

# **DID THE SUPREME COURT'S JUST PUT A TIGER IN THE TAXPAYERS' TANK?**

## **The Unshackling of Chevron**

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Monday, July 1, 2024  
3:30 to 4:00 PM EST  
(30 minutes)



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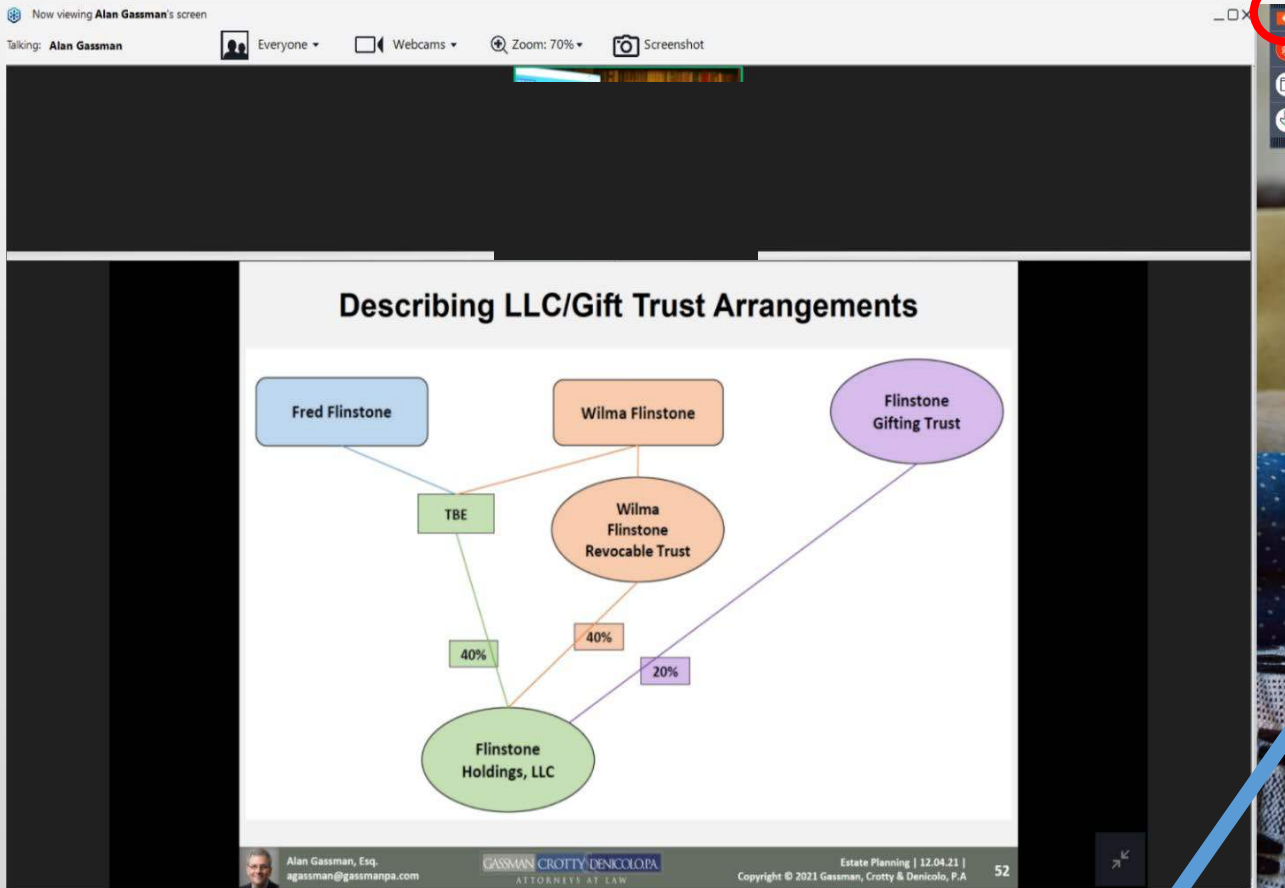
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Presented by: Shoshana (Shosh) Miller, Esq., and Special Guest Rabbi Ari Markberg  
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Caption: What estate planner should know about planning to...  
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**Planning For Orthodox Jewish Families**  
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Presented by: Alan Gassman, CLU, ChFC, CPCU, AEP® (Chairperson), agassman@gassmanpa.com  
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**What Estate Planners Need To Know About African...**  
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**What Estate Planners Need To Know About Jewish...**  
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## Guest Speakers On Estate Tax Planning Topics ▶ Play all

