

UCLA

UCLA Public Law & Legal Theory Series

Title

King v. Burwell and Tax Court Review of Regulations

Permalink

<https://escholarship.org/uc/item/81c201m2>

Journal

Pepperdine Law Review On-Line, 2015

Author

Aprill, Ellen P

Publication Date

2015



Legal Studies Paper No. 2015-30

Annual Review, 2015 Pepperdine Law Review On-Line
(forthcoming)

King v. Burwell and Tax Court

Review of Regulations

Professor Ellen P. Aprill

King v. Burwell and Tax Court Review of Regulations

Ellen P. Aprill

As all participants in this on-line symposium discuss, the Supreme Court in *King v. Burwell*¹ declined to apply *Chevron* deference² to a tax regulation in deciding whether Internal Revenue Code (“Code” or “IRC”) section 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 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 no expertise in crafting health insurance policy of this sort. . . . This is not a case for the IRS.

The Supreme Court reached this decision despite the reliance on *Chevron* deference in the decision below and despite the Court's finding the statute to be ambiguous.⁵ The Supreme Court reached this decision without recognizing the specific grant of regulatory authority given to the Secretary of the Treasury under section 36B(g) or acknowledging that the relevant tax regulation,

¹ 135 S. Ct. 2480 (2015).

² 135 U.S. at 2488-89, citing *Chevron v. NRDC*, 467 U.S. 837 (1984).

³ Section 36B(2)(A) of the Internal Revenue Code provides a credit for taxpayers, their spouses, and dependents for premiums for “an Exchange established by the State . . .” (All references to the Internal Revenue Code of 1986, as amended, unless otherwise indicated.)

⁴ 135 U.S. at 2489. Citations omitted, but the citations include *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

⁵ 135 U.S. at 2491.

although promulgated by Treasury and the IRS,⁶ adopted and cross-referenced the definition of “Exchange” established by HHS.⁷ The Supreme Court reached this decision even though many tax regulations involve enormous amounts of dollars each year⁸ and even though the IRS is charged with administering programs that involve numerous substantive areas of law.⁹

King v. Burwell relied in good measure on *FDA v. Brown & Williamson Tobacco Corp.*,¹⁰ 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.”¹¹ Ostensibly, *Brown & Williamson* was a *Chevron* Step 1 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

⁶ 77 FR 30377, 30400 (May 23, 2012).

⁷ “Exchange has the same meaning as in 45 CFR 155.20.” Treas. Reg. sec. 1.36B-1(k). 25 CFR 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.” All code sections are to the Internal Revenue Code of 1986, as amended, unless otherwise noted.

⁸ As just one example, according to page 24 of the brief of amici curiae of the Association of American Medical Colleges et al. the Petitioner’s brief in *Mayo Foundation v. U. S.*, 562 U.S. 44, 54 (2011), the regulation subjecting residents to FICA amounts to \$700 million in taxes annually. [This brief cites the pet for cert, but I haven’t been able to locate the cert petition].

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, *The \$10 Billion Dollar Loophole*, Center for Effective Government, available at <http://www.foreffectivegov.org/blog/check-box-10-billion-tax-loophole> (Feb. 20, 2014); Jeremy Scott, *Check the Box for Tax Avoidance*, FORBES/INVESTING (Feb.19, 2014), available at <http://www.forbes.com/sites/taxanalysts/2014/02/19/check-the-box-for-tax-avoidance/>

⁹ See Kristen E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014).

¹⁰ 529 U.S. 120 (2000). For cites to *Brown & Williamson* in *King v. Burwell*, see 135 S. Ct. at 2488, 2489 (two uses), 2490.

¹¹ *Id.* at 155.

presented” and that “in extraordinary cases” courts should “hesitate before concluding the Congress has intended such an implicit delegation.”¹²

In *King v. Burwell* the Court rejected use of *Chevron*. It thus explicitly recast *Brown & Williamson* into a so-called *Chevron* Step 0 case,¹³ 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.

