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What We Didn't Learn From *Home Concrete*

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The Supreme Court's recent decision in *Home Concrete* was disappointing in every respect except for the taxpayer's victory. The decision raised several significant issues concerning the application of the *Chevron* test for evaluating the validity of regulations, the scope of the *Brand X* rule for when agencies are permitted to overrule court decisions on issues of statutory interpretation, and the IRS's authority to issue retroactive and temporary regulations. However, it also provided authoritative guidance on none of those issues, because of the lack of a majority opinion on the reason the regulation was substantively invalid and because the holding of substantive invalidity made it unnecessary to reach the retroactivity and procedural issues.

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Introduction

The tax world awaited the Supreme Court's decision in *Home Concrete*[1] with considerable anticipation. *Home Concrete* raised a broad range of important issues that could have had significant implications for not only tax cases, but also administrative law cases generally. However, the Court issued a set of opinions that resolved none of those broader questions. When the decision came out, the news was mixed. The good news was that the taxpayer won. The bad news was that the only thing we learned was that the taxpayer won.

One of the reasons for this disappointing outcome was the lack of a majority opinion on the aspects of the case that presented two of the broader questions. There was a majority opinion only on one feature of the relatively narrow issue of statutory construction presented by the case that has no potential for broader application in other cases.

The specific question in *Home Concrete* was whether an overstatement of basis that results in an understatement of gross income on the disposition of property is an omission from gross income for purposes of the statutory rule that extends the statute of limitations for assessing additional tax when a taxpayer has omitted from gross income an amount that exceeds 25 percent of the gross income reported on its return.[2] In 1958, in *Colony Inc. v. Commissioner*,[3] the Supreme Court considered that question under the corresponding provision of the 1939 code and concluded that there was no omission from gross income in that situation. The issue in *Home Concrete* was whether the 1958 answer still applies. The Court said it does.

The only point on which there was a majority opinion in *Home Concrete* was whether some differences between the current statutory provision incorporating the 25 percent omission test and the provision in effect in 1958 were sufficient to make *Colony*'s holding inapplicable. The Court said they were not. Although that question is complex and interesting,[4] its resolution has no potential for broader application.

Home Concrete presented several opportunities for the Court to reach broader matters: clarification

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[1]*United States v. Home Concrete & Supply LLC*, 132 S. Ct. 1836 (2012), *Doc 2012-8781*, *2012 TNT 81-11*.

[2]Section 6501(e)(1)(A)(i).

[3]*Colony Inc. v. Commissioner*, 357 U.S. 28 (1958).

[4]For a discussion that reached the same conclusion as the Supreme Court majority, see Patrick J. Smith, "Omissions From Gross Income and 'Numerators and Denominators,'" *Tax Notes*, July 11, 2011, p. 157, *Doc 2011-12742*, or *2011 TNT 134-4*.

of step one of the two-part *Chevron*[5] test for evaluating the validity of agency regulations that interpret statutory provisions; clarification of its 2005 *Brand X*[6] decision concerning when an agency is permitted to interpret a statutory provision differently than it has previously been interpreted by a court; clarification of the IRS's authority to issue retroactive regulations; and clarification of the IRS's authority to issue temporary regulations. Those areas will be addressed below. I will also discuss the Supreme Court's standard for dealing with decisions that lack majority opinions and why that standard is unhelpful in *Home Concrete*.

Chevron's Step One

The most significant area in which it was reasonable to expect *Home Concrete* to provide useful guidance concerned the inquiry under step one of *Chevron*'s two-step test. Step one asks whether the agency's interpretation of the statutory provision is contrary to clear congressional intent.[7] If it is concluded that Congress *did not* have a clear intent on the specific point, *Chevron* step two says the agency interpretation will be accepted if it is "reasonable"[8] or "permissible."[9]

The Supreme Court recently clarified that *Chevron* step two is equivalent to the Administrative Procedure Act's (APA's) arbitrary and capricious standard.[10] That standard imposes two basic requirements: the agency's position must be the product of reasoned decision-making, and the agency must provide a contemporaneous explanation of the reasons for its decision so a court reviewing the agency action can evaluate whether the first requirement was satisfied.[11] The Supreme Court's confirmation of the equivalence between *Chevron* step two and the APA's arbitrary and capricious standard provided welcome clarification of the content of step two.[12]

Chevron step one is in need of comparable clarification. The Court in *Chevron* used several different verbal formulations to describe the content of step one, and there is uncertainty about the relationship among them.