**Blow Forms 1065 (and 1120-S) Out of Orbit**  
1:05:55

**Schedule K-2 and K-3 Blow Forms 1120-S and 1065 Out...**  
Alan Gassman  
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**"SOCIAL JUSTICE FUND: ACTIVATING TRUST-BASED PHILANTHROPY"**  
Saturday, May 21st | 12:00 PM to 12:30 PM EDT (30 minutes)  
Presented by: Alan Gassman, CLU, ChFC, CPCU, AEP® (Chairperson), agassman@gassmanpa.com  
41:09

**PCF Social Justice Fund Activating Trust-Based...**  
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**Don Bryan: THE BIGGEST Mistakes Ventriloquists Make**  
Don (Gaylord) Bryan | THE BIGGEST MISTAKE VENTRILOQUISTS MAKE  
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**Don Bryan: The Biggest Mistakes Ventriloquists Make**  
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**PASSING ON THE FAMILY BUSINESS TO KEY EMPLOYEES**  
By: Jerry Hesch  
Saturday, May 7, 2022  
1:00 to 2:00 PM EDT (60 minutes)  
1:01:22

**Jerry Hesch: Passing On The Family Business To A Key...**  
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**Human Aspects of Estate Planning PART 2**  
By: Marty M. Shenkman, Esq.  
33:46

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**Human Aspects of Estate Planning**  
By: Marty M. Shenkman, Esq.  
30:07

**Marty Shenkman: Human Aspects of Estate Planning...**  
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# UPCOMING EVENTS

Saturday, July 13, 2024	Free from our firm	<p>Alan Gassman &amp; Laurie Valentine Present:</p> <p><b>WHY TAX LAWYERS SHOULD CONSIDER WORKING FOR OR WITH COMMUNITY FOUNDATIONS</b></p> <p>11:00 AM to 11:30 AM EST (30 minutes)</p>	<a href="#">REGISTER HERE</a>
Saturday, July 13, 2024	Free from our firm	<p>Alan Gassman &amp; Laurie Valentine Present:</p> <p><b>LAURIE'S GUIDE TO CHARITABLE TAX OPPORTUNITIES</b></p> <p>11:30 AM to 12:00 PM EST (30 minutes)</p>	<a href="#">REGISTER HERE</a>
Saturday, July 20, 2024	Free from our firm	<p>Alan Gassman Presents:</p> <p><b>PLANNING WITH THE FAMILY BUSINESS – PART 1</b></p> <p>11:00 AM to 12:00 PM EST (60 minutes)</p>	<a href="#">REGISTER HERE</a>
Tuesday, July 23, 2024	Financial Experts Network	<p>Alan Gassman Presents:</p> <p><b>ESTATE TAX PLANNING - A DEEPER DIVE INTO THE INSTALLMENT SALE INTO THE GRANTOR TRUST</b></p> <p>1:00 PM to 2:00 PM EST (60 minutes)</p>	<a href="#">REGISTER HERE</a>
Saturday, July 20, 2024	Free from our firm	<p>Alan Gassman Presents:</p> <p><b>PLANNING WITH THE FAMILY BUSINESS – PART 2</b></p> <p>11:00 AM to 12:00 PM EST (60 minutes)</p>	<a href="#">REGISTER HERE</a>
Saturday, July 20, 2024	Free from our firm	<p>Alan Gassman Presents:</p> <p><b>PLANNING WITH THE FAMILY BUSINESS – PART 3</b></p> <p>11:00 AM to 12:00 PM EST (60 minutes)</p> <p><b>&amp;</b></p> <p><b>MATHEMATICAL PLANNING WITH ESTATEVIEW SOFTWARE</b></p> <p>12:00 PM to 1:00 PM EST (60 minutes)</p>	<a href="#">REGISTER HERE</a>