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.¹⁴ This inconsistency may be particularly evident in the case of tax law. In 1978, the Court in *National Muffler v. United States* tested the reasonableness of a tax regulation by such 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.¹⁵ Although the Court in *National Muffler* concluded that “[t]he choice among reasonable interpretations is for the Commissioner, not the courts,”¹⁶ its multi-factor test gave courts a number of bases for invalidating tax regulations.

¹² *Id.* at 159.

¹³ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006); Thomas W. Merrill and Kristin E. Hickman, *Chevron’s Domain*, 80 GEO. L.J. 833 (2001)

¹⁴ 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 FORD. L. REV. 607 (2014); Connor R. Raso & William N. Eskridge, *Chevron as a Canon and Not a Precedent: An Empirical Study of What Motivates Judges in Deference Cases*, 110 COLUM. L. REV. 1717 (2010).

¹⁵ 440 U.S. 472, 477 (1978).

¹⁶ *Id.* at 448.

In *Mayo Foundation v. U.S.*, the Supreme Court noted the distance between *National Muffler* and *Chevron*:¹⁷

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.

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.”¹⁸ In *Mayo*, ending any confusion or inconsistency, the Court held the *Chevron* applies to tax regulations promulgated pursuant to the grant of general authority in section 7805(a) of the Internal Revenue Code¹⁹ 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.”²⁰

In the next two tax cases it encountered, however, the Court avoided possible and plausible *Chevron* Step 2 inquiries. It decided both *U.S. v. Quality Stores*²¹ and *U.S. v. Home Concrete & Supply*²² 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

¹⁷ 562 U.S. 44, 54 (2011).

¹⁸ 562 U.S. at 54.

¹⁹ §7805(a) provides the Commissioner with authority to “prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code. It applies to the entire Internal Revenue Code. Congress also sometimes provides additional authority for tax regulations under specific provisions of the Internal Revenue Code, such as section 36B(g).

²⁰ 562 U.S. at 55.

²¹ 134 S.Ct. 1395 (2014).

²² 132 S.Ct. 1836 (2012).

required the Court to decide whether Step 2 of *Chevron* applied to revenue rulings.²³ In *Home Concrete*, the Court held invalid a regulation providing that the 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.”²⁴ Applies when a taxpayer understates income, in particular gain reported, because of overstating of basis.” The Court relied on its earlier interpretation of the meaning of a phrase in the 1939 Code materially indistinguishable from the language at issue²⁵ and determined that this judicial interpretation of the statute controlled and foreclosed the position taken in the regulations.²⁶ It did so even though the earlier opinion had found the statutory language “not unambiguous.”²⁷

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.²⁸ 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.²⁹ However, as with

²³ 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. *United States v. Quality Stores, Inc. (In re Quality Stores, Inc.)*. In contrast, the Federal Circuit had upheld the IRS interpretation, relying on revenue rulings. *CSX Corp. v. United States*, 518 F. 3d 1328 (Fed. Cir. 2008).

²⁴ § 6501(e)(1)(d). If the phrase applies, the statute of limitations increases from three years to six.

²⁵ 132 S. Ct at 139, citing *Colony, Inc. v. CIR*, 357 U.S. 28 (1958).

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

²⁷ 132 S. Ct. at 1840 (quoting *Colony*, 357 U.S. at 33).

²⁸ See Lee A. Sheppard, *News Analysis: Recent Supreme Court Decisions and Judicial Deference*, 2015 TNT 128-1 (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”

²⁹ See ABA Administrative Law Section Panel on *King v. Burwell*, available at 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.

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.³⁰ 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 \$97.7 billion at issue.³¹ Many of the cases the Tax Court hears involve the validity of tax 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*.³² 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.

The Tax Court and *Chevron*

³⁰ The Tax Court, unlike other possible venues, permits a taxpayer to litigate without first paying the tax. See Tax Court: About the Court at <https://www.ustaxcourt.gov/about.htm>.

³¹ These numbers are derived from the presentation of Deborah Butler, Office of Chief Counsel, to the ABA Tax Section Committee on Court Procedure and Practice, January 2013, available on WESTLAW, CLE.

