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Deferential Review of the U.S. Tax Court, After Mayo Foundation v. United States (2011)

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Deferential Review of the United States Tax Court, After Mayo Foundation v. U.S., By Andre L. Smith, Associate Professor, Widener Law School, Wilmington, Delaware.

Introduction

The death of tax exceptionalism is exaggerated. Some years ago, Paul Caron pled for the end of tax myopia.[1] He contended then that there was no appreciable difference between federal tax statutes and other 'normal' federal laws. In Mayo Foundation v. United States, the Supreme Court agreed, holding that the Tax Court must apply Chevron deference to IRS regulations carrying the force of law, rather than the National Muffler Standard, which up to then had only been applied in tax matters.[2] Since then, there has been a slightly renewed interest in the structure and process of tax litigation.[3] But the application of the Chevron to tax matters is not so simple, because Congress decided long ago that taxation is indeed exceptional and that authority to hear tax adjudications and issue new rules during adjudication should not lie within the IRS, but with an independent, expert tribunal--the United States Tax Court.[4]

When the Internal Revenue Service promulgates a rule interpreting a statute in the Internal Revenue Code and that rule carries the force of law, which is the case for rules promulgated after notice and comment rulemaking and for those issued as temporary regulations, the Chevron Doctrine requires the United States Tax Court to follow that interpretation unless it is arbitrary, capricious, or it represents and interpretation already foreclosed by Congress.[5] Regardless whether the Tax Court affirms or overturns the IRS regulation, an appellate court reviewing the case should apply Chevron deference to the IRS regulation, and not the Tax Court opinion, because, consistent with Chevron, Congress intended in matters of federal taxation for the IRS to have primary prospective, interpretive authority.

On the other hand, the Tax Court's enabling statute makes clear that Congress distrusts and refuses the IRS authority to engage in retroactive rulemaking—i.e., reversals of policy asserted in the midst of an adjudication.[6] Congress permits most agencies to adjudicate cases in house and, under Chenery, to issue new rules during adjudications so long as the reasons for the change are defendable. But, instead of the IRS, Congress gave that authority to the United States Tax Court, a legislative panel of 19 expert tax judges.[7] Therefore, a federal circuit court of appeals should apply Chevron deference to the Tax Court opinion because Congress intended for the Tax Court to have primary interpretive authority with respect to common-law style rulemaking.

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[1] Paul Caron, *Tax Myopia, Or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REVIEW 517 (1994).
[2] Mayo Foundation for Medical Education & Research v. United States, 131 S. Ct. 704 (2011).
[3] E.g., Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643 (2012).
[4] 26 U.S.C., sec. 7441.
[5] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
[6] 26 U.S.C., sec. 7482. SEC v. Chenery Corp., 332 US 194 (1947), grants agencies general authority to announce new rules during adjudication and apply them retroactively to the petitioner in a given case. Such authority is limited by an abuse of discretion standard, National Labor Relations Board v. Bell Aerospace 416 U.S. 267 (1974).
[7] 26 U.S.C., sec. 7441.

This article contends that deferential review of the Tax Court is consistent with the rationale and requirements of the Chevron Doctrine, the text and structure of the internal revenue statute, as well as the history and purpose of the United States Tax Court. Moreover, deference to the U.S. Tax Court promotes the goals of expertise, finality, certainty, uniformity, judicial economy, resource efficiency and the ideal of legislative supremacy.[8] The costs of deference—complexity, displeasure of the tax bar--are negligible in comparison to these benefits.[9] Ultimately, de novo review of Tax Court decisions of law, especially those adopted en banc, wastes the millions of dollars taxpayers dedicate to the maintenance of this expert tribunal.[10]

History of Deference and the U.S. Tax Court

At first, tax controversies were heard within the Bureau of Internal Revenue. Complaints against the process included bias against the taxpayer, except in the case of wealthy taxpayers who negotiated their tax liability with the review panels—members of which were more likely to be appointed by the President because of their political patronage than because of their tax law expertise. Proceedings were not made available for public scrutiny. It is not surprising that Congress vested appellate authority over this system in the district courts, with no requirement to defer to the Bureau's interpretations of law.[11]

