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Chevron Step Zero After City of Arlington.

Patrick J. Smith looks at how the Supreme Court in City of Arlington rejected the contention that Chevron does not apply to questions concerning the scope of an agency's jurisdiction, and he notes that the most unsatisfactory aspect of Mead's test for determining when Chevron applies has been eliminated.

City of Arlington was not a tax case, but is still relevant for the tax world because the Supreme Court clarified when the Chevron two-step test for evaluating the validity of some agency interpretations of statutory provisions applies. This issue is generally referred to as "Chevron step zero." The main holding of City of Arlington was that issues of statutory interpretation related to the scope of the agency's jurisdiction or authority to act are subject to the Chevron two-step test. However, the decision also suggests that the most unsatisfactory aspect of the Mead test for answering Chevron step zero may have been eliminated.

Introduction

The Supreme Court's recent decision in City of Arlington, Texas v. FCC1 did not involve a tax issue, so most tax professionals are probably unaware of the decision. However, the case addresses an aspect of the two-part test for evaluating the validity of agency actions that was established in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.2 Because Mayo Foundation for Medical Education and Research v. United States3 made clear that the Chevron two-part test applies to actions taken by the IRS, just as it does to those taken by all other federal agencies, City of Arlington is relevant to the tax world.4

In City of Arlington, the Court granted certiorari on the question whether the Chevron test applies to issues of statutory interpretation of the scope of a federal agency's jurisdiction or authority to act. The answer, in an opinion written by Justice Antonin Scalia, is an emphatic yes. That holding in and of itself is important enough, but perhaps even more important is what the decision suggests about other aspects of what is now usually referred to as Chevron step zero — namely, determining when the Chevron two-part test applies.5

The decision in which the Court has most comprehensively addressed Chevron step zero is United States v. Mead Corp.6 What is most interesting about the City of Arlington decision is the likelihood that the decision has eliminated the most unsatisfactory aspect of the Chevron step zero test articulated in Mead.

While most of Mead's Chevron step zero test is straightforward, in one respect it is vague, undefined, and open-ended. It is that aspect of the Mead test that seems to have been eliminated by City of Arlington. If that element of the City of Arlington decision holds up, this modification of the Chevron step zero test would be most welcome.

The Chevron Two-Step Test

The Chevron two-step test applies to judicial review of an agency interpretation of a statutory

provision the agency is responsible for administering. Chevron describes the first step of the test as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. 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.7

In an important elaboration of the step one analysis, the Chevron Court emphasized that the step one inquiry should be based on an application of the "traditional tools of statutory construction":

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.8

If the issue of statutory interpretation can be resolved by the reviewing court in step one of the Chevron two-part test, the agency interpretation is given no special weight. If, under step one, the court's interpretation of the statutory provision is different from the agency's interpretation, the agency's interpretation is rejected. If the court's interpretation of the statutory provision coincides with the agency's interpretation, that shared interpretation is the law, not because it is the agency's interpretation, but because the court has concluded that this interpretation is the required interpretation under Chevron step one.

If the issue of statutory interpretation cannot be resolved by the reviewing court in step one of the Chevron two-part test, the court must turn to step two, which Chevron describes as follows:

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. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.9

A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.10

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.11

Left open in Chevron was the step zero issue of which agency interpretations are evaluated under the Chevron two-step test.12 The Court did not provide a comprehensive answer to that question until Mead.

Mead's Answer to Step Zero

Mead described its answer to the Chevron step zero issue as follows:

We hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears [1] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [2] that the agency interpretation claiming deference was promulgated in the exercise of that authority.13

Like the Chevron test itself, Mead's answer to the Chevron step zero question has two parts. The

first part is that for Chevron to apply, Congress must have "delegated authority to the agency generally to make rules carrying the force of law," usually by notice-and-comment rulemaking but sometimes by case-by-case formal adjudication.14 The second part is that for Chevron to apply, the agency must have promulgated the "interpretation claiming deference . . . in the exercise of that authority" — namely, the authority "to make rules carrying the force of law."15

In almost all cases, the first part of this two-part test will be easily answered and satisfied because Congress authorizes most federal agencies to issue regulations with the force of law, as long as they issue regulations using the notice-and-comment procedures required by the Administrative Procedure Act.16 Therefore, in most cases, the resolution of the Chevron step zero issue will not turn on the first part of Mead's Chevron step zero test, but instead on whether the second part of this test is satisfied.