Some of those formulations might be read as suggesting that the inquiry under step one is simply whether the statute has explicitly addressed the point at issue. For example, *Chevron* said step one asks whether "Congress has directly spoken to,"[13] or "directly addressed,"[14] "the precise question at issue" and whether there is an "unambiguously expressed intent of Congress"[15] or whether instead "the statute is silent or ambiguous with respect to the specific issue."[16]

In contrast, the Court in *Chevron* also described step one in terms that suggest that explicit statutory statements are not necessary to conclude that an agency position conflicts with congressional intent. *Chevron* said step one asks whether "Congress had an intention on the precise question at issue" that a court can "ascertain" by "employing traditional tools of statutory construction."[17] Traditional tools of statutory construction include, for example, the principle that a statutory provision or a word or group of words in a statutory provision must be interpreted in its statutory context and not in isolation.[18]

Chevron's reference to "traditional tools of statutory construction" occurs in a footnote to the phrase "unambiguously expressed intent of Congress." Some appellate decisions applying *Chevron* quote only the language from the main text of the opinion to describe the content of step one and neglect to quote the footnote stating that traditional tools of statutory construction must be used in determining congressional intent. Courts of appeal that follow that approach are likely to read the words "ambiguous" and "unambiguous" in the main text of *Chevron* narrowly and to require clear statutory statements on the point at issue before deciding a question against the agency in step-one analysis.

However, by placing the reference to traditional tools of statutory construction in a footnote explaining the meaning of the phrase "unambiguously expressed intent of Congress," the Court in *Chevron*

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[5] *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[6] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

[7] *Chevron*, 467 U.S. at 843, n.9.

[8] *Id.* at 844.

[9] *Id.* at 843.

[10] *See Judulang v. Holder*, 132 S. Ct. 476, 483, n.7 (2011).

[11] *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

[12] *See* Smith, "The APA's Arbitrary and Capricious Standard and IRS Regulations," *Tax Notes*, July 16, 2012 [forthcoming].

[13] *Chevron*, 467 U.S. at 842.

[14] *Id.* at 843.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 843, n.9.

[18] *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning — or ambiguity — of certain words or phrases may only become evident when placed in context. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citations omitted).

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strongly suggested it was using the words ''ambiguous'' and ''unambiguous'' as shorthand to describe the conclusion that is reached at the end of an interpretative process that applies traditional tools of statutory construction to determine the meaning of the statutory provision at issue. If an explicit statutory statement on the point were in fact required to decide a case against the agency under *Chevron* step one, traditional tools of statutory construction would be unnecessary in applying step one.

In *Home Concrete*[19] and similar appeals, the government relied on *Brand X* to support a restrictive reading of ''ambiguous'' and ''unambiguous'' in *Chevron*. In *Brand X*, the Supreme Court repeatedly used those terms to describe the two possible conclusions of the *Chevron* step-one inquiry concerning the degree of clarity of the statutory provision being interpreted. But nowhere in the *Brand X* opinion did the Court explicitly reaffirm that traditional tools of statutory construction must be used in applying step one before concluding that the provision is ambiguous or unambiguous.

