King v. Burwell and Tax Court Review of Regulations

Ellen P. Aprill

INTRODUCTION

As all participants in this online symposium discuss, the Supreme Court in *King v. Burwell*[1] declined to apply *Chevron* deference[2] to a tax regulation in deciding whether Internal Revenue Code (Code) § 36B allowed tax credits for taxpayers who enroll in an insurance plan through a federal rather than a state exchange.[3] According to the Court, the question raised by the case was an extraordinary one that required the Court to interpret the statute itself, rather than consider the validity of the tax regulation permitting credits in such situations.[4] The High Court stated:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has

1. 135 S. Ct. 2480 (2015).

2. *Id.* at 2488–89 (citing Chevron, U.S.A, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)).

3. I.R.C. § 36B(2)(A) (2012). This section of the Code provides a credit for taxpayers, their spouses, and dependents for premiums for "an Exchange established by the State." *Id.*

4. *King*, 135 S. Ct. at 2488–89 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

> no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.[5]

The Supreme Court reached this decision despite the reliance on *Chevron* deference in the decision below and despite the Court finding the statute to be ambiguous.[6] The Supreme Court reached this decision without recognizing the specific grant of regulatory authority given to the Secretary of the Treasury under I.R.C. § 36B(g) or acknowledging that the relevant tax regulation, although promulgated by Treasury and the IRS,[7] adopted and cross-referenced the definition of "Exchange" established by HHS.[8] The Supreme Court reached this decision even though many tax regulations involve enormous amounts of dollars each year[9] and even though the IRS is charged with administering programs that involve numerous substantive areas of law.[10]

King v. Burwell relied in good measure on *FDA v. Brown & Williamson Tobacco Corp.*,[11] which concluded that the FDA did not have authority to regulate tobacco. There, the Court found that legislation specifically directed at tobacco would "preclude an interpretation of the FDCA [Food, Drug, and Cosmetic Act] that grants the FDA jurisdiction to regulate tobacco products."[12] Ostensibly, *Brown & Williamson* was a *Chevron* Step 1

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5. *Id.* at 2489. (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) and citing Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006))

6. *Id.* at 2491.

7. *See* Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377-01, 30,400 (May 23, 2012) (codified at 26 C.F.R. pt. 1).

8. "Exchange has the same meaning as in 45 CFR 155.20." Treas. Reg. § 1.36B-1(k) (2012). 45 C.F.R. § 155.20 provides, in pertinent part, "Unless otherwise identified, this term includes an Exchange serving the individual market for qualified individuals . . . regardless of whether the Exchange is established and operated by a State (including a regional Exchange or subsidiary Exchange) or by HHS."

9. As just one example, according to the brief of amici curiae of the Association of American Medical Colleges in *Mayo Foundation v. U.S.*, the regulation subjecting residents to FICA amounts to $700 million in taxes annually. Brief for Association of American Medical Colleges et al. as Amici Curiae Supporting Petitioners, Mayo Found. for Med. Educ. and Research, v. United States, 562 U.S. 44, 54 (2011) (No. 09-837), *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_837_PetitionerAmCu6OrgsforClinicalEducation.authcheckdam.pdf. President Obama has asserted that the check-the box regulations, which give entities a choice of being subject to the two-level corporate tax or the one-level partnership tax, cost the United States over $10 billion a year because of their use by multinationals. *See* Mark Boyd, *Check the Box: The $10 Billion Dollar Loophole,* CTR. FOR EFFECTIVE GOV. (Feb. 20, 2014),, *http://www.foreffectivegov.org/blog/check-box-10-billion-tax-loophole;* Jeremy Scott, *Check the Box for Tax Avoidance,* FORBES (Feb.19, 2014), http://www.forbes.com/sites/taxanalysts/2 014/02/19/check-the-box-for-tax-avoidance/.

10. *See* Kristin E. Hickman, *Administering the Tax System We Have,* 63 DUKE L.J. 1717 (2014).

11. 529 U.S. 120 (2000); *see King*, 135 S. Ct. at 2488–2490.

