ALM | LAW.COM

New York Law Journal

TAX LITIGATION ISSUES

Tax Regulations One Year After 'Loper Bright'

By Jeremy H. Temkin
July 16, 2025

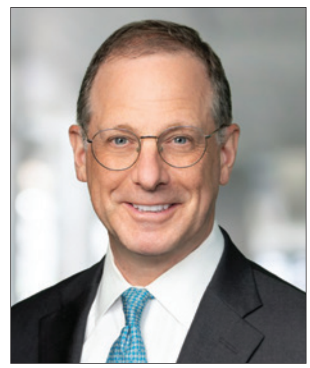
For 40 years, *Chevron, U.S.A., v. Natural Resources Defense Council, Inc. et al.*, 467 U.S. 837 (1984), required federal courts to defer to an administrative agency's reasonable interpretation of an ambiguous statutory provision, even if the court would have interpreted the statute differently.

Last year, in *Loper Bright Enterprises et al. v. Raimondo, et al.*, 603 U.S. 369 (2024), the Supreme Court overruled *Chevron* and empowered courts faced with statutory ambiguity to "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Loper Bright*, 603 U.S. at 400.

The *Loper Bright* majority articulated three limiting principles to be applied in reviewing administrative agency actions.

First, the court made clear that it was not overruling cases that relied on the *Chevron* framework, and that "[t]he holdings of those cases that specific agency actions are lawful … are still subject to statutory *stare decisis*." *Loper Bright*. 603 U.S. at 412.

Second, the court reaffirmed the approach established in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which treats agency interpretations as non-binding guidance that will be entitled to deference to the extent the reviewing court finds the agency's reasoning to be persuasive. *Loper Bright,* 603 U.S. at 402.


Jeremy Temkin

Third, the majority noted that "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Loper Bright*, 603 U.S. at 413.

As this column foreshadowed last summer, *Chevron*'s demise promised to open new avenues for practitioners to advocate on behalf of taxpayers. See Jeremy H. Temkin, "Supreme Court Round-Up on Tax Issues" (N.Y.L.J. July 17, 2024).

In the past year, at least a dozen cases have considered challenges to IRS actions based on *Loper Bright*. While each case necessarily turned on the specific regulatory action at issue, the analysis applied by the courts provides important guidance to lawyers challenging IRS actions in the post-*Loper Bright* world.

Application of 'Loper Bright' Limiting Principles

Cases upholding IRS regulations have relied on each of the limiting principles identified by the court in *Loper Bright*.

For example, in *Weston v. Commissioner*, T.C. Memo 2025-16 (Feb. 12, 2025), the taxpayers challenged a regulation that barred theft loss deductions so long as there was a reasonable prospect of recovery, as inconsistent with Section 165(e), which provides that "any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss."

In rejecting the taxpayer's argument, the Tax Court noted that it had previously upheld the regulation and "reiterate[d] that … Treasury Regulation §1.165-1(d)(3) is the best interpretation of section 165(e)." Weston, T.C. Memo 2025-16, at *14 (citing *Ramsay Scarlett & Co. v. Commissioner*, 61 T.C. 795, 810–11 (1974), *aff'd*, 521 F.2d 786 (4th Cir. 1975)).

The court further noted that *Loper Bright* did not "call into question prior cases…[and] [t]he holdings of those cases that specific agency actions are lawful…are still subject to statutory *stare decisis* despite [the Supreme Court's] change in interpretive methodology." *Weston*, T.C. Memo 2025-16, at *14 n.6 (quoting *Loper Bright*, 144 S. Ct. at 2273).

In *Lissack v. Commissioner*, 125 F.4th 245 (5th Cir. 2025), the court relied on *Skidmore* deference to reject a challenge to the denial of a whistleblower claim. The plaintiff in *Lissack* had provided information that a condominium development group was evading taxes through its treatment of golf membership deposits.

An IRS revenue agent investigated the claim and, while determining that the deposits had been properly treated, concluded that the development group had improperly deducted an intercompany bad debt.

The IRS decided that Lissack was not entitled to an award since the issue giving rise to the adjustment was insufficiently related to the information provided under the applicable regulation.

The Tax Court rejected Lissack's claim, and the United States Court of Appeals for the Fifth Circuit affirmed, concluding that the regulation was a reasonable interpretation of the statute under *Chevron*. *Lissack v. Commissioner*, 68 F.4th 1312, 1321-22 (5th Cir. 2023).

On reconsideration following *Loper Bright*, the Fifth Circuit "assess[ed] the persuasive value of [the IRS's] interpretation under *Skidmore* based on '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."

The court then concluded that the IRS's definition of "'related action' makes good sense of that statutory phrase in context" and was "persuaded by" the IRS's limitation of "related actions" to "'encompass[ ] a finite group of actions that, while likely unknown to the whistleblower, are objectively connected to the information provided." *Lissack*, 125 F.4th at 259-60.

An example of a court relying on legislative delegation occurred in *Express Scripts, Inc. v. United States*, Dkt. No. 162, Case No. 4:21-cv-737 (E.D. Mo. Mar. 18, 2025).

There, a pharmacy benefit management company sought a refund based on Section 199 of the code, which allowed corporations to deduct "Qualifying Receipts derived from 'any lease, rental, license, sale, exchange, or other disposition' of the taxpayer's qualifying production property," including any computer software.