Ordinarily, it is also relatively easy to determine whether the second part of this test is satisfied. Agency guidance that is the product of notice-and-comment rulemaking will satisfy the second part of the test, while agency guidance that is not the product of notice-and-comment rulemaking will not, and therefore will not be subject to Chevron.

Thus, in most of Mead's operation, its answer to the Chevron step zero question is straightforward, sensible, and relatively easy to understand and apply. If Mead's answer to the Chevron step zero question had stopped there, step zero would be in good shape.

Unfortunately, Mead's answer went on to suggest that both parts of the test can become more complex than the simple task of asking whether Congress has given the agency at issue rulemaking authority through a statute and whether that agency has adopted the interpretation in question through the use of that authority:

Delegation of such authority [to make rules carrying the force of law] may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.17

As significant as notice-and-comment is in pointing to Chevron authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.18

Thus, under Mead's test for Chevron step zero, the fact that the agency does not have the authority to issue regulations that have the force of law through notice-and-comment rulemaking, or the fact that an agency that has that authority has not used notice-and-comment rulemaking to adopt the interpretation that is at issue, does not always resolve the Chevron step zero inquiry. Consequently, even though the agency document at issue in Mead was not the product of notice-and-comment rulemaking, the Mead Court did not treat that fact as dispositive in resolving the Chevron step zero inquiry, but instead engaged in the open-ended, multifactor analysis contemplated by the above quotations. The Court analyzed different factors and concluded that the agency document did not satisfy Chevron step zero. However, Mead provided no general guidance for the application of this multifactor analysis aspect of the Chevron step zero test.

The category of agency interpretations in which the Chevron two-step test may apply under the multifactor analysis approach to Chevron step zero, even though notice-and-comment rulemaking is not authorized or the agency did not follow it, is so vague and open-ended that it is almost impossible to predict which interpretations it will apply to. As a result, this part of Mead's answer to the Chevron step zero issue is unsatisfactory.

Mead not only established the test for answering the Chevron step zero issue, but it also clarified that an agency interpretation that does not qualify for the Chevron two-step test under Mead's Chevron step zero analysis is not, as a consequence, given no weight. Mead held that such an agency interpretation is given weight according to its power to persuade.19 Mead derived this power to persuade standard from the Court's 1944 decision in Skidmore v. Swift & Co, in which it said:

The weight [accorded to an administrative] judgment in a particular case will depend 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 it power to persuade, if lacking power to control.20

As discussed below, the Skidmore standard is relevant to a consideration of the multifactor analysis approach to Chevron step zero because the two inquiries are so similar.

Barnhart v. Walton

The Supreme Court applied the multifactor analysis aspect of Mead's Chevron step zero test in Barnhart v. Walton.21 That case turned not only on the validity of an agency regulation's interpretation of what the Court concluded was an ambiguous statutory provision, but also on the validity of the agency's interpretation of its own regulation. The Court's analysis of the relationship between those two issues was far from clear.

After concluding that the interpretation in the regulation was permissible under step two of Chevron's two-part test, the Court provided the following commentary regarding the Chevron step zero issue in response to the argument that the agency arrived at its interpretation without the benefit of notice-and-comment procedures:

The fact that the Agency previously reached its interpretation through means less formal than "notice and comment" rulemaking, does not automatically deprive that interpretation of the judicial deference otherwise its due. . . .

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.22

That discussion illustrates how difficult it is to predict the outcome of the multifactor analysis aspect of Mead's Chevron step zero test in a given case. Vague concepts such as "the interstitial nature of the legal question," "the importance of the question to administration of the statute," and "the complexity of that administration" provide no useful guidance for predicting what the outcome of an analysis based on those concepts will be in other cases.