12. *Brown & Williamson,* 529 U.S. at 155.

decision that the statute itself addressed the question before the Court. By enacting other legislation involving tobacco, said the Court, Congress spoke precisely to the question at issue. The Court observed that inquiry into Step 1 of *Chevron* "is shaped, at least in some measure by the nature of the question presented" and that "[i]n extraordinary cases" courts should "hesitate before concluding that Congress has intended such an implicit delegation."[13]

In *King v. Burwell* the Court rejected use of *Chevron*.[14] It thus explicitly recast *Brown & Williamson* into a so-called *Chevron* Step 0 case,[15] an initial inquiry into whether *Chevron* applies at all, and declared an exception to *Chevron* for at least some cases that involve large, fundamental questions.

I. BACKGROUND ON THE *CHEVRON* DOCTRINE IN TAX COURT

Inconsistency in Supreme Court use of *Chevron*, particularly Step 2, under which a court defers to a permissible administrative decision regarding a statutory ambiguity, is nothing new.[16] This inconsistency may be particularly evident in the case of tax law. In 1979, the Court in *National Muffler Dealers Ass'n, Inc. v. United States* tested the reasonableness of a tax regulation by considering a variety of factors, including the extent to which the regulations harmonized with the plain language origin, and purpose of the statute; the manner in which the regulation evolved; the length of time the regulation had been in effect; the reliance placed on it; the consistency of interpretation; and the degree of scrutiny Congress had devoted to it.[17] Although the Court in *National Muffler* concluded that "[t]he choice among reasonable interpretations is for the Commissioner, not the courts,"[18] its multi-factor test gave courts a number of bases for invalidating tax regulations.

In *Mayo Foundation for Medical Education and Research v. United States,* the Supreme Court noted the distance between *National Muffler* and

13. *Id.* at 159.

14. *King*, 135 S. Ct. at 2489.

15. *See* Cass R. Sunstein, Chevron *Step Zero,* 92 VA. L. REV. 187 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain,* 89 GEO. L.J. 833 (2001).

16. Compare the unwillingness of the Court to rely on *Chevron* in *King v. Burwell* with the broad endorsement of *Chevron,* even in connection with an agency's determination of the scope of its interpretive authority, in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). *See generally* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us about the Rest of Statutory Interpretation,* 83 FORDHAM L. REV. 607 (2014); Connor R. Raso & William N. Eskridge, Jr., Chevron *as a Canon and Not a Precedent: An Empirical Study of What Motivates Judges in Deference Cases,* 110 COLUM. L. REV. 1727 (2010).

17. 440 U.S. 472, 477 (1979).

18. *Id.* at 488.

Chevron:

> Although we have not thus far distinguished between *National Muffler* and *Chevron*, they call for different analyses of an ambiguous statute. Under *National Muffler*, for example, a court might view an agency's interpretation of a statute with heightened skepticism when it has not been consistent over time, when it was promulgated years after the relevant statute was enacted, or because of the way in which the regulation evolved. . . . Under *Chevron*, in contrast, deference to an agency's interpretation of an ambiguous statute does not turn on such considerations.[19]

In *Mayo*, the Court conceded that "[s]ince deciding *Chevron*, we have cited both *National Muffler* and *Chevron* in our review of Treasury Department regulations."[20] In *Mayo,* ending any confusion or inconsistency, the Court held the *Chevron* doctrine applies to tax regulations promulgated pursuant to the grant of general authority in I.R.C. § 7805(a)[21] and deferred under *Chevron* Step 2 to the administrative agency's position in the regulation at issue. The Court declared, "The principles underlying our decision in *Chevron* apply with full force in the tax context."[22]

In the next two tax cases it encountered, however, the Court avoided possible and plausible *Chevron* Step 2 inquiries. It decided both *United States v. Quality Stores, Inc*.[23] and *United States v Home Concrete & Supply, LLC*[24] according to what the Court saw as the plain meaning of statute. In *Quality Stores,* the Court determined that severance payments made to employees terminated against their will were subject to tax under the Federal Income Contribution Act, based on the wording and structure of the statute, rather than finding the statute unclear, a finding that could have required the Court to decide whether Step 2 of *Chevron* applied to revenue rulings.[25] In *Home Concrete*, the Court held invalid a regulation providing that the

19. 562 U.S. 44, 54 (2011).

20. *Id*.