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# UPCOMING EVENTS

Wednesday, August 7, 2024	Financial Experts Network	Alan Gassman Presents: <b>ESTATE TAX PLANNING - GETTING READY FOR 2026</b> 1:00 PM to 2:00 PM EST (60 minutes)	<a href="#">REGISTER HERE</a>
Tuesday, August 27, 2024	Financial Experts Network	Alan Gassman Presents: <b>GRATS AND WHEN GRATS WORK BEST, INCLUDING ROLLING GRATS</b> 1:00 PM to 2:00 PM EST (60 minutes)	COMING SOON!
Wednesday, September 11, 2024	Financial Experts Network	Alan Gassman Presents: <b>THE CPA'S GUIDE TO ESTATE TAX PLANNING - RUNNING THE NUMBERS - PART 2</b> 1:00 PM to 2:00 PM EST (60 minutes)	COMING SOON!
Tuesday, September 24, 2024	Financial Experts Network	Alan Gassman Presents: <b>CHARITABLE REMAINDER TRUSTS FROM A-Z</b> 1:00 PM to 2:00 PM EST (60 minutes)	COMING SOON!
Wednesday, September 25, 2024	Notre Dame Tax Institute	Brandon Ketron & Brad Dillon Present: <b>HOW TO USE FINANCIAL MODELING TO HELP YOUR CLIENTS AND YOURSELF</b> 1:45 PM to 3:45 PM EST (120 minutes)	<a href="#">MORE INFORMATION</a>
Thursday, Thursday 26, 2024	Notre Dame Tax Institute	Alan Gassman Presents: <b>CREATIVE USES OF CHARITABLE REMAINDER TRUSTS</b> 2:00 PM to 3:00 PM EST (60 minutes)	<a href="#">MORE INFORMATION</a>
Tuesday, October 1, 2024	Financial Experts Network	Alan Gassman Presents: <b>CHARITABLE LEAD ANNUITY TRUSTS AND ASSOCIATED PLANNING TO REDUCE TAXES WITH CHARITABLE STRUCTURES</b> 1:00 PM to 2:00 PM EST (60 minutes)	COMING SOON!
Wednesday, October 30, 2024	Financial Experts Network	Alan Gassman Presents: <b>ESTATE TAX PLANNING - PUTTING IT ALL TOGETHER</b> 1:00 PM to 2:00 PM EST (60 minutes)	COMING SOON!
Thursday, November 21, 2024	Financial Experts Network	Alan Gassman Presents: <b>ESTATE TAX PLANNING- TECHNIQUES WE HAVEN'T COVERED YET</b> 1:00 PM to 2:00 PM EST (60 minutes)	<a href="#">REGISTER HERE</a>



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# IRC § 7805(a) Grants the Treasury Department the General Authority to Promulgate Regulations to Enforce the IRC

“Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, **the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.**”



# Types of Treasury Regulations

**Interpretive or “General Authority”:** Promulgated under the general rulemaking and regulatory authority granted by IRC § 7805(a) to “prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”

**Legislative or “Specific Authority”:** Promulgated under a specific grant of authority in a specific Code section beyond the general grant of authority in IRC § 7805(a).

**Procedural:** Found in the IRS Statement of Procedural Rules in 26 CFR Part 601. They provide IRS personnel with rules related to the organization and administrative procedures of the IRS. They are generally not binding upon the IRS.





# Section 553 of the Administrative Procedure Act (“APA”) (*Emphasis Added*)

... **(b) General notice of proposed rule making shall be published in the Federal Register**, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed;
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved; and
- (4) the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language, that shall be posted on the Internet website under section 206(d) of the E-Government Act of 2002 ([44 U.S.C. 3501](#) note) (commonly known as regulations.gov).

**Except when notice or hearing is required by statute, this subsection does not apply—**

**(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or**

**(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.**

**(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.** After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections [556](#) and [557](#) of this title apply instead of this subsection.

**(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—**

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

**(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.**



# Example from *Oakbrook Land Holdings, LLC v. Commissioner* (154 TC 10 - Tax Court 2020)

“Administrative law distinguishes between interpretive and legislative agency rules. ‘An interpretive rule merely clarifies or explains preexisting substantive law or regulations.’ . . . A legislative rule, on the other hand, ‘creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself.’ . . . Legislative rules have ‘the force and effect of law.’