That analysis from Barnhart v. Walton also illustrates how hard it is to distinguish that mode of analysis from the Skidmore standard, which applies to determine the weight of an agency interpretation in cases in which the Chevron step zero test is not met. In light of both of those considerations, it is difficult to justify the multifactor analysis aspect of the Chevron step zero test.

Finally, the Barnhart v. Walton commentary illustrates that the multifactor analysis aspect of Mead's Chevron step zero test ordinarily relates to the second part of the test — namely, whether the agency interpretation should be viewed as an exercise of the agency's authority to act with the force

of law in a case in which that interpretation is not the product of notice-and-comment rulemaking. The application of the multifactor analysis aspect of Mead's Chevron step zero test in Barnhart v. Walton clearly does not represent the application of the first part of Mead's Chevron step zero test — namely, whether Congress gave the agency the authority to act with the force of law.

In the tax world, the area in which that multifactor analysis aspect of Mead's Chevron step zero test has the most obvious potential significance is in the treatment of temporary regulations, which are almost always issued without prior notice-and-comment procedures, but which the government nevertheless ordinarily claims satisfy the Chevron step zero test so as to qualify for the Chevron two-step test despite that lack.23 A principal argument the government ordinarily makes in applying the Chevron two-step test to temporary regulations is that temporary regulations come within this vague and undefined multifactor analysis aspect of Mead's Chevron step zero test.

City of Arlington

As noted above, in City of Arlington the Court rejected the proposition that questions of statutory interpretation relating to the scope of an agency's jurisdiction are excluded from the Chevron two-step test. If the Court had instead accepted this proposition, the consequence would have been that for any issue relating to the scope of the agency's jurisdiction that could not be resolved at step one of the Chevron two-part test, the agency's interpretation would not get the benefit of Chevron step two. Thus, the agency interpretation would not be upheld merely because it was reasonable or permissible.

In that instance, the reviewing court would decide the question of statutory interpretation based on the court's best judgment, as is the case under Chevron step one. However, in contrast to the decision the court makes in Chevron step one, the court would make its decision based on what it concluded to be the best reading of the statute, rather than on the basis of determining what was the only permissible interpretation.

In rejecting the proposition that questions of statutory interpretation relating to the scope of an agency's jurisdiction are excluded from the Chevron two-step test, Scalia's majority opinion notes that this proposition was derived from the important distinction between jurisdictional requirements and non-jurisdictional requirements for bringing a case in court that may be imposed by the statutory provisions that apply to the type of case being brought, a distinction that the Court has tried to clarify in recent decisions.24 Scalia noted that while this distinction between jurisdictional requirements and non-jurisdictional requirements for bringing a case in court has significant consequences because it relates to the authority of the Court to hear the case,25 the distinction between jurisdictional issues and non-jurisdictional issues relating to the scope of the authority of agencies has no comparable significance.

Scalia reasons that for issues of statutory interpretation relating to the scope of an agency's authority, the supposed distinction between jurisdictional and non-jurisdictional issues is illusory, because every issue relating to whether the agency's action was consistent with the terms of the relevant statutory provision (and thus every issue to which Chevron could potentially apply) could be reframed as an issue of whether the agency had exceeded its authority:

The label is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction.26

No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.27

The question . . . is always whether the agency has gone beyond what Congress has permitted it to do.28

The question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not.29

Thus, according to Scalia's analysis, limiting Chevron's scope by holding that it does not apply to issues relating to an agency's jurisdiction would essentially eliminate Chevron entirely: "Make no mistake — the ultimate target here is Chevron itself."30 Finally, in response to concerns that Chevron gives agencies too much power, Scalia notes that this concern should be addressed through a robust, rather than permissive, application of Chevron:

