Federal Income Taxation, Schmalbeck, Zelenak, Lawsky, Oei
6th edition
2024 Summer Update

p. 4 — note 2; 2024 Inflation Adjustments

IRS Inflation adjustments for 2024 are contained in Rev. Proc. 2023-34, 2023-48 IRB 1287 (Nov. 9, 2023).

p. 28 — Loper Bright and Relentless; Chevron deference overruled

Replace last paragraph on p. 28 and accompanying footnotes with the following:

Moving upward in the hierarchy of authority, the Internal Revenue Code is, of course, subject to any constraints imposed by the U.S. Constitution. Some older Supreme Court cases struck down various income tax provisions on constitutional grounds, but in recent decades the courts have been very reluctant to find constitutional infirmities in the federal income tax. Moving downward in the hierarchy, regulations promulgated by the Treasury Department under the Code (either under the general authority granted by §7805(a), or under a more specific grant of authority with respect to a particular provision) have the force of law unless they are inconsistent with the statute. Although courts invalidate regulations more often than they find constitutional violations in the statute, judicial invalidation of regulations has historically not been common. In some cases, Congress has delegated to the Treasury the authority to establish substantive rules, rather than merely to interpret the Code.[1] Regulations promulgated under such broad grants of authority are commonly referred to as "legislative" regulations, in contrast to "interpretive" regulations. Because the grants of authority are so broad, legislative regulations have seldom been invalidated.[2] Under the now-overruled *Chevron* deference doctrine, interpretive regulations were at greater risk of invalidation, but if a court believed that a Code provision could reasonably be interpreted in more than one way, it would uphold any reasonable regulatory interpretation.[3]

In June 2024, the Supreme Court overruled Chevron deference in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc., v. Department of Commerce*., 603 U.S. __ (2024). Under *Loper Bright*, where there is a challenge to an interpretive regulation, courts will now have to employ their own independent judgment in interpreting the statute, and must come to the "best reading" of the statute, rather than deferring to the agency's reasonable regulatory interpretation.[4] With respect to legislative regulations (i.e., regulations in which the statute properly delegates regulatory authority to the agency), *Loper Bright* holds that courts must "respect the delegation" but must also ensure that the agency is regulating within the scope of the delegation.[5]

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[1] See, e.g., §121(c)(2)(B) (authorizing Treasury to issue regulations defining what, if anything, qualifies as "unforeseen circumstances" for purposes of the exclusion of gain from the sale of a principal residence).
[2] For a rare invalidation of a legislative regulation (in the rather arcane area of consolidated corporate returns), see Rite Aid Corp. v. United States, 255 F.3d 1357 (Fed. Cir. 2001).
[3] Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (the leading case on judicial deference to reasonable regulatory interpretations; not a tax case); Mayo Foundation for Medical Education and Research v. United States, 131 S. Ct. 704 (2011). In Mayo Foundation, the Supreme Court made clear that interpretive tax regulations are entitled to deference under the usual Chevron standard.
[4] Loper Bright, slip op. at 23.
[5] Loper Bright, slip op. at 35.

Commentators have noted that in the aftermath of *Loper Bright*, we are likely to see more challenges to tax regulations, which may be more successful.[6] The decision may also affect how Treasury goes about rulemaking and how taxpayers engage in tax planning.

p. 262 — The Realization Requirement and Moore v. United States

Replace first full paragraph on p. 262 with:

In June 2023, the Supreme Court granted certiorari in *Moore v. United States*.[7] The narrow issue in the case — involving a constitutional challenge to a provision of the Tax Cuts and Jobs Act of 2017 taxing shareholders of a controlled foreign corporation (CFC) on the CFC's undistributed earnings — is far outside the scope of this book. However, in ruling against the taxpayers' challenge, the Ninth Circuit had opined that realization of income is not a constitutional requirement for taxation.[8] In June 2024, the Supreme Court decided *Moore* 7-2, upholding the tax on CFC undistributed earnings and denying taxpayers' refund request.[9] Justice Kavanaugh's majority opinion was narrow and did not rule on whether realization is a constitutional requirement. However, four of the justices favored a realization requirement (Justices Alito and Barrett in a concurrence, and Justices Gorsuch and Thomas in the dissent), while only one (Justice Jackson) said realization was not constitutionally required. The remaining four justices did not address whether the Constitution requires realization. Thus, while *Moore* did not change the constitutional status of *Macomber* (whatever that might be) and did not answer the question of whether, for example, a tax on unrealized gains of billionaires would be constitutional, future litigation seems likely.

p. 375—Personal Deductions

While the current edition of the casebook covers this in detail, it may be worth emphasizing that the material in chapter 4 includes a number of provisions relating to home mortgage interest, state and local taxes, casualty losses and several other items that are scheduled to expire at the end of 2025. These may be extended as written, extended as amended, or simply allowed to expire as scheduled. Much will depend on which parties control the House, the Senate, and the White House in 2025. Watch this space!

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[6] The Supreme Court's July 1, 2024 ruling *in Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. ___ (2024) may further pave the way for such challenges by extending the time frame in which they can be brought. *Corner Post* held that the six-year statute of limitations for bringing APA claims for review of agency rulemaking begins when the plaintiff is first injured by the rule, rather than at the time of the rule's issuance, which is likely earlier.

[7] Moore v. United States, Docket No. 22-800.

[8] Moore v. United States, 36 F4th 930 (9th Cir. 2022).

[9] Moore v. United States, 144 S. Ct. 1680 (2024)