**Section 170(h)(5)(A) requires that the conservation purpose underlying the easement be ‘protected in perpetuity.’ But the statute does not indicate how (or whether) this requirement could be deemed satisfied given the possibility that the easement might later be extinguished. The regulation specifies the circumstances in which “the conservation purpose can nonetheless be treated as protected in perpetuity.”**

To secure this treatment the regulation requires that the donor agree, at the time of the gift, to a specified division of proceeds in the event the property is sold following judicial extinguishment of the easement. . . . **Because the regulation imposes a requirement not explicitly set forth in the statute, it is appropriately treated as a legislative rule.”**



# Example from IRC § 453 (emphasis added)

## (j) REGULATIONS

### (1) IN GENERAL

**The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the provisions of this section.**

### (2) SELLING PRICE NOT READILY ASCERTAINABLE

The regulations prescribed under paragraph (1) shall include regulations providing for ratable basis recovery in transactions where the gross profit or the total contract price (or both) cannot be readily ascertained.

## (k) CURRENT INCLUSION IN CASE OF REVOLVING CREDIT PLANS, ETC.

In the case of—

(1) any disposition of personal property under a revolving credit plan, or

(2) any installment obligation arising out of a sale of—

(A) stock or securities which are traded on an established securities market, or

(B) to the extent provided in regulations, property (other than stock or securities) of a kind regularly traded on an established market,

subsection (a) shall not apply, and, for purposes of this title, all payments to be received shall be treated as received in the year of disposition. **The Secretary may provide for the application of this subsection in whole or in part for transactions in which the rules of this subsection otherwise would be avoided through the use of related parties, pass-thru entities, or intermediaries.**



# *Chevron* Deference: The Rule from 1984 to June 28, 2024

**Two Questions** when a federal court reviews an agency's construction of a statute that it administers:

**Question 1:** Has Congress directly spoken to the precise question at issue?

If Yes: 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.

If No: If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Proceed to Question 2.

**Question 2:** Is the agency's answer based on a permissible construction of the statute?

If Yes: The court must follow the agency's interpretation. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

If No: The court must interpret the statute using the general rules of statutory interpretation.





# SCOTUS Refined and Added Exceptions to *Chevron*

Courts are not supposed to defer when the agency construing a statute:

- (1) has not been charged with administering that law (satisfied for the Treasury Department under IRC § 7805(a));
- (2) has not used deliberative procedures—i.e., notice-and-comment rulemaking or adjudication; or
- (3) is intervening in a “major question,” of great economic and political significance.



# *Mayo* Eliminated the Distinction Between Legislative and Interpretive Regulations When Applying *Chevron*

The 2001 Supreme Court decision in *Mayo* held that *Chevron* deference not only applies to Treasury Regulations, but also applies to any agency rule—regardless of whether it is legislative or interpretive—so long as the “agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, **where the agency uses full notice-and-comment procedures to promulgate a rule**, [and] where the resulting rule falls within the statutory grant of authority.”

*Mayo Foundation for Medical Education and Research v. United States*, 533 U.S. 218 (2001) (emphasis added).

This has been referred to as *Chevron*’s “Step Zero.” *Chevron* deference only applied to a regulation that has been subjected to the APA’s procedures in issuing the regulation.



# *Mayo* Eliminated the Distinction Between Legislative and Interpretive Regulations When Applying *Chevron* (Cont'd)

“The Federal Insurance Contributions Act (FICA) requires employees and employers to pay taxes on all “wages” employees receive, . . . and defines “wages” to include “all remuneration for employment,” . . . .

FICA defines “employment” as “any service ... performed ... by an employee for the person employing him,” . . . , but excludes from taxation any “service performed in the employ of ... a school, college, or university ... if such service is performed by a student who is enrolled and regularly attending classes at [the school],” . . . .

Since 1951, the Treasury Department has construed the student exception to exempt from taxation students who work for their schools “as an incident to and for the purpose of pursuing a course of study.” . . . . In 2004, the Department issued regulations providing that “[t]he services of a full-time employee”—which includes an employee normally scheduled to work 40 hours or more per week—“are not incident to and for the purpose of pursuing a course of study.” . . . The Department explained that this analysis “is not affected by the fact that the services ... may have an educational, instructional, or training aspect.” . . . The rule offers as an example a medical resident whose normal schedule requires him to perform services 40 or more hours per week, and concludes that the resident is not a student.”