³² See *generall*, Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 THE TAX LAW. 717 (2004).

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,³³ it has certainly done so in many, if not all, of its more recent cases.³⁴ *Mayo Foundation*, after all, eliminated any doubt that such was the proper approach, at least for regulations promulgated with notice and comment, whether the regulations are promulgated pursuant to a grant of specific authority or pursuant to the grant of general authority in section 7805(a).³⁵ The Tax Court has, since *Mayo*, consistently and usually without controversy used *Chevron*,³⁶ 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.³⁷

³³ 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 Federal Savings and Loan Association v. Commissioner*, 948 F.2d 289, 300 (6th Cir. 1991).

³⁴ 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. CIR*, 145 T.C. No. 3 (July 27, 2015), invalidating a tax regulation because, although it cites *Chevron*, because it turns on the particular issue of reasoned decision making, often known as the *State Farm* doctrine, from *Motor Vehicles Mfrs. Assn. v. State Farm Mut. Auto. Ins.*, 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 standard of *State Farm*.” NOT SURE HOW TO DO PIN CITE. That is, the Tax Court may be making new demands on *Chevron* Step 2 in ways that allow it to invalidate regulations. In an even more recent case, *McDonald v. CIR*, T.C. Memo-169 (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 made more liberal changed in response to public comment. NEED PIN CITE.

³⁵ See Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NATIONAL TAX J. 917, 925-31 (2012) for a discussion of the issues raised by temporary regulations promulgated without notice and comment.

³⁶ 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. CIR*, 136 T.C. 432, 440-41 (2011) (no reconsideration of earlier case regarding statute of limitation for innocent spouse after *Mayo* because earlier case appealable to the Seventh Circuit had applied the Seventh Circuit rule of using *Chevron*). For citation of *Chevron* that sounds almost mechanical, as if the Tax Court is checking off a requirement, see *The Howard Hughes Company v. CIR*, 142 T.C. 355, 388 (2014) (regulation regarding costs attributable to dwelling units in definition of home construction contract in long-term contract regulations “reasonable,” citing *Chevron*).

³⁷ In *Carpenter Family Investments v. CIR*, 136 T.C. 373, 389 (2011), a case 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.

In the recent case of *Perez v. CIR*,³⁸ for example, the Tax Court found that Treas. Reg. sec. 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” and, as a result, payments to a young woman who donated her eggs pursuant to a contract could not exclude the amounts she received. The Tax Court made short shrift of Step 1: “The Code doesn’t define “damages”, and so we can swiftly hop onto Chevron’s step two.”³⁹ Under Step 2, the Tax Court found the regulation not “arbitrary or capricious in substance on manifestly contrary to statute,” primarily on the basis of long-standing case law and the legislative changes to section 104.⁴⁰

In *Gaugh Properties v. CIR*,⁴¹ the Tax Court found nothing in the structure of section 6229(e) (a provision providing statute of limitations for assessment of tax when a partner is not identified), 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, Temporary Proced. & Admin. Regs., . . . is based on a permissible construction of section 6229(e).”⁴²

³⁸ 144 T.C. No. 4 (Jan. 15, 2015).

³⁹ Not sure how to give pin cite

⁴⁰ Similarly, in *Our Country Home Enterprises v. CIR*, 145 T.C. No. 1 (July 13, 2015), the Tax Court upheld the economic benefit provisions of Reg. sec. 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 section 61 does not include the term “economic benefit,” the Tax Court moved quickly from *Chevron*’s Step 1 to Step 2. It upheld the regulation as reasonable, looking to “long standing judicial jurisprudence related to section 61(a).” NEED PIN – NOT SURE HOW TO DO WITH SO RECENT A CASE

⁴¹ 139 T.C. 219 (2012).

⁴² 139 T.C. at 248.