The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional."31

Scalia does not cite Mead in his primary discussion of the issue in City of Arlington, even though both cases deal with the Chevron step zero issue of when the Chevron two-step test applies, and even though Mead is clearly the authoritative decision on Chevron step zero. His failure to cite Mead in his primary discussion is not surprising, because he dissented vigorously in Mead, contending that Mead improperly restricted the cases in which the Chevron two-step test applies.32 His dissent in Mead also correctly predicted that the multifactor analysis aspect of Mead's Chevron step zero test would lead to confusion, uncertainty, and unpredictability.33 Moreover, in his dissent in National Cable & Telecommunications Ass'n v. Brand X Internet Services,34 in which the majority held that agencies are permitted to overrule court decisions on issues of statutory construction as long as the court decision did not conclude that its interpretation was the only permissible one, he reiterates his opposition to Mead,35 and in his concurring opinion in United States v. Home Concrete & Supply LLC,36 he reiterated his opposition to Brand X.37

However, in a later section of the City of Arlington opinion in which he responds to the dissent, Scalia seems finally to have accepted Mead:

The dissent is correct that United States v. Mead Corp. requires that, for Chevron deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. No one disputes that.38

Nevertheless, having accepted Mead, Scalia proceeds to rewrite it:

But Mead denied Chevron deference to action, by an agency with rulemaking authority, that was not rulemaking. What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support Chevron deference for an exercise of that authority within the agency's substantive field.39

By describing Mead as having "denied Chevron deference to action, by an agency with rulemaking authority, that was not rulemaking," Scalia makes it appear that the denial of Chevron deference in Mead followed directly from the fact that the agency action at issue in Mead was not rulemaking. That ignores the analysis that Mead went through in explaining why, even though the agency action in Mead was not the product of notice-and-comment rulemaking, that fact alone was not enough to

decide that Chevron did not apply: “The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of Chevron.”40

However, while Scalia’s characterization of Mead in this respect is inaccurate, he was able to get four other justices to join his opinion without any of them objecting to this inaccuracy in his characterization of Mead. Moreover, the same narrowing of the Mead test for Chevron step zero is present in his statement that the dissent had cited no case “in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support Chevron deference for an exercise of that authority.” This statement leaves no room for the application of the multifactor analysis aspect of Mead’s Chevron step zero test, which contemplates that under some circumstances, an agency action that does not represent an exercise of rulemaking authority might nevertheless satisfy Chevron step zero.

Moreover, the majority opinion goes on to describe “the preconditions to deference under Chevron” in the following terms:

It suffices to decide this case that the preconditions to deference under Chevron are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.41

According to this passage, “the preconditions to deference under Chevron” are that “Congress has unambiguously vested the [agency] with general authority to administer the [relevant] Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.” This restatement of “the preconditions to deference under Chevron” (the requirements for satisfying Chevron step zero) makes no reference to the multifactor analysis aspect of Chevron step zero that was identified in Mead and then applied in Barnhart v. Walton, under which an agency interpretation that does not represent an exercise of rulemaking authority might still satisfy Chevron step zero. Once again, although this is a departure from Mead, four other justices joined Scalia in his opinion without objecting to this departure.

Consequently, Scalia’s majority opinion suggests that the multifactor analysis aspect of Mead’s Chevron step zero test has no vitality. Moreover, additional support for this reading of the decision is presented by Justice Stephen G. Breyer’s concurring opinion in the case. Breyer’s vote was not necessary to Scalia’s five-vote majority, so his concurring opinion represents only his own views. However, Breyer’s objection to the majority opinion provides insight into the meaning of that opinion.

Further, in considering Breyer’s concurring opinion, it is significant that Breyer was the author of the Court’s opinion in Barnhart v. Walton. (Scalia concurred in that case but without joining most of Breyer’s analysis.42) It is not surprising that Breyer’s concurring opinion in City of Arlington disagrees with the streamlined, simplified version of Chevron step zero articulated in Scalia’s majority opinion, in light of Breyer’s opinion for the Court in Barnhart v. Walton and his general preference for applying open-ended, multifactor forms of analysis rather than bright-line tests.