**SCOTUS applied the *Chevron* doctrine to the interpretive regulation and held that the Treasury Department’s full-time employee rule was a reasonable construction of §3121(b)(10).**



# New Rule: *Loper Bright Enterprises v. Raimondo*

“Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And 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. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”





# In Search for the “Best Meaning”

“Once more, the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied. **The statute still has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit.**”



# Scope of Review Under Section 706 of the APA

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1)compel agency action unlawfully withheld or unreasonably delayed; and
- (2)hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B)contrary to constitutional right, power, privilege, or immunity;
  - (C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D)without observance of procedure required by law;
  - (E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.



# New Fundamental Question Under *Loper*

“*Chevron’s* fictional presumption of congressional intent was always unmoored from the APA’s demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from **the question that matters: Does the statute authorize the challenged agency action?** And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in ‘the reviewing court,’ to ‘decide all relevant questions of law’ and ‘interpret . . . statutory provisions.’”



# What About *Stare Decisis*?

**“[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory stare decisis despite our change in interpretive methodology.** . . . Mere reliance on *Chevron* cannot constitute a ‘special justification’ for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, ‘just an argument that the precedent was wrongly decided.’”





# Treas. Regs. Are Still Binding on the Treasury Department and the IRS and Are Still Persuasive, Just Not Always Controlling

Quote from *Loper*, p. 25:

“In an agency case in particular, the court will go about its task with the agency’s ‘body of experience and informed judgment,’ among other information, at its disposal. . . . And although an agency’s interpretation of a statute ‘cannot bind a court,’ it may be especially informative ‘to the extent it rests on factual premises within [the agency’s] expertise.’ . . . Such expertise has always been one of the factors which may give an Executive Branch interpretation particular ‘power to persuade, if lacking power to control.’

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. **The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.**



# A Return to *Skidmore*?

The *Loper* opinion quoted *Skidmore* as providing an appropriate standard when a federal court is considering an interpretive regulation.

*Skidmore* is a 1944 Supreme Court decision that held that the deference to an interpretive regulation depends 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 [the regulation] power to persuade, if lacking power to control.”

*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).



# First Impressions of *Loper's* Impact on Tax Controversy During NYU's June 28 Tax Controversy Forum

As quoted in Tax Notes July 1, 2024 article: *Supreme Court's Overturning of Chevron Could Cause Tax Shake-Up* by Mary Katherine Browne and Nathan J. Richman. <https://www.taxnotes.com/tax-notes-today-federal/litigation-and-appeals/supreme-courts-overturning-chevron-could-cause-tax-shake/2024/07/01/7kf0g>

**Diana L. Erbsen of DLA Piper:** “‘I wouldn’t expect pure deference, but I would absolutely continue to expect a reasonable reliance on what absolutely is expertise at Treasury and expertise at other agencies. Were that to be completely abandoned, you likely would have seen different authors,’ . . . noting that Roberts wrote the majority opinion rather than either Justice Neil M. Gorsuch or Justice Clarence Thomas.”

**Tax Court Judge Elizabeth A. Copeland (Trump Appointee)** “agreed that Treasury and the IRS have special expertise in interpreting tax statutes. She added that she would continue to give substantial weight to statutory interpretations in Treasury regulations and that she expected little change in the expectation that judges would read and consider those regulations in future cases.”

**IRS Chief Counsel Marjorie Rollinson** “said the Loper Bright decision could increase the difficulty of writing regulations because regulators would now need to both comply with the Administrative Procedure Act and be prepared to persuade any judge that their interpretation is the correct one.”

**Steven Toscher of Hochman Salkin Toscher Perez PC** “noted that taxpayers and tax professionals will still want regulatory guidance on tax statutes in the wake of Loper Bright. The decision shouldn’t change much, he said.”



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# Example 1 Given in Justice Gorsuch's Concurrence

“Under *Chevron*, executive officials can replace one ‘reasonable’ interpretation with another at any time, all without any change in the law itself. The result: Affected individuals ‘can never be sure of their legal rights and duties.’ . . .

How bad is the problem? Take just one example. *Brand X* concerned a law regulating broadband internet services. There, the Court upheld an agency rule adopted by the administration of President George W. Bush because it was premised on a ‘reasonable’ interpretation of the statute. Later, President Barack Obama’s administration rescinded the rule and replaced it with another. Later still, during President Donald J. Trump’s administration, officials replaced that rule with a different one, all before President Joseph R. Biden, Jr.’s administration declared its intention to reverse course for yet a fourth time. . . . Each time, the government claimed its new rule was just as ‘reasonable’ as the last.”





