
ADMINISTRATIVE LAW & REGULATION

GOODBYE TAX EXCEPTIONALISM

By Kristin E. Hickman*

In the past few decades, the practices and doctrines governing the interpretation and administration of the federal tax code have diverged somewhat from general administrative law doctrines and norms in several ways. No one doubts that the Administrative Procedure Act (“APA”) applies to federal tax administration. No one questions that Treasury regulations interpreting the Internal Revenue Code (“IRC”) are legally binding on all taxpayers. Nevertheless, while the standard of judicial review for most agency regulations that carry such legal force derives from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹ at least until very recently, many tax lawyers, the United States Tax Court, and some circuit courts maintained that an arguably less deferential standard articulated prior to *Chevron* in the tax-specific case of *National Muffler Dealers Ass’n, Inc. v. United States* applied to most tax regulations.² The APA generally requires that agencies seeking to promulgate legally binding regulations do so by publishing a notice of proposed rulemaking and considering public comments received in response before issuing final regulations.³ If an agency feels the need to issue such regulations prior to or without pursuing notice and comment, the APA requires the agency to explain why pursuing the default notice-and-comment process is “impracticable, unnecessary, or contrary to the public interest.”⁴ The Treasury Department (“Treasury”), however, issues a large percentage of tax regulations—more than one third during a recent three-year period—as temporary regulations with only post-promulgation notice and comment and without a contemporaneous finding of good cause for bypassing that process.⁵ Finally, since the Supreme Court’s decision in *Abbott Laboratories v. Gardner* in 1967, the courts have interpreted the APA as establishing a presumption in favor of pre-enforcement judicial review of agency rulemaking efforts.⁶ By contrast, the courts have long interpreted language in the IRC and the Declaratory Judgment Act as precluding judicial review of pre-enforcement challenges against Treasury regulations and IRS rulings.⁷

Deviations from general administrative law norms are not unique to tax. Lawyers in many practice areas tend to over-rely on precedents specific to the agencies with which they frequently interact, leading to deviations from general administrative law principles in other areas of law as well.⁸ Congress can and often does adopt specific statutory provisions that alter the requirements of the APA for particular agencies. Nevertheless, tax scholars for years have decried the particularly insular nature of the tax bar and its resulting habit of ignoring potentially relevant nontax legal doctrine.⁹ “Tax is different” has been a frequent and often unchallenged meme.

The tide is turning, however. Two recent judicial opinions, one from the Supreme Court and the other from D.C. Circuit

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sitting en banc, have begun to reverse the trend of treating tax differently from other areas of administrative law.

Mayo Foundation for Medical Education and Research v. United States

The first, and most important, is the Supreme Court’s decision this past Term in *Mayo Foundation for Medical Education & Research v. United States*.¹⁰ The case concerned a Treasury Department interpretation of a provision of the IRC exempting students who work for the academic institutions in which they are enrolled from FICA taxes on their wages. Treasury exercised its general authority under IRC § 7805(a) to “prescribe all needful rules and regulations for the enforcement of” the IRC and adopted a regulation declaring that medical residents are not students, reversing a longstanding IRS interpretation to the contrary.¹¹ Institutions that withheld and paid the taxes unsuccessfully sought refunds and then promptly sued, challenging the validity of the regulation.

For years prior to *Mayo*, the courts and the tax community had debated whether *Chevron* or the tax-specific *National Muffler* provided the appropriate standard of review for evaluating such general authority Treasury regulations, and for that matter whether the two standards were meaningfully different.¹² The Supreme Court’s previous discussions of the issue were muddled and contradictory.¹³ Finally, the *Mayo* case brought the issue squarely before the Supreme Court. The *National Muffler* standard expressly called for considering an interpretation’s consistency and longevity¹⁴—factors that weighed against Treasury’s new regulation—while *Chevron* expressly recognizes the need to allow agencies to change their interpretive positions. Also, unlike in prior tax cases before the Court, briefing in *Mayo* by the parties and by dueling amici clearly raised and thoroughly addressed the question of *Chevron* versus *National Muffler* review.¹⁵