By 1924, distrust of executive branch handling of tax adjudications led Congress to establish the Board of Tax Appeals--which would become the U.S. Tax Court--entirely outside the Internal Revenue, the Treasury Department, and the Executive Branch (Article II) altogether. The hearings were made public, and the judges were appointed for fifteen year terms by the President, with the advice and consent of the Senate.[12] These changes made the process for tax appeals less biased and more reliant on expert decision making. However, because the decisions of the BTA were appealable to the district courts with no requirement for deference, uniformity was lacking, as each federal district court was free to interpret our relatively new federal income tax laws de novo—regardless whether the case was an appeal from the BTA or a refund suit filed originating in district court.

Two years later, in 1926, Congress raised the salaries of BTA judges and lengthened their tenure. Acknowledging the growing expertise of the BTA, Congress provided for review of BTA decisions in the circuit courts of appeals, and provided that BTA findings of fact were final so long as they had 'warrant in the record' and their decisions of law were to be respected unless 'not in accordance with law.'[13] In 1942, Congress changed the name of the BTA to the United States Tax Court.[14] And then, in 1943, the Supreme Court in Dobson v. Commissioner held that the statutory language of section 1141, 'not in accordance with law', limited the courts of appeals to reversing the Tax Court only for 'clear-cut

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[8] David F. Shores, *Deferential Review of Tax Court Decisions: Taking Institutional Choice Seriously*, 55 TAX LAW. 667 (2002); *Rethinking Deferential Review of Tax Court Decisions*, 53 Tax Law. 35 (1999).
[9] See Leandra Lederman, 92 B.U. L. REV. 642 (2012); Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions is Undesirable*, 77 OR. L. REV. 235 (1998).
[10] 26 U.S.C., sec. 7460.
[11] HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS (1979).
[12] Revenue Act of 1924, ch. 234, sec. 900(a), (b), (h), 43 Stat. 253, 336.
[13] Revenue Act of 1926, ch. 27, sec. 1003(b), 44 Stat. 9, 110.
[14] Revenue Act of 1942, ch. 619, sec. 504, 56 Stat. 798, 957.

mistakes of law'.[15] The Court noted that circuit courts of appeal properly reviewed other agencies operating under the same statutory language:

"The [Tax Court] is independent… It deals with a subject that is highly specialized and so complex as to be the despair of judges … Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts. Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law… The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."[16]

The Supreme Court may have been attempting to avoid further tax cases, since the Court itself is at a comparative disadvantage to the Tax Court in matters of pure tax. By promoting deferential review, which in turn promotes finality, the Supreme Court, feeling less than confident in tax matters, may have been trying to lessen its own responsibilities.[17] But despite the clear command of Dobson, as well as the purpose for deferential review, circuit courts of appeals avoided Dobson's strictures. After being "repeatedly admonished", second circuit jurist, Learned Hand, complained, "why, if that be so, we—or indeed even the Supreme Court itself—should be competent to fix the measure of the Tax Court's competence, and why we should ever declare that it is wrong, is indeed an interesting inquiry."[18]

When Congress responded to Dobson by amending the statute in 1948, they provided for review of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."[19] Appeals of the district court in such matters include review of the facts under the clearly erroneous standard, and review of the law de novo. Except, Congress amended 1141(a), which related to findings of facts, and left undisturbed 1141(c), which related to conclusions of law. Professor David Shores pointed out that section 1141(c), now section 7482(c), uses the same language that was before the Dobson Court and should be interpreted as such.[20] By amending section 1141(a), but not 1141(c), Congress increased the level of scrutiny circuit courts are to apply to findings of fact, but questions of law are to be left undisturbed unless there was a clear cut mistake.