21. I.R.C. § 7805(a) provides the Commissioner with authority to "prescribe all needful rules and regulations for the enforcement" of the Code. It applies to the entire Internal Revenue Code. Congress also sometimes provides additional authority for tax regulations under specific provisions of the Code, such as § 36B(g).

22. 562 U.S. at 55.

23. 134 S. Ct. 1395 (2014).

24. 132 S. Ct. 1836 (2012).

25. *Quality Stores*, 134 S. Ct. at 1399–1400. The Court overturned the Sixth Circuit regarding the substance of the plain meaning of the statute, but like the Sixth Circuit looked to the statute without administrative gloss. *See id*.; *see also* In re Quality Stores, Inc., 693 F.3d 605, 612 (6th Cir. 2012). In contrast, the Federal Circuit had upheld the IRS interpretation, relying on revenue rulings. *See, e.g*., CSX Corp. v. United States, 518 F. 3d 1328 (Fed. Cir. 2008).

statutory phrase—"omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return"[26]—applies when a taxpayer understates income, in particular gain reported, because of overstating of basis.[27] The Court relied on its earlier interpretation of the meaning of a phrase in the 1939 Code materially indistinguishable from the language at issue[28] and determined that this judicial interpretation of the statute controlled and foreclosed the position taken in the regulations.[29] It did so even though the earlier opinion had found the statutory language "not unambiguous."[30]

With this background, it is, of course, difficult to know whether *King v. Burwell* (along with *Quality Stores* and *Home Concrete*) signals a lowering of deference to administrative agencies, including Treasury and the IRS, as some have speculated.[31] In most cases, there will be little difference in result between a case decided at *Chevron* Step 0 and a case decided at *Chevron* Step 1, and thus *King v. Burwell* may effect little if any change.[32] However, as with *Chevron* itself, the practical impact of *King v. Burwell* will depend in large measure on how lower courts treat it.

For tax law, the response of the Tax Court to *King v. Burwell* will hold particular importance. The vast majority of federal tax litigation takes place in the Tax Court rather than federal District Court or the Court of Federal Claims.[33] Many of the cases the Tax Court hears involve the validity of tax

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26. I.R.C. § 6501(e)(1)(A) (2012). If the phrase applies, the statute of limitations increases from three years to six. *Id*.

27. *Home Concrete*, 132 S. Ct. at 1844.

28. *Id*. at 1839 (citing Colony, Inc. v. Comm'r, 357 U.S. 28 (1958)).

29. *Id*. at 1843. The key administrative law case at issue in *Home Concrete* was the impact on *Chevron* of *National Cable & Communications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005), in particular when a decision of a court, particularly the Supreme Court, eliminates statutory ambiguity and thus prevents a change of interpretation by an administrative agency.

30. *Home Concrete*, 132 S. Ct. at 1840 (quoting *Colony,* 357 U.S. at 33).

31. *See* Lee A. Sheppard, *News Analysis: Recent Supreme Court Decisions and Judicial Deference*, 148 TAX NOTES 7 (July 6, 2015). Sheppard quotes from an Alston & Bird client memo:

> "The majority's decision in *King v. Burwell* could be seen as reducing the power of the executive branch in interpreting and implementing statutory schemes -- and increasing that of the judicial branch in the situations where a court chooses not to apply *Chevron* deference but to independently interpret an ambiguous statutory provision for itself." *Id*.

32. *See After* King v. Burwell*, What is Chevron's Domain?*, ABA (July 8, 2015), *http://www.americanbar.org/content/dam/aba/administrative/administrative_law/leadership/king_burwell_7_8_15.authcheckdam.mp3*. In *King v. Burwell* itself, the Court, as noted above, found the statute to be ambiguous, a decision that would move analysis in most cases to *Chevron* Step 2, but a move the Court declined to make. *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

33. According to statistics from the IRS Office of Chief Counsel, for Fiscal Year 2012, Tax Court cases represented almost 97% of the more than 31,000 docketed federal tax cases and 68% of $29.7 billion at issue. DEBORAH BUTLER, OFFICE OF CHIEF COUNSEL, INTERNAL REVENUE SERV., 2013 MIDYEAR MEETING: IMPORTANT DEVELOPMENTS PANEL PRESENTED TO THE ABA TAX SECTION COMMITTEE ON COURT PROCEDURE AND PRACTICE (2013), *available at* 2013 WL 841866.

regulations and other IRS guidance, such as revenue rulings. The consequence of the Tax Court reading *King v. Burwell* as lowering the level of deference given to tax regulations would be significant.