Upholding the regulation, an undivided Court unequivocally chose *Chevron* and rejected *National Muffler* as the standard of review for general authority Treasury regulations. In reaching that decision, the Court made several observations and conclusions, including that the *Chevron* and *National Muffler* standards “call for different analyses of an ambiguous statute”; that *National Muffler* factors such as an agency’s inconsistency or an interpretation’s longevity or contemporaneity (or lack thereof) are not reasons for denying *Chevron* deference to a Treasury regulation; and, finally, that “*Chevron* and *Mead*, rather than *National Muffler* . . . , provide the appropriate framework for evaluating” the Treasury regulation at issue.¹⁶

In the midst of this analysis, the Court also offered a short discussion of the relationship between tax administration and administrative law doctrine with potential implications beyond the standard of review question. First, the Court stated explicitly, “[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly ‘[r]ecogniz[ed] the importance of maintaining a

uniform approach to judicial review of administrative action.”¹⁷ In making this statement, the Court quoted *Dickinson v. Zurko*, a non-tax (patent) case with an extensive discussion regarding Congress’s intent that the APA bring uniformity to the otherwise disparate field of federal administrative action.¹⁸ The Court also cited *Skinner v. Mid-America Pipeline Co.*¹⁹ for “declining to apply ‘a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.’”²⁰ Other turns of phrase within the *Mayo* Court’s analysis reflect a similar orientation toward reconciling the tax and non-tax contexts.

Cohen v. United States

The D.C. Circuit’s recent en banc decision in *Cohen v. United States* is less immediately consequential but, consistent with the Supreme Court’s policy of administrative law uniformity, represents a further shift in favor of bringing tax administration back in line with administrative law norms.²¹ The case grew from several challenges against an old telephone excise tax made defunct by changes in telephone technology and long-distance billing practices. After several circuit courts rejected the IRS’s arguments in favor of the continued vitality of the tax,²² the IRS promulgated special refund procedures for the tax by issuing informal guidance, Notice 2006-50, without notice and comment.²³ Taxpayers who consider the IRS’s special refund procedures for the telephone excise tax to be fundamentally flawed challenged Notice 2006-50 on APA procedural grounds, seeking notice and comment as the appropriate forum for requiring the IRS to address the alleged inadequacies.

IRC § 7421(a), also known as the Anti-Injunction Act, generally prohibits any lawsuit “for the purpose of restraining the assessment or collection of any tax” until either the IRS issues a notice of deficiency to a taxpayer or denies a taxpayer-requested refund. Correspondingly, the Declaratory Judgment Act prevents courts from providing declaratory relief for controversies “with respect to Federal taxes.”²⁴ In a series of cases in the 1960s and 1970s, the Supreme Court interpreted these provisions as precluding judicial review of virtually all tax cases except for statutory deficiency or refund actions.²⁵ Although the Court has never interpreted the Anti-Injunction Act or the Declaratory Judgment Act as precluding pre-enforcement judicial review of APA procedural challenges against Treasury regulations and IRS rulings, a few lower courts interpreted its precedents as requiring that conclusion.²⁶

In *Cohen*, after the district court dismissed the case for lack of jurisdiction, a split panel of the D.C. Circuit reversed and remanded the case for consideration of the merits of the taxpayers’ APA procedural claim.²⁷ Several months later, the court granted the government’s petition for en banc review and requested briefing on several questions pertinent to interpreting the Anti-Injunction Act and the Declaratory Judgment Act in relation to the APA.²⁸ This summer, a divided en banc court issued its decision, also in favor of the taxpayers, reaching several conclusions regarding the courts’ jurisdiction to consider APA procedural claims in the tax context.²⁹

First, the court held that APA § 702 waives sovereign immunity for APA procedural challenges in the tax context, just

as it does in other regulatory areas; there is no tax exception from the APA.³⁰ Picking up the *Mayo* Court’s admonition in favor of administrative law uniformity, quoted elsewhere in the majority opinion, the court concluded that “[t]he IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA.”³¹