Still, the circuit courts of appeal retrenched in short order, the specificity of the amendment notwithstanding. While some circuit courts spoke of having some respect for Tax Court opinions, all of them eventually interpreted the amendment of section 1141(a) to mean de novo review of Tax Court decisions of law.[21]

Circuit courts of appeals continued to review Tax Court decisions de novo, even after Chevron v. NRDC (1984). Despite language in the Administrative Procedures Act that says a reviewing court shall decide all relevant questions of law, the Court in Chevron held that primary interpretative authority lies

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[15] Dobson v. Commissioner, 320 U.S. 489 (1943).
[16] Id.
[17] Paul Caron, *Tax Myopia*, fn. 24-26.
[18] Brooklyn Nat'l Corp. v. Commissioner, 157 F.2d 450, 452 (2d Cir. 1946).
[19] Rules of Decision Act of 1948, ch. 646 Sec. 36, 62 Stat. 991, 991-92.
[20] Shores, *supra* note __.
[21] *Id*.

with the agency charged with administering the statute, and that federal appellate courts were limited to reviewing authoritative executive interpretations of a statute only for arbitrariness and capriciousness.[22] At first, Chevron was thought to be limited only to those issues where the agency enjoys expertise, but it has since expanded to almost all executive interpretations of the organic statute--even with respect to interpreting the extent of authority Congress has granted to that agency. And yet, the Courts refused to apply Chevron to the Tax Court (and the Tax Court refused to apply Chevron to Treasury Regulations).[23]

Chevron deference is typically granted to executive interpretations that are formulated after notice and comment rulemakings, or those that are announced as part of a decision relating to a formal adjudication, or those that are otherwise found by a court to be authoritative interpretations of the executive. In the context of taxation, Chevron deference has been applied to notice and comment regulations promulgated by the IRS, but it does not extend to informal IRS guidance, like Revenue Rulings and Private Letter Rulings. The lesser, Skidmore/Mead deference applies to these.[24] But, despite the Supreme Court's rationale in Dobson, that the Tax Court was the epitome of an expert, principled administrative body deserving of respect, circuit courts of appeal have refused even to grant the lesser, Skidmore/Mead deference to Tax Court decisions of law. So much for the notion that, "Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts."[25]

In 1996, David Shores criticized de novo appellate review of Tax Court decisions of law for promoting non-uniformity and non-finality.[26] Professor Shores adheres to the notion that it does not matter so much that the tax laws are settled correctly, so long as they are settled. Consistent with the Dobson Court, Shores advocates for deferential review because increased finality with respect to Tax Court decisions will probably lessen the amount of federal circuit court splits relating to tax law. He contends that when Congress amended section 1141(a), but not 1141(c), Congress intended to increase circuit scrutiny of the facts, not the law.

Steve Johnson, on the other hand, contended that deferential review of the Tax Court will lead to greater non-uniformity, not less.[27] If the circuit courts review the district courts de novo but reviews the Tax Court only for clear cut mistakes, Professor Johnson argues that there will be an increase in

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[22] 5 U.S.C. Sec. 706.

[23] In U.S. v. Mead (2001), the Court held that even non-authoritative interpretive pronouncements of the executive were entitled to some deference, though not as much as Chevron grants to 'official' or 'authoritative' interpretations. The Mead Court invoked the old Skidmore v. Swift standard that allowed circuit court judges to defer to agencies based on the agency interpretation's power to persuade. Factors included the depth and quality of reasoning, along with the length of time the executive has been operating under that interpretation. In fact, one of, if not the only, major distinction between Chevron and Skidmore/Mead relates to the length of time the executive has been operating under a given interpretation: Under Skidmore/Mead, a recently changed interpretation does not receive much deference at all, whereas, under Chevron, an authoritative interpretation receives almost absolute deference even if it represents a sudden reversal of previous policy.

[24] Leandra Lederman, *supra* note __.

[25] Dobson, *supra* note __.

[26] Shores, *supra* note __.

