice Scalia points out, everyone now knows that is the magic word that signals that there is room to adopt a different statutory interpretation through regulations.

We are not sure what the views of the four dissenters are on this point, since they did not see *Colony* as a controlling case. The dissent in fact explicitly reserves on the issue of whether a Supreme Court case is special under *Brand X* principles.

It's a little less clear what we should now do in assessing the *Chevron* Step 1 meaning of pre-*Chevron* lower court decisions. We will certainly need to parse them for indications of whether they are based on a view that the statute speaks for itself. However, I doubt that the rather soft approach that the plurality opinion used to analyze *Colony* is the right one to take for lower courts. First of all, it's only a plurality opinion. And second, a circuit court decision just cannot remove ambiguity in the way that a Supreme Court decision does. I don't think you can say with a straight face that, if there had never been a Supreme Court decision like *Colony*, the taxpayer-favorable interpretation was obviously the only possible interpretation. The fact that the Supreme Court had spoken made clear something that was previously unclear.

I have also been thinking about what impact the *Home Concrete* decision should have on our regulatory process. We do, of course, assess validity questions in the guidance process. Since the *Mayo* decision, that analysis has been framed by *Mayo*, *Chevron*, and *Brand X*. I think that will continue to be the case. I certainly think it's noteworthy that none of the other Justices took the opportunity offered by Justice Scalia to overturn *Brand X*.

I do think that we will need to look especially carefully at Supreme Court precedents that construe statutory language that is similar to the language in play under the guidance. And I think we will need to be sensitive to the timing and status of cases in the pipeline.

We already knew that a regulation can be invalidated if a court bases its interpretation on the argument that the statute is clear on its face, whether the court decision comes before or after the regulation. What may be new is the possibility that at least the Supreme Court can make an ambiguous statute unambiguous for *Chevron* purposes—in which case it does make a difference whether a regulation comes before or after a Supreme Court decision.

In the end, I think the main considerations that should guide us are the reasons that the doctrine of judicial deference exists in the first place. The thesis of *Chevron* deference is based on agency competence and integrity. The leading decisions on judicial deference focus on the agency's knowledge of the subject matter, the agency's ability to consider secondary and tertiary effects on stakeholders and on the regulatory system writ large, and the agency's ability to consult at length with affected internal and external parties. We recognize that all of this implies the need to make choices based on wise public policy. ■