# Example 2 Given in Justice Gorsuch's Concurrence

“Thomas Buffington, a veteran of the U. S. Air Force, was injured in the line of duty. For a time after he left the Air Force, the Department of Veterans Affairs (VA) paid disability benefits due him by law. But later the government called on Mr. Buffington to reenter active service. During that period, everyone agreed, the VA could (as it did) suspend his disability payments. After he left active service for a second time, however, the VA turned his patriotism against him. By law, Congress permitted the VA to suspend disability pay only “for any period for which [a service member] receives active service pay.” 38 U.S.C. § 5304(c).

38 U.S.C § 5304(c) reads: (c) Pension, compensation, or retirement pay on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay.

38 U.S.C § 5304 did not contain any specific grant to issue regulations thereunder.



# Example 2 Given in Justice Gorsuch's Concurrence (Cont'd)

“... But the VA had adopted a self-serving regulation requiring veterans to file a form asking for the resumption of their disability pay after a second (or subsequent) stint in active service.”

38 C.F.R. § 3.654(b)(2) (2021) read (it was amended in 2023) (emphasis added):

(2) Payments, if otherwise in order, will be resumed effective the day following release from active duty or active duty for training **if claim for recommencement of payments is received within 1 year from the date of such release**; otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim. Prior determinations of service connection will not be disturbed except as provided in § 3.105. Compensation will be authorized based on the degree of disability found to exist at the time the award is resumed. Disability will be evaluated on the basis of all facts, including records from the service department relating to the most recent period of active service. If a disability is incurred or aggravated in the second period of service, compensation for that disability cannot be paid unless a claim therefor is filed.

“Unaware of the regulation, Mr. Buffington failed to reapply immediately. When he finally figured out what had happened and reapplied, the VA agreed to resume payments going forward but refused to give Mr. Buffington all of the past disability payments it had withheld.”

“Mr. Buffington challenged the agency's action as inconsistent with Congress's direction that the VA may suspend disability payments only for those periods when a veteran returns to active service. But armed with Chevron, the agency defeated Mr. Buffington's claim. Maybe the self-serving regulation the VA cited as justification for its action was not premised on the best reading of the law, courts said, but it represented a 'permissible' one.”



# Possible Applicability: Probability of Exhaustion Test Under IRC § 7520

According to the Treasury Regulations under IRC § 7520, when a trust pays an annual lifetime annuity (annual lifetime payments) to an individual in what is known as a private annuity sale, it must have enough in assets to pay the person until age 110. This is known as the “exhaustion test.” It is extremely unlikely that a person will live to this age.

IRC § 7520 contains a specific grant of authority to the Treasury Department only to issue regulations prescribing tables (emphasis added):

## **(a) GENERAL RULE**

For purposes of this title, the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be determined—

**(1) under tables prescribed by the Secretary, and**

**(2) by using an interest rate (rounded to the nearest 2/10ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls. . . .**

## **(c) TABLES**

### **(1) IN GENERAL**

**The tables prescribed by the Secretary** for purposes of subsection (a) shall contain valuation factors for a series of interest rate categories.

### **(2) REVISION FOR RECENT MORTALITY CHARGES**

**The Secretary shall revise the initial tables** prescribed for purposes of subsection (a) to take into account the most recent mortality experience available as of the time of such revision. Such tables shall be revised not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision.



# Possible Applicability: Probability of Exhaustion Test Under IRC § 7520 (Cont'd)

Congress only authorized the Treasury to issue “tables” to implement Section 7520.

The regulations, including the assumption that every transferor lives to the age of 110, are not tables or an explanation of their use.

The Treasury promulgated these regulations without the express authority of Congress.