Next, the court held that the Anti-Injunction Act and the Declaratory Judgment Act do not bar judicial review of the taxpayers’ APA procedural claim.³² Citing and quoting extensively from *Hibbs v. Winn*, in which the Supreme Court interpreted a similar provision governing state taxation,³³ the D.C. Circuit adopted a narrow, textualist interpretation of the Anti-Injunction Act’s limitation on judicial review. According to the court, the Anti-Injunction Act’s prohibition against suits to restrain “the assessment or collection of any tax” does not refer to a “‘single mechanism’ that ultimately determines the amount of revenue the Treasury retains” and is not “synonymous with the entire plan of taxation.”³⁴ Instead, “assessment” and “collection” are defined terms in the Internal Revenue Code. “Assessment” represents “the trigger for levy and collection efforts,” and “collection” is “the actual imposition of tax against a plaintiff.”³⁵ The appellants’ APA procedural claim does not concern the assessment or collection of taxes because “[t]he IRS previously assessed and collected the excise tax at issue”; rather, this suit is merely about the procedures under which the IRS will refund taxes that it has already collected.³⁶ Although the text of the Declaratory Judgment Act is arguably broader in its prohibition of declaratory relief in tax cases, the *Cohen* court held that the Declaratory Judgment Act is to be interpreted coterminously with the Anti-Injunction Act and not as a separate limitation on judicial review.³⁷

While the government argued that interpreting the Anti-Injunction Act and the Declaratory Judgment Act in this way would open the floodgates for APA challenges against Treasury and IRS actions, those provisions are not the only potential limitations on judicial review of agency action, whether in the tax context or otherwise. The majority and dissenting opinions considered several. Particularly where (as here) a specific statute provides its own legal mechanisms for seeking judicial review, APA §§ 703 and 704 limit the availability of judicial review under the APA to cases in which the challenging parties otherwise lack an adequate legal remedy.³⁸ The dissenting judges in *Cohen* contended that statutory refund actions authorized by IRC § 7422 offered the appellants an adequate legal remedy.³⁹ The majority disagreed on the ground the taxpayers’ APA procedural challenge seeks equitable relief rather than a tax refund (even if a refund is their ultimate goal), and IRC § 7422 does not offer that remedy.⁴⁰ Both opinions additionally discuss the doctrines of ripeness and exhaustion at some length, while standing and finality limitations make brief appearances as well. In analyzing these different barriers to judicial review, the *Cohen* majority construed its conclusions very narrowly. Indeed, the court labeled the case before it as “*sui generis*” and either assumed or stated outright that judicial review of many if not most APA procedural challenges to Treasury and IRS actions will be limited by one or more of these obstacles.⁴¹ Hence, while the taxpayers’ APA claim may not be the only one eligible for judicial review outside of the statutory mechanisms provided by

the IRC, just how many others will be able to run this gauntlet of limitations is unclear. Regardless, the *Cohen* court's insistence upon treating the taxpayer's APA challenge as such, and its interpretation of the Anti-Injunction Act and the Declaratory Judgment Act as interacting with rather than wholly displacing the APA, represent bold statements about tax as part of and not separate from administrative law more generally.

One final point of interest from *Cohen* concerns the court's statement regarding the finality of Notice 2006-50. The initial panel decision in the case determined that Notice 2006-50 represents final agency action because it determines taxpayer rights and obligations and binds the agency.⁴² In discussing other issues concerning the justiciability of the taxpayers' APA claim, the en banc court reiterated that conclusion.⁴³ The IRS does not employ APA notice and comment rulemaking in issuing notices (or other informal guidance documents, like revenue rulings or revenue procedures), taking the position that these pronouncements are exempt from such requirements as either interpretative rules or policy statements. Indeed, the *Cohen* taxpayers' primary claim at this point is that the IRS should have subjected the rules contained in Notice 2006-50 to notice-and-comment rulemaking and failed to do so.