The remainder of this paper looks at the Tax Court's recent application of *Chevron* and *Brown v. Williamson* to speculate as to whether the Tax Court will view the extraordinary case exception from *Chevron* adopted in *King v. Burwell* as the limited province of the Supreme Court or as empowering the Tax Court, with a strong sense of its own expertise, to invalidate tax guidance more easily and frequently, as it did under the more flexible standard of *National Muffler*.[34] While any conclusion is only a guess, I believe that the Tax Court could well read *King v. Burwell* as increasing its ability to invalidate regulations.

II. THE TAX COURT AND *CHEVRON*

Although the Tax Court did not rush to apply *Chevron,* with the strong deference the case grants to administrative agencies in the face of statutory ambiguity,[35] it has certainly done so in many, if not all, of its more recent cases.[36] *Mayo*, after all, eliminated any doubt that such was the proper

In addition, the Tax Court, unlike other possible venues, permits a taxpayer to litigate without first paying the tax. *See* Flora v. United States, 362 U.S. 145, 158 (1960) (finding that the Board of Tax Appeals, the predecessor to today's Tax Court, was established to allow taxpayers to contend against a tax liability without first paying the tax); Kaffenberger v. United States, 314 F.3d 944, 958 (8th Cir. 2003) ("Full payment of a tax assessment is a prerequisite to suit in federal district court; taxpayers may bring prepayment suits only in United States Tax Court."); *About the Court*, U.S. TAX COURT (May 25, 2011) https://www.ustaxcourt.gov/about.htm ("[P]ayment of the underlying tax ordinarily is postponed until the case has been decided."); *see also* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 224 (2014) (noting that the Tax Court "hears over ninety-five percent of federal tax-related litigation").

34. *See generally*, Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717 (2004).

35. For example, in 1991, the Sixth Circuit criticized the Tax Court for using what it saw as the less deferential standard of *National Muffler* to invalidate a tax regulation and upheld the regulation under Step 2 of *Chevron*. *See* People's Fed. Sav. and Loan Ass'n v. Comm'r, 948 F.2d 289, 300 (6th Cir. 1991).

36. Tax Court cases that use both *Chevron* and *Brown & Williamson* are discussed in the next section of this paper. This contribution to the symposium does not discuss at all one very recent case, *Altera Corp. v. Commissioner*, 145 T.C. No. 3 (2015), invalidating a tax regulation because, although it cites *Chevron,* it turns on the particular issue of reasoned decision making, often known as the *State Farm* doctrine (from *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29 (1983)), and not deference more generally. It is important to note, however, that the decision states that "whether *State Farm* or *Chevron* supplies the standard of review is immaterial because *Chevron* step 2 incorporates the reasoned decisionmaking [sic] standard of *State Farm*." *Altera*, 145 T.C. No. 3 at 2. That is, the Tax Court may be making new demands on *Chevron* Step 2 in ways that allow it to invalidate regulations. *Altera* can also be seen as part of a general move to reject tax exceptionalism in administrative law. *See* Hoffer & Walker, *supra* note 33.

approach, at least for regulations promulgated with notice and comment, whether the regulations are promulgated to pursuant to a grant of specific authority or pursuant to the grant of general authority in I.R.C. § 7805(a).[37] The Tax Court has, since *Mayo,* consistently and usually without controversy used *Chevron*,[38] primarily Step 2, and looked to a variety of sources to determine that a regulation is reasonable. As the following discussion shows, the Tax Court will look to legislative history and case law, among other sources, in deciding whether a regulation is reasonable. [39]

In the recent case of *Perez v. Commissioner*,[40] for example, the Tax Court found that Treas. Reg. § 1.104-1(c)(1) validly required damages excluded from income to be "an amount received . . . through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution,"[41] and as a result, a young woman who donated her eggs pursuant to a contract could not exclude the amounts she received, which were characterized as "compensation for her pain and suffering."[42] The Tax Court made short shrift of Step 1: "The Code doesn't define 'damages,' and so we can swiftly hop up onto *Chevron*'s step two."[43] Under Step 2, the Tax Court found the regulation not "arbitrary or capricious in substance or manifestly contrary to statute," primarily on the basis of long-standing case

In an even more recent case, McDonald v. Commissioner, T.C. Memo. 2015-169, 6 (August 25, 2015), the Tax Court upheld a regulation setting forth requirements for making the foreign earned income exclusion under *Chevron* Step 2, but noted as an important factor in the regulation's reasonableness the fact that the final regulation was changed and made more liberal in response to public comment.