[27] Johnson, *supra* note __.

intra-circuit uniformity, that is, there will be more than one rule within the same circuit. Shores responds that intra-circuit uniformity would be minimal since the Tax Court has chosen to bind itself to the interpretations of laws of the circuit court of the taxpayer if that circuit court has already dealt with the issue, and the circuit court of appeals under a deferential review standard would typically adhere to the Tax Court's interpretations.[28]

Both Shores and Johnson seem to believe that the optimal solution to non-uniformity is a National Court of Tax Appeals, which has been proposed several times but with little movement, the most likely reason being the perception that such a court would be biased in favor of the government.[29] However, I contended in 2005 that deferential review of the Tax Court is better than either the current system of de novo review or a national court of tax appeals, because deferential review 1) improves finality, certainty and uniformity, 2) increases our system's reliance on expert decision makers, 3) retains the ability of generalist circuit court judges to review facts and nontax matters, and 4) only minimally increases the perception of bias.[30] Here, I argue that deferential review of the Tax Court, as opposed to de novo review, also supports legislative supremacy, the efficient use of judicial resources, and the efficient use of taxpayer dollars.

Mayo and the Current Debate over Chevron and the Tax Court

The debate went silent for a few years, until the Court decided Mayo Foundation v. United States (2011), holding that tax law is not an extraordinary area of law and that the Chevron doctrine applies to authoritative administrative interpretations of the Internal Revenue Code. Responding to the Mayo decision, Leandra Lederman explored the world of IRS interpretations, categorizing those which have received Chevron deference versus those which have received Skidmore/Mead deference.[31] She focused mainly on resolving the issue of whether the IRS should receive Chevron deference when it issues temporary "fighting regs".

Fighting regulations are temporary regulations promulgated by the IRS containing new interpretations of law designed to influence or govern a pending litigation. IRS temporary regulations carry the force of law upon their issuance, but expire after a certain amount of time if the IRS does not complete the promulgation process.[32] Because Chevron deference typically attaches to interpretations

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[28] Golsen v. Commissioner of Internal Revenue, 54 T.C. 742 (1970) (aff'd on other issues 445 F.2d 985 (10th Cir. 1971).

[29] See, e.g., Gary W. Carter, *The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals*, 59 TEMP. L.Q. 879 (1986); H. Todd Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228 (1975); Ralph H. Dwan, *Administrative Review of Judicial Decisions: Treasury Practice*, 46 Colum L. Rev. 581 (1946); Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Oscar E. Bland, *Federal Tax Appeals*, 25 COLUM. L. REV. 1013 (1925).

[30] Andre L. Smith, Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity and Impartiality, 58 TAX LAWYER 361 (2005).

[31] Lederman, *supra* note __.

[32] Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with the Administrative Procedures Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1158-59 (2008) ("Congress, Treasury, and taxpayers all operate with the understanding that Treasury regulations, whether temporary or final, are legally binding on both taxpayers and the government.").

carrying the force of law, temporary IRS regulations, even those issued in anticipation of regulations, may receive Chevron deference.[33] On the other hand, temporary regulations may not receive Chevron deference because temporary regulations have not been vetted through the notice and comment procedure and, thus, are not the product of the agency's full and informed expertise.[34]

On one hand, Professor Lederman argues that "all Treasury regulations should be subject to Chevron deference."[35] However, she laments the fact that the Chevron doctrine seems to award deference to IRS temporary regulations without them first going through the notice and comment period. Chevron applies generally to interpretations carrying the force of law, which should include temporary regulations. But if one of the rationales for the Chevron doctrine is agency expertise, then it makes little sense to award deference to a regulation that has not yet been fully vetted.[36] Thus, Professor Lederman supports using the arbitrary and capricious standard to invalidate those interpretations that were issued for the purpose of affecting a pending litigation (at least in some cases). I agree with her position, on both counts.