General administrative law doctrine surrounding the interpretative rule and policy statement exemptions from notice and comment procedures is notoriously murky but overlaps substantially with finality doctrine.⁴⁴ A conclusion that Notice 2006-50 represents a justiciable final agency action does not automatically compel a decision that the IRS should have used notice and comment in that pronouncement's development, but a contrary holding may be difficult to justify. If, in future proceedings, the district court and the D.C. Circuit ultimately conclude that Notice 2006-50 is procedurally invalid for the lack of notice-and-comment rulemaking, then the same is likely true of other IRS notices, revenue rulings, and revenue procedures, meaning that many such guidance documents may be susceptible to invalidation on APA procedural grounds. Thus, while the D.C. Circuit's recent decision in the *Cohen* case really concerns the timing of and avenues for seeking judicial review in tax cases, rather than its availability under any circumstances, the panel's earlier conclusion that Notice 2006-50 represents final agency action may ultimately be the most significant aspect of this case vis-à-vis future litigation.

Conclusion

Notwithstanding these two very important decisions, so many questions regarding the applicability of administrative law doctrines and norms in the tax context remain unanswered. The *Cohen* taxpayers' claims regarding the substantive and procedural validity of Notice 2006-50, and the implications for other IRS guidance documents, remain unresolved.⁴⁵ Additionally, the Supreme Court recently agreed to consider a series of conflicting federal circuit court decisions regarding the validity of yet another Treasury regulation, this one raising issues concerning the applicability of the Court's decision in *National Cable and Telecommunications Ass'n v. Brand X Internet Services*⁴⁶ to a Treasury regulation promulgated initially in temporary form with only post-promulgation notice and comment in the course of litigation.⁴⁷ The courts may ultimately decide

that, in some instances, the IRC authorizes deviations from the APA in the tax context. Nevertheless, *Mayo* and *Cohen* have buried the notion that tax is especially unique among areas of government regulation. The tax community has taken notice, and government officials responsible for administering the tax laws are on notice that they should attend also to administrative law doctrines and norms.

Endnotes

- 1 467 U.S. 837, 842-43 (1984); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that agency actions carrying "the force of law" are *Chevron*-eligible).
- 2 440 U.S. 472, 477 (1979).
- 3 5 U.S.C. § 553(b)-(c).
- 4 5 U.S.C. § 553(b)(B).
- 5 *See* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1748-51 (2007) (documenting empirical study results).
- 6 387 U.S. 136 (1967).
- 7 *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1164-74 (2008) (summarizing the jurisprudence).
- 8 *See generally* Richard Levy & Robert Glicksman, *Agency-Specific Precedents*, 89 TEXAS L. REV. 499 (2011) (describing several examples).
- 9 *See, e.g.*, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) ("[T]ax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law [T]his misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate."); Leandra Lederman, *"Civil"izing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency*, 30 U.C. DAVIS L. REV. 183, 183 (1996) ("Tax law tends to be uninformed by other areas of law. This insularity has the unfortunate consequence of depriving tax and other fields of cross-fertilization.").
- 10 131 S. Ct. 704 (2011).
- 11 *See* Treas. Reg. § 31.3121(b)(10)-2(e); T.D. 9196, 69 Fed. Reg. 76404 (Dec. 21, 2004).
- 12 *See, e.g.*, Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1556-59 (2006) (summarizing the disagreement among the federal circuit courts and legal scholars).
- 13 *See* Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy*, 89 TEXAS L. REV. *SEE ALSO* 89, 107-08 (2011) (analyzing Supreme Court tax precedents).
- 14 *See* *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979).
- 15 *See* Brief for Petitioners, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011) (No. 09-837); Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondent, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011) (No. 09-837); Brief of Tax Professor Carlton M. Smith as Amicus Curiae in Support of the Petitioners, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011) (No. 09-837).
- 16 *See Mayo*, 131 S. Ct. at 712-14.
- 17 *Id.* at 713.
- 18 527 U.S. 150, 154 (1999).
- 19 490 U.S. 212, 222-23 (1989).