However, nothing else in any of the Court's various opinions in *Brand X* suggested any intention to change the content of *Chevron* step one, and the use of the terms ''ambiguous'' and ''unambiguous'' as shorthand to describe a conclusion reached using traditional tools of statutory construction is entirely consistent with the use of those terms in *Chevron* itself. Moreover, the year before *Brand X*, the Court decided *General Dynamics Land Systems*,[20] a decision that strongly reaffirmed the need to use traditional tools of statutory construction in applying *Chevron* step one:

> Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.[21]

In light of that recent reaffirmation of the importance of traditional tools of statutory construction in *Chevron* step one, it is difficult to imagine that the *Brand X* Court intended to narrow the content of step one without explicitly saying so.[22]

Even for courts that understand that step one requires the application of traditional tools of statutory construction, there is uncertainty about whether legislative history, such as committee reports, is among those tools.[23] Moreover, even if legislative history may be used as part of the *Chevron* step-one inquiry, there is uncertainty about how clear that legislative history needs to be on the point at issue in order for an agency position to be rejected at step one. For example, must there be an explicit statement in a committee report, or can less direct evidence be sufficient?[24]

Home Concrete would have provided an excellent opportunity for the Court to reaffirm that *Chevron* step one does in fact require the use of traditional tools of statutory construction, including legislative history, and that *Brand X* did nothing to change the content of *Chevron* step one. That is because a key issue in *Home Concrete* was whether *Colony* should be viewed as having applied the equivalent of *Chevron* step one or *Chevron* step two instead.[25] *Brand X* held that the question whether an agency has the authority to interpret a statutory provision differently than it has been interpreted by a prior court decision turns on whether that prior decision was in effect a holding under *Chevron* step one or instead a holding under *Chevron* step two.

According to *Brand X*, if the prior judicial decision held that the interpretation adopted by that court was the only permissible reading, that decision was a holding under *Chevron* step one, and the agency was not free to adopt a different interpretation.[26] In contrast, if the judicial decision merely arrived at what that court concluded was the *best* interpretation, that prior interpretation was not a holding under *Chevron* step one and accordingly the agency would be free under *Chevron* step two to adopt a different interpretation.[27]

Home Concrete involved 2010 final regulations in which the IRS took the position that an overstatement of basis represents an omission from gross

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[19]*See, e.g.*, *Home Concrete*, 132 S. Ct. at 1842-1843.

[20]*General Dynamics Land Systems Inc. v. Cline*, 540 U.S. 581 (2004).

[21]*Id.* at 600.

[22]For an earlier discussion of these issues, see Smith, ''*Brand X* and Omissions From Gross Income,'' *Tax Notes*, Feb. 1, 2010, p. 665, *Doc 2010-604*, or *2010 TNT 22-5*.

[23]*See, e.g.*, *Intermountain Insurance Service of Vail LLC v. Commissioner*, 134 T.C. 211, 233-238 (2010), *Doc 2010-10163*, *2010 TNT 88-12* (Halpern and Holmes, JJ., concurring in the result only) (discussing variation in the answers to this question in different Supreme Court and court of appeals decisions).

[24]*See, e.g.*, *Grapevine Imports Ltd. v. United States*, 636 F.3d 1368, 1379 (Fed. Cir. 2011), *Doc 2011-5233*, *2011 TNT 49-14* (''of the excerpts [from the legislative history] analyzed by the Supreme Court, none explicitly discussed application of the limitations period to cases involving overstatement of basis'').

[25]*See, e.g.*, *Brand X*, 545 U.S. at 982 (''the better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate'').

[26]*Id.* at 984 (the Ninth Circuit's ''prior decision in *Portland* held only that the *best* reading of section 153(46) was that cable modem service was a 'telecommunications service,' not that it was the *only permissible* reading of the statute'') (emphasis in original).

[27]*Id.*

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income for purposes of the 25 percent omission test — contrary to the interpretation adopted in *Colony*. The question in *Home Concrete* was whether those regulations were authorized by *Brand X*.

In *Colony*, the Court said that based exclusively on the statutory text, ''it cannot be said that the language is unambiguous''[28] on whether an overstatement of basis that resulted in an understatement of gross income should be considered an omission from gross income. However, after considering the legislative history, the Court said it was persuaded that it could discern that congressional intent was that an overstatement of basis was not an omission from gross income.[29]

Thus, the question presented in *Home Concrete* was whether the fact that *Colony* used legislative history to arrive at an understanding of congressional intent meant that *Colony* could not be a *Chevron* step-one holding for purposes of the *Brand X* inquiry. A clear and definitive answer to that question would have provided extremely useful guidance for other cases, not only for purposes of applying *Brand X*, but also — and even more significantly — for purposes of applying the *Chevron* two-step test itself.