The long and varied opinions of the Tax Court judges in *Tigers Eye Trading v. CIR*,⁴³ offer a particularly lively discussion of *Chevron* Step 2. There, petitioner asserted that, under the DC Circuit decision *Petaluma X Partners v. CIR*,⁴⁴ the Tax Court lacked jurisdiction to decide certain issues, including application of penalty provisions, in a partnership tax dispute. The respondent CIR assumed that it was bound by the DC Circuit decision.

Relying on the fact that *Mayo* had been decided after the DC Circuit *Petaluma* opinion, on a later DC Circuit case,⁴⁵ and on *Chevron*, the main opinion, authored by Judge Beghe, argued that holdings of the DC 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,”⁴⁶ It then rejected, as a matter of law, the Government’s concession and asserted its jurisdiction. 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.⁴⁷

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) disagree.”⁴⁸ He rejects Judge Beghe’s reliance on *Mayo* on the grounds that the DC Circuit had long been applying *Chevron* deference to tax regulations and that it did not overlook the regulation at issue.

⁴³ 138 T.C. 67 (2012). 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. Judge Halpern wrote a concurring opinion that judges Beghe, Goeke, and Wherry joined. Judge Wherry wrote a concurring opinion. Judge Marvel wrote a dissenting opinion, in which Judge Kroupa joined Part I and judges Gale and Paris joined part II. Judge Holmes wrote a dissenting opinion.

⁴⁴ 591 F.3d 649 (D.C. Cir. 2010).

⁴⁵ *Intermountain Ins. Serv. Of Vail, LLC v. CIR*, 650 F.3d 691 (D.C. Cir. 2011)(deference under *Mayo* requires deference to definition in valid regulations rather than earlier case law).

⁴⁶ 138 T.C. at 74.

⁴⁷ 138 T.C. at 124.

⁴⁸ 138 T.C. at 174 (Holmes, J., dissenting). “*Tsuris*” is a Yiddish word meaning trouble or distress. See <http://www.merriam-webster.com/dictionary/tsuris>.

He dismissed the majority's reliance on *Intermountain* because *Intermountain* did not address the same issue.⁴⁹ 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*.⁵⁰ 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.

The Tax Court and *Brown & Williamson*

Tax Court cases often cite *Brown & Williamson*⁵¹ for the truism that statutes are interpreted in their context and harmoniously, sometimes with and sometimes without any link to *Chevron*.⁵² That is, the Tax Court often uses *Brown v. 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

⁴⁹ 138 T.C. at 177-78. The issue in *Intermountain* was that before and resolved the Supreme Court in *Home Concrete*, whether an earlier Supreme Court case blocked regulatory reinterpretation.

⁵⁰ 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).

⁵¹ For analyzing Tax Court use of *Brown & Williamson*, I have not limited research to cases after *Mayo*.

⁵² See, e.g., *Hewlett-Packard Co. v. CIR*, 139 T.C. 255, 265 n. 13 (2012) (cited for construing meaning of words in statute; not in context of *Chevron*); *New Millennium Trading v. CIR*, 131 T.C. 274, (2008) (in context of *Chevron* Step 1 and then concludes that regulation is consistent with statute); *Lewis v. CIR*, 128 T.C. 48, 54 (2007) (in context of asking whether Congress has spoken to issue addressed in regulation, but specifying that regulation is valid under *Chevron* or *National Muffler*); *TG Missouri Corp. v. CIR*, 133 T.C. 278, 288 (2009) (interpretation of statute; not in context of interpreting regulation); *Carlebach v. Cir*, 139 T.C. 1, 10 (2012) (in connection with *Chevron* Step 1 for reading together subsections of statute and principle of annual accounting; regulation deemed valid under Step 2 even if statute weren't clear); *Speckling v. CIR*, 117 T.C. 95, 107 (2001) (statutory interpretation; cites *Brown & Williamson* and *Chevron* to find regulation consistent with meaning of statute); *Dorn v. Cir*, 119 T.C. 356, 358 (2002) (guide to interpreting statute in order to give Tax Court jurisdiction; no regulation at issue); *Shea Homes v. CIR*, 142 T.C. 60 (2014) (cited for proposition that different parts of a regulation must be harmonized and rejecting the CIR's position in the case as to the meaning of the regulations).