37. *See* Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT'L TAX J. 917, 925–31 (2012) (discussing the issues raised by temporary regulations promulgated without notice and comment).

38. Prior to *Mayo,* whether the Tax Court used *Chevron* depended on the Circuit to which the case would be appealed. *See, e.g.,* Pullins v. Comm'r, 136 T.C. 432, 441–42 (2011) (refusing reconsideration of an earlier case regarding statute of limitation for innocent spouse after *Mayo* because the earlier case, appealable to the Seventh Circuit, had applied the Seventh Circuit rule of using *Chevron*). For a citation of *Chevron* that sounds almost mechanical, as if the Tax Court is checking off a requirement, *see Howard Hughes Co. v. Commissioner*, Nos. 10539-11, 10565-11 2014 WL 10077466, at *21 (T.C. June 2, 2014) (citing *Chevron* to find a regulation regarding costs attributable to the construction of dwelling units "reasonable").

39. In *Carpenter Family Investments, LLC v. Commissioner*, 136 T.C. 373, 389 (2011), which was decided shortly after *Mayo,* the Tax Court wrote, "The Supreme Court's opinion in *Mayo* implies, by omission rather than affirmative statement, that a trial court's investigation of congressional intent at *Chevron* step one be limited to the plain text of the statute." However, as discussed *infra,* the Tax Court has since looked to legislative history, although these later cases have generally involved Step 2.

40. 144 T.C. No. 4 (2015).

41. *Id.* at 5.

42. *Id.* at 1, 8.

43. *Id.* at 5.

law and the legislative changes to I.R.C. § 104.[44]

In *Gaughf Properties, L.P. v. Commissioner*,[45] the Tax Court found nothing in the structure of I.R.C. § 6229(e),[46] dictionaries, or legislative history that enabled it to conclude under Step 1 of *Chevron* that Congress had spoken to the question of whether "furnish" could mean "file." The Tax Court proceeded to Step 2 of *Chevron* and concluded: "Given the similarity between the definitions of the words 'furnish' and 'file' previously discussed, we find that section 301.6229(e)-1T . . . is based on a permissible construction of section 6229(e)."[47]

The long and varied opinions of the Tax Court judges in *Tigers Eye Trading, LLC v. Commissioner*,[48] offer a particularly lively discussion of *Chevron* Step 2. There, petitioner asserted that, under the D.C. Circuit decision *Petaluma FX Partners, LLC v. Commissioner*,[49] the Tax Court lacked jurisdiction to decide certain issues, including application of penalty provisions, in a partnership tax dispute.[50] The respondent assumed it was bound by *Petaluma*.

Relying on the fact that *Mayo* had been decided after *Petaluma*, on a later D.C. Circuit case,[51] and on *Chevron,* the main opinion, authored by Judge Beghe, argued that holdings of the D.C. Circuit in *Petaluma* "were the result of a concession by the Government that the Court of Appeals accepted without any discussion of the applicable regulations."[52] It then rejected, as a

44. *Id*. at 5–6. Similarly, in *Our Country Home Enterprises v. Commissioner,* 145 T.C. No. 1 (2015), the Tax Court upheld the economic benefit provisions of Treas. Reg. § 1.61-22(d)–(g) so that life insurance policies issued on behalf of four shareholder/employers were taxable as part of a split-dollar life insurance arrangement. Because I.R.C. § 61 does not include the term "economic benefit," the Tax Court moved quickly from *Chevron*'s Step 1 to Step 2. *Our Country*, 145 T.C. No. 1 at 31. It upheld the regulation as reasonable, looking to "longstanding judicial jurisprudence related to section 61(a)." *Id*.

45. 139 T.C. 219 (2012).

46. This section provides a statute of limitations for the assessment of tax when a partner is not identified.

47. *Id*. at 248.