Comments by several of the justices during oral arguments in *Home Concrete* revealed a recognition that clarification on the content of step one was needed because of uncertainty about the meaning of the terms ''ambiguous'' and ''unambiguous'' in *Chevron*'s description of the step-one inquiry. Chief Justice John G. Roberts noted that in using the term ''ambiguous,'' Justice John Marshall Harlan, writing for the Court in *Colony*, ''was writing very much in a pre-*Chevron* world'' and ''was certainly not on notice that that was a term of art or would become a term of art.''[30] Roberts continued, ''I don't think you necessarily can take the use of the word 'unambiguous' in his opinion to mean what it does today,''[31] after *Chevron*.

Justice Antonin Scalia asked: ''It depends on what the meaning of 'ambiguous' is, right?''[32] Justice Samuel Alito observed: ''I can hardly think of a statutory interpretation question that we have gotten that doesn't involve some degree of ambiguity, if we're honest about it. . . . So what degree of ambiguity is *Brand X* referring to?''[33] Justice Stephen Breyer commented: ''There are many different kinds of ambiguity and the question is, is this of the kind where the agency later would come and use its expertise.''[34]

Nevertheless, because of the lack of a majority opinion on why *Brand X* did not give the IRS authority to adopt an interpretation different from that adopted in *Colony*, *Home Concrete* failed to provide much-needed guidance on the content of *Chevron* step one.

The plurality opinion indicated that *Colony* should be viewed as a *Chevron* step-one opinion for purposes of applying *Brand X*, despite *Colony*'s use of legislative history in determining congressional intent.[35] However, the plurality opinion weakened the usefulness of even that conclusion by noting: ''It may be that judges today would use other methods to determine whether Congress left a gap to fill.''[36]

Although Breyer's plurality opinion on this issue presented the views of four justices, Scalia did not join that portion of the opinion. Scalia based his concurrence instead on his continuing view that *Brand X* was wrongly decided and should be overruled.[37] However, no other justice indicated agreement with that view. Because the rationale for Scalia's concurrence was so divergent from the rationale adopted by the plurality, the Court's conclusion that *Brand X* did not authorize the IRS to adopt a different interpretation from the interpretation adopted in *Colony* provides no guidance for future cases.

Brand X

The second major area in which *Home Concrete* could reasonably have been expected to provide needed clarification concerns the application of *Brand X*. If the Court had decided that *Colony* was not a *Chevron* step-one holding, it would have been necessary to address whether there were other reasons *Brand X* may not have authorized the IRS to reach a conclusion different from the one reached in *Colony*.

The most important clarification would have been whether *Brand X* applies when the conflicting prior judicial interpretation of a statutory provision is a Supreme Court decision. Justice John Paul Stevens's concurring opinion in *Brand X* expressed doubt that *Brand X* would apply in that situation,

[28] *Colony*, 357 U.S. at 33.

[29] *Id.* at 36 (''this history shows to our satisfaction that the Congress intended an exception to the usual three-year statute of limitations only in the restricted type of situation already described'').

[30] Transcript of Oral Argument at 11, *Home Concrete*.

[31] *Id.* at 12.

[32] *Id.* at 40.

[33] *Id.* at 41.

[34] *Id.* at 43.

[35] *Home Concrete*, 132 S. Ct. at 1844.

[36] *Id.*

[37] *Id.* at 1848 (Scalia, J., concurring).

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since the rationale for *Brand X* ''would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity.''[38]

However, the plurality opinion in *Home Concrete* did not reach that issue, because it concluded that *Brand X* was inapplicable for other reasons. And Scalia's concurrence, with its blanket disapproval of *Brand X*, likewise expressed no view on whether *Brand X* should be limited in that way if it is not overruled.

There are other significant areas of uncertainty concerning the application of *Brand X* that one *could not* reasonably expect to have been resolved in *Home Concrete*. *Brand X* involved a prior judicial interpretation by the Ninth Circuit, and the validity of the subsequent agency interpretation of the statutory provision was also addressed in a Ninth Circuit decision.