20 *Mayo*, 131 S. Ct. at 713.

21 2011 WL 2600672 (D.C. Cir. Jul. 1, 2011) (en banc).

22 *See, e.g.*, *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005); *Office Max, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005); *Nat'l R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005).

23 *See* IRS Notice 2006-50, 2006-1 C.B. 1141.

24 28 U.S.C. § 2201(a).

25 *See, e.g.*, *United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 8, 12 (1974) (per curiam); *Alexander v. "Ams. United" Inc.*, 416 U.S. 752, 756-57, 763 (1974); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 727, 735-36 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5-6 (1962).

26 *See, e.g.*, *Stephenson v. Brady*, 927 F.2d 596, 1991 WL 22835, at *2, *4-5 (4th Cir. 1991) (per curiam) (unpublished table decision); *Reimer v. United States*, 919 F.2d 145, 1990 WL 186825, at *1-3 (9th Cir. 1990) (unpublished table decision); *cf. Inv. Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 8-9 (D.C. Cir. 1979) (reading the Anti-Injunction Act and the Declaratory Judgment Act as statutory limitations on pre-enforcement judicial review in the tax context, notwithstanding the APA presumption in favor thereof). *But see* *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1285-86 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976) (concluding before vacatur that the Anti-Injunction Act, the Declaratory Judgment Act, and the APA do not operate to preclude judicial review of all pre-enforcement tax claims).

27 *See* *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009), *vacated in part*, 599 F.3d 652 (D.C. Cir. 2010).

28 *See* *Cohen v. United States*, 599 F.3d 652 (D.C. Cir. 2010).

29 *See* *Cohen v. United States*, 2011 WL 2600672 (D.C. Cir. Jul. 1, 2011) (en banc).

30 *See id.* at *4.

31 *Id.*

32 *See id.* at *6-7.

33 *See* *Hibbs v. Winn*, 542 U.S. 88, 99-108 (2004) (interpreting 28 U.S.C. § 1341).

34 *Cohen*, 2011 WL 2600672, at *7.

35 *Id.*

36 *Id.*

37 *See id.* at *8-12.

38 *See* 5 U.S.C. §§ 703 & 704.

39 *See Cohen*, 2011 WL 2600672, at *19 (Kavanaugh, J. dissenting).

40 *See id.* at *12-14.

41 *Id.* at *14.

42 *See Cohen*, 578 F.3d at 8-9.

43 *See Cohen*, 2011 WL 2600672, at * 4.

44 *See, e.g.*, Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 547-48 (2000) (citing cases describing the distinction between legislative and interpretative rules as "fuzzy," "tenuous," "blurred," "baffling," and "shrouded in considerable smog").

45 *See generally* Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 (2009) (documenting administrative law questions raised by IRS use of informal guidance documents).

46 545 U.S. 967 (2005).

47 *See* *United States v. Home Concrete & Supply*, No. 11-139, 2011 WL 3322358 (Sept. 27, 2011) (granting certiorari to evaluate validity of regulation interpreting IRC § 6501(e)); *see also, e.g.*, *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368 (Fed. Cir. 2011) (finding IRC § 6501(e) statute ambiguous at *Chevron* step one, deferring to the regulation at *Chevron* step two, and declaring APA procedural challenge against temporary regulation moot because the regulation was finalized using notice and comment); *Burks v. United States*, 633 F.3d 347 (5th Cir. 2011) (finding IRC § 6501(e) clear

in support of the taxpayer at *Chevron* step one but alternatively declaring that the court would have found the regulation unreasonable at *Chevron* step two because the temporary regulation lacked notice and comment); *Beard v. Comm'r*, 633 F.3d 616 (7th Cir. 2011) (finding IRC § 6501(e) clear in support of the government at *Chevron* step one but declaring that the court would have deferred to the regulation regardless).