48. 138 T.C. 67 (2012), *aff'd in part, rev'd in part and remanded sub nom*., Logan Trust v. Tigers Eye Trading, LLC, No. 12-1148, 2015 WL 3915993 (D.C. Cir. June 26, 2015). Judge Beghe wrote the plurality opinion, in which judges Colvin, Cohen, Halpern, and Goeke joined; Judges Gale and Paris concurred in the result only; Judge Foley dissented; Judges Vasquez, Gustafson, and Morrison did not participate. *Id*. at 143. Judge Halpern wrote a concurring opinion that judges Beghe, Goeke, and Wherry joined. *Id*. at 143–50. Judge Wherry wrote a concurring opinion. *Id*. at 150–66. Judge Marvel wrote a dissenting opinion, in which Judge Kroupa joined Part I and judges Gale and Paris joined part II. *Id*. at 166–73. Judge Holmes wrote a dissenting opinion. *Id*. at 173–92.

49. 591 F.3d 649 (D.C. Cir. 2010).

50. *Tigers Eye*, 138 T.C. at 72.

51. Intermountain Ins. Serv. Of Vail, LLC v. Comm'r, 650 F.3d 691 (D.C. Cir. 2011) (stating deference under *Mayo* requires deference to definition in valid regulations rather than earlier case law).

52. 138 T.C. at 74.

matter of law, the Government's concession and asserted its jurisdiction.[53] It found nothing under *Chevron* Step 1 to foreclose the interpretation of the regulations and found them to be a valid and considered interpretation under Step 2 of a technical and complex regulatory scheme.[54]

In his dissent, Judge Holmes bemoans the "tsuris" of a position with which two circuit courts, a few trial courts, the Department of Justice, and "even the IRS (at times) all disagree."[55] He rejects Judge Beghe's reliance on *Mayo* on the grounds that the D.C. Circuit had long been applying *Chevron* deference to tax regulations and that it did not overlook the regulation at issue.[56] He dismissed the majority's reliance on *Intermountain* because *Intermountain* did not address the same issue.[57] Judge Holmes did not reject use of *Chevron*, however, but only the way in which Judge Beghe had applied it.

In short, the Tax Court since *Mayo* has structured its opinions along the two-step analysis of *Chevron*.[58] Nonetheless, its frequent use of case law privileges the judiciary under the guise of deferring to the executive and suggests that members of the Tax Court would welcome a precedent that gives primacy to judicial interpretation.

III. THE TAX COURT AND *BROWN & WILLIAMSON*

Tax Court cases often cite *Brown & Williamson*[59] for the truism that statutes are interpreted harmoniously and in context, sometimes with and sometimes without any link to *Chevron*.[60] That is, the Tax Court often uses

53. *Id.* at 76–77.

54. *Id.* at 124.

55. *Id.* at 174 (Holmes, J., dissenting). "Tsuris" is a Yiddish word meaning trouble or distress. *See Dictionary: tsuris*, MERRIAM WEBSTER (Sept. 7, 2015), http://www.merriam-webster.com/dictionary/tsuris.

56. *Tigers Eye*, 138 T.C. at 177–78.

57. *Id.* The issue in *Intermountain* was the same one resolved by the Supreme Court in *Home Concrete*, which was whether an earlier Supreme Court case blocked regulatory reinterpretation.

58. *But see* Steve Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era,* 32 VA. TAX REV. 269, 280–85 (2012) (arguing against use of *Chevron* and suggesting that the doctrine is weakening).

59. For analyzing Tax Court use of *Brown & Williamson,* I have not limited research to cases after *Mayo*.

60. *See, e.g.,* Hewlett-Packard Co. v. Comm'r, 139 T.C. 255, 265 n. 13 (2012) (cited for construing meaning of words in statute; not in context of *Chevron)*; New Millennium Trading, LLC v. Comm'r, 131 T.C. 275 (2008) (cited in context of *Chevron* Step 1, and holding that regulation is consistent with statute); Lewis v. Comm'r, 128 T.C. 48, 54 (2007) (specifying that regulation is valid under *Chevron* or *National Muffler* in context of asking whether Congress has spoken to issue addressed in regulation); TG Missouri Corp. v. Comm'r, 133 T.C. 278, 288 (2009) (interpretation of statute; not in context of interpreting regulation); Carlebach v. Comm'r, 139 T.C. 1, 10 (2012) (in connection with *Chevron* Step 1 for reading together subsections of statute and principle of annual