Brand X did not address the presumably much more common situation in which a statutory provision is initially interpreted by Circuit A, an agency later interprets the provision differently, and the validity of the agency interpretation is then considered by Circuit B. Because Circuit B would in no event be bound by Circuit A's interpretation, even without any intervening agency interpretation, it seems clear that *Brand X* has no direct application in that type of situation. If *Brand X* does not apply when the prior judicial interpretation was by the Supreme Court (a question that remains open after *Home Concrete*) and likewise does not apply when the prior judicial interpretation was by a circuit other than the circuit considering the validity of the subsequent agency interpretation, the scope of *Brand X* is quite narrow. It would be limited to a rule for each circuit to use in determining the binding effect of that circuit's own prior decisions. Consequently, *Brand X* would be far less significant than it is generally considered to be.

Lack of a Majority Opinion

The Supreme Court has established a principle for dealing with situations in which it has disposed of a case without agreeing on a majority opinion. In *Marks*,[39] the Court said: ''When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest possible grounds.' ''[40] The Court has recognized, however, that in some cases, ''this test is more easily stated than applied to the various opinions'' in a particular case.[41]

The *Marks* ''narrowest grounds'' test is inapplicable in *Home Concrete* because neither Breyer's plurality opinion nor Scalia's concurrence is ''narrower'' than the other. The two opinions are based on entirely different rationales.[42] If the plurality had based its conclusion that *Brand X* is inapplicable on the principle that *Brand X* does not authorize an agency to overrule a Supreme Court decision under any circumstances, regardless of whether the Supreme Court decision represents an application of *Chevron* step one or *Chevron* step two, that plurality opinion would have been identifiable as the holding of the Court under the *Marks* test, because Scalia's concurrence was based on the ''broader'' rationale that *Brand X* should not permit an agency to overrule a decision by *any* court.

However, the rationale for the plurality opinion in *Home Concrete* was not that *Brand X* never authorizes an agency to overrule any Supreme Court decision, but only that based on the nature of *Colony*'s reasoning, rather than the fact that it was decided by the Supreme Court, *Colony* was in the category of decisions that *Brand X* does not authorize an agency to overrule.

Consistent with Scalia's well-established position that legislative history should never be used for any purpose in resolving issues of statutory interpretation, it is clear from his concurrence in *Home Concrete* that he would not have considered *Colony* the type of decision that would be immune from being overruled by an agency under *Brand X* — if he accepted the validity of *Brand X*. Thus, Breyer's plurality opinion is not based on a rationale that is narrower than the rationale for Scalia's concurrence. Likewise, Scalia's concurrence, which is based on the position that *Brand X* was incorrect and should be overruled, is clearly not narrower than Breyer's plurality opinion. Consequently, the *Marks* ''narrowest grounds'' test is simply inapplicable to *Home Concrete*.

Retroactive Regulations

The third major area in which *Home Concrete* could have provided needed guidance is the scope of the IRS's authority to issue retroactive regulations. Before 1996, section 7805(b) provided a blanket authorization for the IRS to issue retroactive

[38]*Brand X*, 545 U.S. at 1003 (Stevens, J., concurring).
[39]*Marks v. United States*, 430 U.S. 188 (1977).
[40]*Id.* at 193.

[41]*Nichols v. United States*, 511 U.S. 738, 745 (1994).
[42]For court of appeals decisions finding the *Marks* test inapplicable on similar grounds in other contexts, see, *e.g.*, *United States v. Donovan*, 661 F.3d 174, 180-184 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 798-799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 62-64 (1st Cir. 2006).

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regulations.[43] Section 7805(b) was amended in 1996 to instead provide specific and detailed rules authorizing limited retroactivity. However, the changes applied only to regulations under statutory provisions enacted after the 1996 amendment. The 25 percent omission from gross income test was enacted in 1954.

