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The "Major Questions Doctrine": Another Tool to Challenge Tax Regulations?

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Debates have raged in recent years over the future of Chevron deference, particularly given the change in the makeup and views of the Supreme Court of the United States. We have written extensively on Chevron deference in the past (see here, here and here, for example). Although the Court has not addressed the continuing viability of Chevron, it has recently found ways to avoid applying Chevron deference to questions involving the interpretation of agency regulations.

In West Virginia v. EPA, No. 20-1530 (June 30, 2022), the Supreme Court did not address Chevron deference directly. However, it reconfirmed and applied what is known as the "major questions doctrine." Under this judicial doctrine, which originated in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), a federal agency must point to clear congressional authorization for the authority it claims. Meaning, when a statute confers authority upon an agency to promulgate rules, a court must determine whether US Congress wanted to give the agency the power to make decisions of vast economic and political significance. Accordingly, "[a]gencies have only those powers given to them by Congress and it must be presumed that major policy decisions are left with Congress, not agencies."

The Supreme Court's recent decision is not limited to a particular agency. Indeed, the major questions doctrine has been applied in a tax context before. In King v. Burwell, 576 U.S. 473 (2015), for example, the Court applied the major questions doctrine in declining to defer to tax regulations interpreting the Affordable Care Act (internal references omitted):

In extraordinary cases … there may be reason to hesitate before concluding that Congress has intended [] an implicit delegation [to the agency to fill in the statutory gaps]. … This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep economic and political significant that is central to this statutory scheme; had Congress wished to assign that question to the agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

Thus, it appears that the major questions doctrine is now firmly entrenched as another tool of statutory construction and should be considered in any analysis of whether tax regulations have been

validly promulgated and are entitled to deference.

Practice Point: It will be interesting to see how the Supreme Court's recent decision will impact future challenges to tax regulations. In the not too distant past, Administrative Procedure Act challenges to tax regulations and other published guidance were rare, but the Court's 2011 decision in Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011) changed the landscape. Some tax regulations are invariably based on policy decisions, and in appropriate cases, taxpayers may seek to challenge such regulations under the major questions doctrine.

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