Brown & Williamson as a tool of statutory construction in determining the meaning of a word or phrase within a particular statutory provision, whether or not the validity of a tax regulation is involved. When it cites *Brown & Williamson*, the Tax Court sometimes limits itself to other language of the same statutory provision, sometimes looks to legislative history, and other times scrutinizes other provisions of the Code.[61] It has not, however, used *Brown & Williamson* to make a Step 0 determination, that is, to ask whether Congress intended delegation at all.

The Tax Court's most sustained discussion of *Brown & Williamson* appears in *Square D Co. v. Commissioner*,[62] where it applied the case in the context of *Chevron* Step 1. *Square D* involved the validity of Treas. Reg. § 1.267(a)-3, a regulation that prevented the taxpayer from deducting interest until amounts were paid and not simply accrued.[63] The Tax Court upheld the validity of the regulation in light of a reversal by the Third Circuit of an earlier Tax Court case, *Tate & Lyle v. Commissioner*, which had invalidated the same regulation.[64] In the earlier case, the Tax Court had held the regulation "manifestly contrary to the statute" for failing to follow the matching principle of I.R.C. § 267.[65] The Third Circuit, however, found that the Tax Court had failed to give sufficient attention to the structure of the statute, particularly the interaction of two subsections of 267.[66] In light of this interaction, the Third Circuit found Congress did not express a clear intent to apply a matching principle in the case of foreign persons and concluded that the regulation was permissible under *Chevron* Step 2.[67]

The Tax Court thus reconsidered its position regarding the statute under *Chevron*. For its Step 1 analysis, it announced that *Brown & Williamson* "recently provided additional guidance."[68] It noted that the Supreme Court

accounting; regulation deemed valid under Step 2 even if statutory provisions were not clear); Specking v. Comm'r, 117 T.C. 95, 107 (2001) (citing *Brown & Williamson* and *Chevron* to find regulation consistent with meaning of statute*)*; Dorn v. Comm'r, 119 T.C. 356, 358 (2002) (guide to interpreting statute in order to give Tax Court jurisdiction; no regulation at issue); Shea Homes, Inc. v. Comm'r, 142 T.C. 60 (2014) (citing *Brown & Williamson* for proposition that different parts of a regulation must be harmonized and rejecting the Commissioner's position in the case as to the meaning of the regulations).

61. Thus, for example, *Square D Co. v. Commissioner,* 118 T.C. 299 (2002), discussed different subsections of the same code provision, while *TG Missouri Corp. v. Commissioner*, 133 T.C. 279 (2009), sought to harmonize subsections of I.R.C. §§ 41 and 174.

62. 118 T.C. 299.

63. *Id*. at 303–04.

64. Tate & Lyle, Inc. v. Comm'r, 103 T.C. 656 (1994), *rev'd and remanded,* 87 F.3d 99 (3d Cir. 1996).

65. *Square D*, 118 T.C. at 306–07.

66. *Tate & Lyle*, 87 F.3d at 105–06.

67. *Id*.

68. *Square D*, 118 T.C. at 308.

in *Brown & Williamson* had looked at subsequent Acts of Congress.[69] For the issue before it, the validity of Treas. Reg. § 1.267(a)-3, the Tax Court conceded that, in light of *Brown & Williamson,* its "opinion in Tate & Lyle I may have given insufficient attention to fitting all parts of section 267(a) into an 'harmonious whole.'"[70]

In particular, according to the Tax Court, its earlier opinion failed to give sufficient weight to the impact that the enactment of I.R.C. § 267(a)(3) two years after enactment of § 267(a)(2) could have on the meaning of § 267(a)(2).[71] In *Square* D, the Tax Court went on, under *Chevron* Step 2, to examine the meaning of the statutory language and concluded, based on extensive examination of the legislative history, that Congress intended the Secretary to have authority to the impose the cash method on a payor with a foreign payee.[72] Thus, the Tax Court concluded, the regulation at issue was reasonable under *Chevron* Step 2.[73] It incorporated *Brown & Williamson* into its Step 1 analysis but did so in order to proceed to Step 2, not as a basis for invalidating regulation, as the Supreme Court had done in *Brown & Williamson*.[74]