# Possible Applicability: NIMCRUT Rules

The relevant statutory language authorizing the creation of the NIMCRUT is as follows:

**I.R.C. § 664(d)(2) Charitable Remainder Unitrust** — For purposes of this section, a charitable remainder unitrust is a trust—

**I.R.C. § 664(d)(2)(A)** — from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in section 170(c) and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals,

**I.R.C. § 664(d)(2)(B)** — from which no amount other than the payments described in subparagraph (A) and other than qualified gratuitous transfers described in subparagraph (C) may be paid to or for the use of any person other than an organization described in section 170(c),

**I.R.C. § 664(d)(2)(C)** — following the termination of the payments described in subparagraph (A), the remainder interest in the trust is to be transferred to, or for the use of, an organization described in section 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in subsection (g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in section 4975(e)(7)) in a qualified gratuitous transfer (as defined by subsection (g)), and

**I.R.C. § 664(d)(2)(D)** — with respect to each contribution of property to the trust, the value (determined under section 7520) of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

**I.R.C. § 664(d)(3) Exception** — Notwithstanding the provisions of paragraphs (2)(A) and (B), the trust instrument may provide that the trustee shall pay the income beneficiary for any year—

**I.R.C. § 664(d)(3)(A)** — the amount of the trust income, if such amount is less than the amount required to be distributed under paragraph (2)(A), and

**I.R.C. § 664(d)(3)(B)** — any amount of the trust income which is in excess of the amount required to be distributed under paragraph (2)(A), to the extent that (by reason of subparagraph (A)) the aggregate of the amounts paid in prior years was less than the aggregate of such required amounts.



# Possible Applicability: NIMCRUT Rules (Cont'd)

IRC Section 643(b) provides the definition of income for purposes of the above:

## (b)Income

For purposes of this subpart and subparts B, C, and D, the term “income”, when not preceded by the words “taxable”, “distributable net”, “undistributed net”, or “gross”, means the amount of income of the estate or trust for the taxable year determined under the terms of the governing instrument and applicable local law. Items of gross income constituting extraordinary dividends or taxable stock dividends which the fiduciary, acting in good faith, determines to be allocable to corpus under the terms of the governing instrument and applicable local law shall not be considered income.

This means that income is defined under applicable state law for purposes of determining the amount that can be distributed from the "make up account" in future tax years.

IRC Section 664 does give a general grant of authority to the Treasury to issue regulations and reads as follows:

I.R.C. § 664(a) General Rule — Notwithstanding any other provision of this subchapter, the provisions of this section shall, in accordance with regulations prescribed by the Secretary, apply in the case of a charitable remainder annuity trust and a charitable remainder unitrust.





# Possible Applicability: NIMCRUT Rules (Cont'd)

The Secretary subsequently issued regulations (Treas. Reg. 1.664-3(a)(1)(i)(b)(3)) to limit "income" to not exceed the appreciation above the initial fair market value of the assets contributed to the trust as of the date of the makeup payment, and reads in relevant part as follows:

**(3)** For purposes of this paragraph (a)(1)(i)(b), **trust income** generally means **income** as defined under section 643(b) and the applicable regulations. However, **trust income** may not be determined by reference to a fixed percentage of the annual **fair market value** of the **trust property**, notwithstanding any contrary provision in applicable **state law**. **Proceeds from the sale or exchange of any assets contributed to the trust by the donor must be allocated to principal and not to trust income at least to the extent of the fair market value of those assets on the date of their contribution to the trust. Proceeds from the sale or exchange of any assets purchased by the trust must be allocated to principal and not to trust income at least to the extent of the trust's purchase price of those assets.** Except as provided in the two preceding sentences, **proceeds** from the **sale or exchange** of any assets contributed to the **trust** by the **donor** or **purchased** by the **trust** may be allocated to **income**, pursuant to the **terms** of the governing instrument, if not prohibited by applicable local law. A discretionary power to make this **allocation** may be granted to the **trustee** under the **terms** of the governing instrument but only to the extent that the **state** statute permits the **trustee** to make **adjustments** between **income** and principal to treat beneficiaries impartially.

As a result of the above, there are often situations where the Trust may have "income" as defined under applicable state law, but the Trust cannot treat such income as income under the Charitable Remainder Trust resulting in the inability to distribute the full make up account to the non-charitable beneficiary.

Following the repeal of *Chevron*, Treas. Reg. 1.664-3(a)(1)(i)(b)(3) may possibly be challenged as a regulation that exceeds the Treasury Department's authority to regulate Flip NIM-CRUTs.



# **DID THE SUPREME COURT'S JUST PUT A TIGER IN THE TAXPAYERS' TANK?**

## **The Unshackling of Chevron**

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Monday, July 1, 2024  
3:30 to 4:00 PM EST  
(30 minutes)

**THANK YOU FOR PARTICIPATING!**



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