However, one notable thing about Breyer’s concurring opinion in City of Arlington is that it focuses Breyer’s disagreement exclusively on the first part of the two-step Chevron step zero test from Mead and not at all on the second part of that test:

The existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant. . . . In Mead, for

example, we looked to several factors other than simple ambiguity to help determine whether Congress left a statutory gap, thus delegating to the agency the authority to fill that gap with an interpretation that would carry "the force of law."43

That passage focuses on whether Congress has given the agency the authority to act with the force of law, rather than on whether the agency interpretation represents an exercise of that authority. Breyer then quotes the above passage from his opinion in Barnhart v. Walton as supposedly providing an additional example of the use of the multifactor analysis in the first part of Mead's Chevron step zero test, even though that passage actually addressed the second part of Mead's step zero test.

As his discussion continues, however, it clearly focuses on the first part of the step zero test:

The subject matter of the relevant provision — for instance, its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority — has also proved relevant.

Moreover, the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law.44

Breyer then acknowledges the view that this type of approach is difficult to apply and makes it virtually impossible to predict the outcome in any particular case, but he dismisses that concern:

Although seemingly complex in abstract description, in practice this framework has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency.45

By focusing his attention on the first part of Mead's Chevron step zero test and disagreeing with the streamlining of that part of the test adopted in Scalia's majority opinion, Breyer not only confirms that the majority opinion represents a departure from Mead in abandoning the application of the open-ended, multifactor analysis aspect of the step zero test but also fails to raise any comparable objection to the streamlining effect on the second part of the test. While it might be argued that the focus on the first part of the Mead Chevron step zero test can be explained by the fact that it was this part of the test that was at issue in City of Arlington, the breadth of the language in Scalia's majority opinion cannot be overlooked.

In light of Breyer's concurring opinion, it cannot be claimed that the four other members of the Court who joined Scalia's majority opinion might have overlooked that Scalia's opinion streamlines the step zero test. Thus, by joining the majority opinion, they must be taken to have assented to the streamlining effect.

Chief Justice John G. Roberts Jr. dissented in City of Arlington in an opinion that was joined by justices Anthony Kennedy and Samuel Alito. The main idea of the dissent was similar to that in Breyer's concurring opinion, in that it approached the first part of the Chevron step zero inquiry, which asks whether the agency has the statutory authority to address the particular issue in a way that has the force of law, using a case-by-case approach. The dissent calls for the more open-ended analysis rather than simply asking whether the agency has the general authority to issue rules with the force of law and concluding that if the agency has that general authority, the authority necessarily covers the provision at issue.

In light of this similarity between the dissent and Breyer's concurrence, Scalia's response to the dissent is equally a response to Breyer:

Where we differ from the dissent is in its apparent rejection of the theorem that the whole includes all of its parts — its view that a general conferral of rulemaking authority does not validate rules for all the matters the agency is charged with administering. Rather, the dissent proposes that even when general rulemaking authority is clear, every agency rule must be subjected to a de novo judicial determination of whether the particular issue was committed to agency discretion. It offers no standards at all to guide this open-ended hunt for congressional intent (that is to say, for evidence of congressional intent more specific than the conferral of general rulemaking authority). It would simply punt that question back to the Court of Appeals, presumably for application of some sort of totality-of-the-circumstances test — which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of Chevron. The excessive agency power that the dissent fears would be replaced by chaos.46

This passage leaves no doubt that after City of Arlington, the first part of the Chevron step zero test looks exclusively to whether the agency has general rulemaking authority, and likewise leaves no doubt that the answer to that question is dispositive on this part of the test. Thus, it is clear now that the multifactor analysis aspect of Mead's Chevron step zero test has no application to the first part of the test. Moreover, while this vigorous rejection of the multifactor approach is nominally directed at the first part of the Chevron step zero test, the reasoning based on the need for predictability under the approach that is applied, and the fact that that predictability would be defeated by a requirement to engage in a totality-of-the-circumstances, case-by-case analysis in applying that first part of the Chevron step zero test, is equally applicable to the second part of the Chevron step zero test. That clearly leads to a rejection of the undefined, open-ended, multifactor analysis aspect for both parts of the Chevron step zero test established in Mead.

Conclusion

City of Arlington's negative answer to whether issues of statutory interpretation relating to the scope of an agency's authority are excluded from the Chevron two-step test for evaluating the validity of agency interpretations is clearly important in and of itself. More significant, however, is the decision's streamlining of Mead's Chevron step zero test by eliminating the multifactor analysis approach that had been the most unpredictable aspect of that test.