The recent case, *Yari v. Commissioner,*[75] offers an example of the Tax Court citing *Brown & Williamson* when interpreting statutory language in the absence of any administrative interpretations. The case asked whether, in applying a penalty under § 6707A for failure to disclose a transaction that has been listed by the IRS as abusive, the IRS is to use the tax shown on the return giving rise to a disclosure obligation or the tax shown on a subsequent, amended return.[76] The Tax Court held the former approach was the proper one under the clear language of the statute by looking to the penalty provision as a whole.[77] It cited *Brown & Williamson* for the proposition that statues must be interpreted "in their context and with a view to their place in the overall statutory scheme."[78] Somewhat ironically, *Yari* noted how difficult is "the process of divining the legislative intent

69. *Id*.

70. *Id*.

71. *Id*. at 308–09. Section 267(a)(2) of the Internal Revenue Code invokes the matching principle, but § 267(a)(3) gives the Secretary authority to apply the matching principle by regulations when the payee is not a United States person.

72. *Square D*, 118 T.C. 311. The Tax Court note that Appellate Courts differ as to whether examination of legislative history is permissible at *Chevron* Step 1.

73. *Id*. at 312

74. *Id*. at 307–09.

75. 143 T.C. 157 (2014).

76. *Id*. at 158.

77. *Id*. at 165–66.

78. 143 T.C. at 164 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

underlying a statute's language and structure, while subject to the canons of construction and well-established methodologies"[79] by pointing specifically to the split in the circuits that gave rise to the Supreme Court's decision in *King v. Burwell*.[80]

In short, while not turning *Brown & Williamson* into a *Chevron* Step 0 case, as *King v. Burwell* did, the Tax Court has frequently cited *Brown & Williamson* and cut it loose from any *Chevron* Step 1 analysis. The Tax Court's invocation of *Brown & Williamson* for statutory interpretation generally suggests that it may well welcome and accept the invitation of *King v. Burwell* to apply *Chevron* Step 0 to tax regulations.

CONCLUSION

Predicting from past case law in this case is much like reading tea leaves; nonetheless, the reluctance of the Tax Court to adopt *Chevron* and its willingness to cite *Brown & Williamson* as a canon of statutory possibility underscores the possibility that the Tax Court will make use of *King v. Burwell* to review and reject tax regulations under a *Chevron* Step 0. The Tax Court's expertise in the subject matter before it may well encourage it to invoke *Chevron* Step 0. If *Chevron* does not apply, the Tax Court need not confront whether statutory ambiguity requires application of *Chevron* Step 2 or whether the justification for *Chevron* deference relies on expertise, which the Tax Court shares with the IRS, or on implied Congressional delegation to a branch of government more politically responsive than the judiciary.[81]

The Supreme Court in *King v. Burwell* gave no guidance as to when a law involves issues of such economic or political significance that judicial, rather than administrative, interpretation is needed. Any significant tax reform, however, could fall into this category and thus offer the Tax Court to apply *Chevron* Step 0 as set forth in *King v. Burwell*. Reading the cases discussed in this piece and considering others in which courts have begun applying administrative law principles to tax,[82] I predict it would happily

79. 143 T.C. at 166 n.5.

80. *Id*.

81. For a discussion of these two bases for *Chevron* deference, see Gluck, *supra* note 16, at 620–21; Peter L. Strauss, *"Deference Is Too Confusing – Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143 (2012). Admittedly, the Tax Court is an Article I, not an Article III, court. Nonetheless, the reasoning in favor of deference to an administrative agency but not a court in cases of statutory ambiguity are the same. *See* Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014); Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation,* 92 B.U. L. REV. 642 (2012); Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235 (1998).

82. See generally Amandeep S. Grewal, *Taking Administrative Law to Tax*, 63 DUKE L.J. 1625

accept such an offer. As a supporter of *Chevron* who believes that administrative agencies are better placed than judges to interpret statutes in the myriad and ever-changing situations to which they must apply,[83] I hope my own prediction is proved wrong.

(2014), and other contributions to this symposium.

83. *See* Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005).