the Internal Revenue Code.⁵³ 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 v. CIR*,⁵⁴ where it applied the case in the context of *Chevron* Step 1. *Square D* involved the validity of Treas. Reg. sec. 1.167(a)-3, a regulation that prevented the taxpayer from deducting interest until amounts were paid, and not simply accrued. 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. CIR*, that had invalidated the same reg.⁵⁵ In the earlier case, the Tax Court had held the regulation "manifestly contrary to the statute" for failing to follow the matching principle of section 267.⁵⁶ 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. 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.

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."⁵⁷ It noted that the Supreme Court in *Brown & Williamson* had looked at subsequent Acts of Congress. For the issue before it, the validity of Treas. Reg. sec. 1.167(a)-3, the Tax

⁵³ Thus for example, *Square D v. CIR*, 118 T.C. 299 (2002), *infra*, discussed different subsections of the same code provision, while *TG Missouri Corp. v. CIR*, 133 T.C. 279 (2009), sought to harmonize subsections of sections 41 and 174.

⁵⁴ 118 T.C. 299 (2002).

⁵⁵ *Tate & Lyle, Inc. v. CIR*, 107 T.C. 656 (1994), *rev'd and remanded*, 87 F.3d 99 (a996).

⁵⁶ 118 T.C. at 306-07.

⁵⁷ 118 T.C. at 308.

Court conceded that, in light of *Brown v. Williamson*, its “opinion in *Tate & Lyle* 1 may have given insufficient attention to fitting all part of section 267(a) into a “harmonious whole.”⁵⁸

In particular, according to the Tax Court, its earlier opinion failed to give sufficient weight to the impact of the enactment of section 267(a)(3) two years after enactment of section 267(a)(2) could have on the meaning of section 267(a)(2).⁵⁹ 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 impose the cash method on a payor with a foreign payee.⁶⁰ Thus, the Tax Court concluded, the regulation at issue was reasonable under *Chevron* Step 2.⁶¹ 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*.

The recent case, *Yari v. CIR*,⁶² 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 section 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. 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. It cited *Brown & Williamson* for the proposition that statutes must be interpreted “in their context and with a view to their place in the

⁵⁸ 118 T.C. at 308.

⁵⁹ Section 267(a)(2) invokes the matching principle, but section 267(a)(3) gives the Secretary authority to apply the matching principle by regulations when the payee is not a United States person.

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

⁶¹ 118 T.C. at 312

⁶² 143 T.C. 157 (2014).

overall statutory scheme.”⁶³ Somewhat ironically, *Yari* noted how difficult is “the process of divining the legislative intent underlying a statute’s language and structure, while subject to the canons of construction and well-established methodologies”⁶⁴ by pointing specifically to the split in the circuits that gave rise to the Supreme Court’s decision in *King v. Burwell*.⁶⁵

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 is the judiciary.⁶⁶

⁶³ 143 T.C. at 164, quoting 529 U.S. 120, 133.

⁶⁴ 143 T.C. at 166, n. 5.

⁶⁵ *Id.*

⁶⁶ For a discussion of these two bases for *Chevron* deference, see Gluck, *supra* note 14, at 620-21; Peter L. Strauss, “Deference Is Too Confusing – Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COL. L. REV. 1143 (2012). Admittedly, the Tax Court is an Article I, not an Article III court. Nonetheless, the reasoning in favor of

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 well 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,⁶⁷ I predict it would happily accept such an offer. As a supporter of *Chevron*, someone who feels that administrative agencies are better placed than judges to interpret statutes in the myriad and ever-changing situations to which they must apply,⁶⁸ I hope my own prediction is proved wrong.

deference to an administrative agency but not a court in cases of statutory ambiguity are the same. See 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).

⁶⁷ See generally Symposium, *Taking Administrative Law to Tax*, 63 DUKE L. J. 1625 and ff (2014) and other contributions to this symposium.

⁶⁸ See Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005).