However, I disagree with Professor Lederman's position that rules emanating from Tax Court adjudications should not receive Chevron deference. In responding to Mitchell Gans' proposal that the Tax Court refuse deference to most all IRS interpretations,[37] Lederman asserts "The IRS, not the Tax Court, is the expert agency."[38] She criticizes Dobson v. Commissioner and the notion that Tax Court decisions should also receive deference: "Dobson not only was criticized by contemporary commentators, but it also was unpopular with appellate courts, which generally preferred to retain a larger scope of review. A return to the Dobson regime would also treat tax cases differently from other cases."[39] As the next section will discuss, I do not believe any of these criticisms of deference to the Tax Court trumps the fact that Congress clearly divided interpretive authority between the IRS and the Tax Court.

While there is virtue in treating tax just like any other administrative law, Congress decided that when it comes to adjudicatory authority, which typically includes authority to engage in retroactive rulemaking, tax is indeed special. Not only did Congress establish an Article I court to deal with tax controversies because it distrusted the IRS' capacity to hold fair adjudicatory hearings in house, but Congress also set up a unique Tax Court conference procedure to ensure that retroactive rulemaking in the Tax Court meets or exceeds common notions of fairness.

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[33] Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) ("Whether temporary regulations so issued are generally entitled to Chevron deference remains an open question.").

[34] Tax & Accounting Software Corp. v. United States, 301 F.3d 1254, 1260 (10th Cir. 2002).

[35] Lederman, *supra* note __, at 699.

[36] Gonzales v. Oregon, 546 US 243 (2006) ("Chevron deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.").

[37] Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 792-795 (2002).

[38] Lederman, *supra* note __, at 670.

[39] *Id*.

Congressional Authorization to Interpret the Internal Revenue Code

The Chevron analysis begins with the question, to whom did Congress delegate authority to interpret federal statutes? The answer is usually a single, executive agency. But this is not always the case.[40] The text and structure of the Tax Court's enabling statute, along with its history and purposes, demonstrates that Congress intended to divide interpretive authority between the IRS and the Tax Court. Therefore, Chevron should apply to authoritative IRS interpretations of a prospective nature, as well as retroactively applied rules emanating from formal adjudications before the Tax Court, especially those retroactive rules adopted by the Tax Court conference procedure.

"As always, we start with the text."[41] Section 1141(c), now section 7482(c) of the Internal Revenue Code, has not changed since Dobson v. Commissioner, when the Supreme Court held that its language "not in accordance with law" meant that interpretations adopted or formulated by the Tax Court were to be respected by the circuits of appeal so long as they did not represent a "clear-cut mistake."[42] Indeed, the tax bar and the appellate courts objected to Dobson, as Professor Lederman points out.[43] But it should go without saying that the tax bar and appellate courts cannot overturn a Supreme Court decision or repeal a validly enacted statute. Until Congress amends section 1141(c) to provide for de novo review, Dobson's lack of popularity is simply irrelevant, much less conclusive.

The structure of the Tax Court's enabling statute also militates in favor of deference, as it places the Tax Court under Article I.[44] The Tax Court is, therefore, Congress' agent. And since one of the rationales for Chevron deference in addition to expertise is that the Executive Branch is more politically accountable than the Judiciary,[45] then, by the same token, authoritative interpretations by agents of the legislature should be respected as much as (and perhaps more than) those by the executive. It is an affront to legislative supremacy that the executive's agents receive deference but the legislature's do not. In fact, the concept of legislative supremacy demands the opposite.

Also, the Tax Court's enabling statute provides for a collegial decision making process intended to promote expertise and impartiality, the two reasons the Court in Dobson awarded deference to the Tax Court some forty years before Chevron. Tax Court judges do not release their opinions to the public. Instead, they file reports to the Chief Judge, who may certify the opinion and release it, remand it back to the trial judge for reconsideration, or submit the report to the Tax Court conference where all 19 Tax Court judges vote on the report. New interpretations of law applied retroactively are typically submitted to 'court conference'.[46] If the report is approved by the Tax Court conference, it is then released to the public. If the report is not approved by the Tax Court conference, it is remanded to the trial judge or assigned to another judge. This elaborate process ensures that retroactively applied tax rules have been dutifully considered and approved by expert tax judges in a manner that squelches the