FOOTNOTES

1 133 S. Ct. 1863 (2013) .

2 467 U.S. 837 (1984).

3 131 S. Ct. 704 (2011) .

4 For prior commentary making this same point, see Kristin E. Hickman, "Don't Overlook City of Arlington, Texas v. FCC," TaxProf Blog (May 22, 2013).

5 The term "Chevron step zero" was first used in Thomas W. Merrill and Hickman, "Chevron's Domain," 89 Geo. L.J. 833, 836 (2001). See also Cass R. Sunstein, "Chevron Step Zero," 92 Va. L. Rev. 187 (2006).

6 533 U.S. 218 (2001). Neither Chevron itself, Mead, nor City of Arlington uses the term "step zero."

7 467 U.S. at 842-843.

8 Id. at 843, n.9 (citations omitted).

9 Id. at 843 (footnotes omitted).

10 Id. at 844.

11 Id. at 843, n.11.

12 Chevron step zero might be described more accurately as Chevron step one and a half, because a reviewing court faced with an issue of statutory interpretation must always undertake the Chevron step one analysis regardless of whether there has been an agency interpretation that might be subject to step two. It is only after the step one analysis has been performed without resolving the question of statutory interpretation that it becomes necessary to ask whether there is an agency interpretation that would be accepted as controlling under step two. Nevertheless, the term "Chevron step zero" is now so widely used that there is no point in quibbling with its accuracy.

13 533 U.S. at 226-227 (numbers added).

14 In the discussion that follows, the focus will be on agency action through rulemaking rather than through adjudication, because the IRS, like most agencies, makes rules that have the force of law through rulemaking rather than through adjudication.

15 For a wide-ranging recent discussion of the force of law concept, see Hickman, "Unpacking the Force of Law," 66 Vand. L. Rev. 465 (2013).

16 See 5 U.S.C. section 553.

17 533 U.S. at 227 (emphasis added).

18 Id. at 230-231 (emphasis added).

19 Id. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

20 533 U.S. at 228 (quoting 323 U.S. at 140) (alteration in original).

21 535 U.S. 212 (2002).

22 Id. at 221-222 (citation omitted).

23 The relevance of Chevron step zero in the tax world is limited to temporary regulations because the IRS and the Justice Department do not claim that the Chevron two-step test applies to any form of IRS guidance other than regulations. See Marie Sapirie, "DOJ Won't Push Chevron Deference for Revenue Rulings," Tax Notes, May 16, 2011, p. 674 .

24 133 S. Ct. at 1868-1869. For a discussion of some of these cases, see Patrick J. Smith, "Is the Anti-Injunction Act Jurisdictional?" Tax Notes, Nov. 28, 2011, p. 1093 .

25 Thus, if a statutory requirement for bringing a case in court is determined to be jurisdictional, the issue may be raised at any stage of the litigation, including by the court itself, and it cannot be waived or forfeited by a party for failing to raise it sooner during the litigation.

26 133 S. Ct. at 1870.

27 Id. at 1868 (emphasis in original).

28 Id. at 1869.

29 Id. at 1871.

30 Id. at 1873.

31 Id. at 1874.

32 533 U.S. at 239-240 (Scalia, J., dissenting).

33 Id. at 245-246.

34 545 U.S. 967 (2005).

35 Id. at 1014-1015 and 1018 (Scalia, J., dissenting).

36 132 S. Ct. 1836 (2012) .

37 Id. at 1848 (Scalia, J., dissenting).

38 133 S. Ct. at 1874 (citation omitted).

39 Id.

40 533 U.S. at 231.

41 133 S. Ct. at 1874.

42 535 U.S. at 226-227 (Scalia, J., concurring).

43 133 S. Ct. at 1875 (Breyer, J., concurring).

44 Id. at 1875-1876 (citations omitted).

45 Id. at 1876 (emphasis added).

46 133 S. Ct. at 1874 (emphasis in original).

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