There was a significant question in *Home Concrete* concerning the permitted scope of retroactive regulations. In *Home Concrete* and all the other cases presenting the same issue, the normal three-year statute of limitations had expired by the time the IRS asserted the deficiency. The IRS action was barred unless the applicable statute of limitations was six years. Thus, the effect of the regulations was to retroactively extend the statute of limitations in cases where it would otherwise have expired, and there was an issue as to whether this retroactive effect was permissible. However, because the Supreme Court concluded that the regulation in *Home Concrete* was precluded by *Colony*, it was unnecessary to consider the retroactivity question.

The taxpayer in *Home Concrete* argued against permitting the regulation to have retroactive effect by maintaining that the amended version of section 7805(b) applied to the regulations at issue. It argued that the effective-date provision for the 1996 amendment[44] should be read as though it made the amendment applicable to *regulations* issued after the date of enactment. That is how the effective date of the 1988 amendment that enacted section 7805(e) providing limits on temporary regulations was worded.[45] The only comment during oral arguments on the taxpayer's position on this point was Justice Sonia Sotomayor's observation that ''you would have to ignore every rule of grammar that there is in order to read it your way . . . wouldn't you?''[46]

In an article published while the overstated basis regulation cases were proceeding in the courts of appeals, I suggested a different argument against unlimited retroactivity for regulations that are issued after the 1996 amendment to section 7805(b) but are nevertheless subject to the original 1954 version of section 7805(b) based on the effective-date provision for the amendment.[47] I argued that when Congress in 1954 enacted the original version of section 7805(b) authorizing the IRS to issue retroactive regulations, it had no way of knowing that 30 years later *Chevron* would give agencies the authority to issue regulations that are not necessarily the best interpretation of the statute but fall within a range of permissible interpretations. Likewise, in enacting the original version of section 7805(b) in 1954, and in enacting the amendment to section 7805(b) in 1996, Congress could not have known that in 2011, *Mayo*[48] would surprise and shock most of the tax world by holding that *Chevron* applies to IRS regulations, or that in 2005 *Brand X* would give agencies the authority to overrule court decisions on matters of statutory interpretation.

The substantive authority given to agencies by *Chevron* is substantially different from the nature of the interpretive authority exercised by courts that justifies retroactive application of judicial interpretations of statutory provisions. The interpretive authority of courts is to find the *best* interpretation of a statutory provision, and the justification for retroactive application is the notion that the interpretation adopted by the court was always the best interpretation.

In contrast, the interpretive authority given to agencies under *Chevron* step two is clearly not the authority to adopt only the best interpretation of a statutory provision, but instead the authority to choose among a range of permissible interpretations. Permitting the application of that interpretive authority retroactively is profoundly inconsistent with the rationale for permitting retroactive application of interpretations of statutory provisions, namely, that the interpretation adopted was always the best interpretation.

Thus, IRS regulations with the substantive scope authorized by *Chevron*, *Brand X*, and *Mayo* clearly could not have been contemplated by Congress in 1954 when it enacted the original version of section 7805(b) authorizing the IRS to issue retroactive regulations. Consequently, it is unreasonable to conclude that the 1954 authorization provides a basis for giving retroactive effect to IRS regulations whose substantive validity depends on *Chevron*, *Brand X*, and *Mayo*. I continue to believe this is a forceful argument against permitting retroactive application of regulations like those at issue in *Home Concrete*, even if the

[43]The original 1954 version of section 7805(b) provided: ''The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.''

[44]''The amendment made by subsection (a) shall apply with respect to regulations which relate to statutory provisions enacted on or after the date of the enactment of this Act.'' P.L. 104-168, section 1101(b).

[45]''The amendments made by this section shall apply to any regulation issued after the date which is 10 days after the date of the enactment of this Act.'' P.L. 100-647, section 6232(b).

[46]Transcript of Oral Argument at 50, *Home Concrete*.

[47]*See* Smith, ''Omissions From Gross Income and Retroactivity,'' *Tax Notes*, Apr. 4, 2011, p. 57, *Doc 2011-4748*, or *2011 TNT 65-7*.

[48]*Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), *Doc 2011-609*, *2011 TNT 8-10*.