In claiming an entitlement to the deduction, Express Scripts argued both that its software generated revenue from sales and that the IRS regulations that limited deductions under Section 199 to revenues from sales, as opposed to the provision of services, constituted an impermissible interpretation of the statute.

In granting the commissioner's motion for summary judgment, the court remarked that *Loper Bright* "did not affect an agency's ability to exercise rulemaking authority clearly conferred by statute" and that sometimes the legislative delegation of authority is "the best reading of the statute."

The court concluded that the distinction in the regulation was a sound interpretation of the statute and that, based on the evidence presented, "Express Scripts did not license or otherwise dispose of its software as set out in 26 U.S.C. §199 and the regulations promulgated thereunder." *Express Scripts*, Dkt. No. 162 at 42, 46.

Courts Rejecting IRS Regulations Under *Loper Bright*

Although most tax cases addressing *Loper Bright* challenges have upheld IRS regulations, several courts have rejected regulations as being at odds with the plain words of the governing statute.

In *Memorial Hermann Care Org. v. Commissioner*, 120 F.4th 215 (5th Cir. 2024), a nonprofit corporation sought a declaration that it was exempt from federal income taxes under 26 U.S.C. §501(c)(4), which applies to entities "not organized for profit but operated exclusively for the promotion of social welfare."

In rejecting the corporation's application, the IRS and later the Tax Court employed a "substantial nonexempt purpose test" derived from *Better Business Bureau of Washington, D.C. v. United States*, 326 U.S. 279 (1945), which governs cases under 26 U.S.C. §501(c)(3).

In addressing the plaintiff's argument that the Tax Court should have applied the "primary purpose" test set forth in 26 C.F.R. §1.501(c)(4)-1(a)(2)(i), the Court of Appeals noted that the statutory text was unambiguous, and that "[t]he *Better Business Bureau* decision shows that the word exclusively, at least as used in §501(c)(3), 'plainly means that the presence of a single non-[exempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes.'"

The court then cited *Loper Bright* for the proposition that "we no longer are required to provide '*Chevron* deference' to the Treasury's interpretation of §501(c)(4) (although we can certainly consider it)" and concluded that "the IRS's embrace of a legal standard cannot supplant our independent interpretation of the statutory text." *Memorial Hermann Care Org.*, 120 F.4th at 219-20.

Finally, in *FedEx Corp. v. United States*, No. 2:20-cv-2794 (W.D. Tenn. Feb. 13, 2025), and *Varian Medical Systems, Inc. v. Commissioner*, 163 T.C. 76 (Aug. 26, 2024), the courts invalidated different aspects of regulations implementing the Tax Cuts and Jobs Act provisions relating to the taxation of dividends that U.S. corporations receive from foreign subsidiaries.

In *FedEx*, the court originally agreed that the taxpayer was entitled to credits for foreign taxes paid on net profits that remained after losses suffered by some foreign subsidiaries were deducted from the gains generated by others.

In doing so, the court rejected the applicable regulation under *Chevron*, finding that the plain language of the code permitted the credits at issue.

The government then sought to reduce the credits due to the taxpayer by applying 26 C.F.R. §1.965-5(c)(1)(i), and the taxpayer moved to enforce the court's initial judgment, arguing that the Regulatory Haircut Rule, also contradicts the text of the code.

The government argued that, under *Loper Bright*, the court was required to respect Congress' delegation of authority to the Secretary of the Treasury, or at the very least to give great weight to the Treasury's subject-matter expertise.

The court rejected these arguments, finding that the Regulatory Haircut Rule contradicted the plain language of the statute, concluding that even under *Chevron*, an explicit delegation of regulatory authority does not permit an agency to promulgate a regulation that contradicts the governing statute.

Similarly, in *Varian*, the Tax Court rejected regulations addressing the interplay between two provisions of the TCJA: new Section 245A, which allows a domestic corporation a deduction for certain dividends received from foreign subsidiaries, and amended section 78, which precludes taxpayers that claim foreign tax credits from also deducting the underlying dividends.

Due to a mismatch in the effective dates of the provisions, taxpayers with foreign subsidiaries with taxable years that did not run from January 1 to December 31 had a window where the amendments to Section 78 did not apply to preclude Section 245A deductions.

To address this mismatch, Treasury Regulation §1.78-1 changed the effective date of the amendment to Section 78. Varian challenged the regulation, and the Tax Court determined that the regulation contradicted the plain language of the statute.

In reaching its conclusion, the Tax Court cited *Skidmore* and emphasized that Congress's delegation of certain rulemaking authority to the Treasury under Section 245A "does the commissioner no good here" since the regulation "falls outside the boundaries of any authority that Congress may have delegated" as it "impermissibly attempts to change an unambiguous provision." *Varian*, 163 T.C. at 107.

Conclusion

Notwithstanding 26 U.S.C. §7805(a)'s broad delegation of the power to "prescribe all needful rules and regulations for the enforcement of" the Internal Revenue Code to the Secretary of the Treasury, cases decided in the year since *Loper Bright* have demonstrated that courts are prepared to scrutinize regulations issued by the IRS to ensure that they reflect the "single, best meaning" of the statutory provisions.

Thus, while challenging regulations remains an uphill battle, counsel representing taxpayers should not hesitate to press arguments that regulations issued by the IRS are inconsistent with the relevant statutory provisions.

Jeremy H. Temkin *is a principal in Morvillo Abramowitz Grand Iason & Anello P.C.* **Emily Smit**, *an associate of the firm, assisted in the preparation of this article.*