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Supreme Court had concluded they were permissible on a prospective basis.

Temporary Regulations

The fourth major area in which *Home Concrete* could have provided important guidance is the validity of the IRS practice of issuing temporary regulations without the prior notice and comment that is required by the APA.[49]

The regulations in *Home Concrete* were issued in temporary form in September 2009 without prior notice and comment. As required by section 7805(e), they were released at the same time as proposed regulations with an opportunity for subsequent comment. They were issued in final form in December 2010.

The taxpayers in the various court of appeals cases, and in the Supreme Court in *Home Concrete*, contended that the issuance of the regulations in temporary form without prior notice and comment was a violation of the APA's notice and comment requirements. The IRS practice of issuing temporary regulations without prior notice and comment in situations in which the APA exceptions from notice and comment for ''good cause'' and for ''interpretative rules'' are not satisfied is widespread.[50] The IRS claims that its temporary regulations are exempt from the APA notice and comment requirements because of the provisions in section 7805(e) referring to temporary regulations.[51]

However, the requirements in section 7805(e) that temporary regulations must also be issued as proposed regulations and that temporary regulations must expire three years after they are issued cannot plausibly be read as approving the use of temporary regulations by the IRS in all circumstances without regard to the APA's notice and comment requirements. Instead, these provisions are most naturally read as being based on the assumption that temporary regulations will be used only when the good cause exception applies.[52]

Also, section 559 of the APA provides that a ''subsequent statute'' must not be read to supersede or modify the requirements of the APA unless it does so expressly. It cannot plausibly be argued that section 7805(e) expressly supersedes the APA's notice and comment requirements. Instead, the requirements in section 7805(e) represent ''additional requirements'' within the meaning of another provision in section 559 of the APA, which provides that the provisions of the APA ''do not limit or repeal additional requirements imposed by statute or otherwise recognized by law.'' In light of those provisions in section 559 of the APA, the restrictions on temporary regulations imposed by section 7805(e) do not provide a basis for the IRS to claim that temporary regulations are exempt from the APA's notice and comment requirements.[53]

In the Supreme Court, the government did not defend the temporary regulation on the basis of either the good cause or interpretive rules exception. Instead, in addition to claiming that IRS temporary regulations are blessed by section 7805(e), the government claimed that any violation of the APA notice and comment requirements in issuing the temporary regulations was cured by the use of notice and comment procedures in proceeding from the temporary regulations to the final regulations. Clarification of that issue would have been very useful since temporary regulations issued by the IRS subsequent to the 1988 enactment of section 7805(e) are now in nearly all cases followed within three years by final regulations issued with the benefit of notice and comment based on the proposed regulations that were issued at the same time as the temporary regulations.

However, as with the retroactive regulations question, because the Court concluded that the substance of the regulation was precluded by *Colony*, it was unnecessary to consider whether the regulation was procedurally defective.

Conclusion

Home Concrete presented several issues of broad significance on which guidance is clearly needed. However, the Court resolved none of those issues, both because there was no majority opinion on the aspects of the case to which several of those broader issues related and because the Court concluded that the regulation was substantively invalid, making it unnecessary to reach issues concerning retroactivity and procedural validity.

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[49]*See* 5 U.S.C. section 553.

[50]*See, e.g.*, Kristin E. Hickman, ''Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirement,'' 82 *Notre Dame L. Rev.* 1727 (2007).

[51]*See, e.g.*, Brief for the United States at 29, *Home Concrete*, No. 11-139 (describing section 7805(e)(1) as ''granting the Treasury Department authority to issue temporary regulations'').

[52]For a more extended discussion of the reasons the government's reliance on section 7805(e) is misplaced, see Brief of Amicus Curiae Kristin E. Hickman in Support of Respondents at 14-19, *Home Concrete*, No. 11-139.

[53]For a discussion of section 559 of the APA, see Smith, ''Standards for Tax Court Review in Equitable Innocent Spouse Cases,'' *Tax Notes*, Feb. 20, 2012, p. 981, *Doc 2012-583*, or *2012 TNT 35-27*.

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