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[40] Note, *Multiple Agency Delegations & One Agency Chevron*, 67 VAND. L. REV. 275, 285 (2014).
[41] Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624 (1983).
[42] Shores, *supra* note __.
[43] Lederman, *supra* note __; Johnson, *supra* note __.
[44] Tax Reform Act of 1969, Pub. L. No. 91-172, sec. 951, 83 Stat. 487, 730.
[45] Chevron v. NRDC (1984); also see Dobson v. Commissioner (1943).
[46] 26 U.S.C. 7460.

bias of any one judge. But, then, de novo review allows a panel of inexpert circuit court judges to overturn the Tax Court decision without ever identifying a flaw in the Tax Court's reasoning, even if the Tax Court acted unanimously.

Even the history and purpose of the U.S. Tax Court indicates that Congress intended to strip the IRS of their authority to engage in common law-style, retroactive rulemaking, and that they intended to give that authority to an independent, expert administrative body. When the adjudications of tax controversies were before the Bureau of Tax Appeals inside the Internal Revenue Service, calamity followed in the form of in-expertise, bias and secrecy.[47] Congress corrected its mistake by creating the U.S. Tax Court and establishing its elaborate procedures, including the court conference. Therefore, with respect to the Chevron Doctrine, the split is clean: Prospective regulations issued by the IRS and carrying the force of law receive Chevron deference, as do interpretations of law emanating from or adopted by the U.S. Tax Court.

Applying Chevron to the Tax Court is congruent with its application to other federal administrative contexts—Chevron deference applies both to notice and comment rulemakings and to formal adjudications. Thus, Chevron deference to the Tax Court is consistent with other administrative contexts and does not really treat tax specially, as Professor Lederman contends.[48]

Costs and Benefits of Deferentially Reviewing the U.S. Tax Court

In my view, the costs associated with deference to the Tax Court are exaggerated, of marginal importance by themselves, and negligible in relation to the benefits. Professor Steve Johnson's criticism that deferential review will promote greater intra-circuit uniformity does not amount to much of a problem: "Certainly Johnson is correct in that 1) the Tax Court could pass on an issue and adopt rule of law A, 2) the circuit court prefers rule of law B but affirms the Tax Court because rule of law A is reasonable and deferential review is the rule, 3) a district court case with the same issue also is resolved in favor of rule A, then 4) the circuit court reverses the district court because such a review is de novo and requires no deference. This sequence of events would lead to the application of different rules of law it within the same circuit, that is, intra-circuit non-uniformity. Under close inspection though, the circuit court would be overturning its own case, and thereafter, pursuant to the Golsen Rule, the Tax Court would be bound by that circuit's adoption of rule B. In fact, the Golsen Rule was adopted specifically to prevent intra-circuit non-uniformity, and it will so operate. Nothing about deferential review diminishes the Golsen rule."[49]

Complexity issues are similarly overblown, especially since courts are familiar with deferentially reviewing interpretations of law emanating from formal administrative adjudications. While it is true that circuit courts of appeal would review tax cases emanating from district courts de novo, but the Tax Court deferentially, the concept of deference to Tax Court expertise is just not very hard to grasp. Concerns of the tax bar are similarly exaggerated, since it is not surprising in the least that a tax litigator

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[47] Dubroff, *supra* note __.
[48] Lederman, *supra* note __.
[49] Cf. Johnson, *supra* note __, with Smith, *supra* note __.

would want two shots at setting aside the IRS determinations, de novo in the Tax Court and de novo at the appellate level. But Congress decided otherwise. Their respective statutes provide for de novo review of the district courts and deferential review of the Tax Court. To wit, forum shopping cannot be much of a legitimate concern, since Congress purposefully provided taxpayers with two adjudicatory forums to choose between.

The benefits, on the other hand, are considerable. Deference to the Tax Court promotes finality, because deference to the Tax Court likely results in fewer reversals, which will likely result in fewer appeals from Tax Court decisions. Deference to the Tax Court promotes national uniformity, because fewer reversals of the Tax Court will likely result in fewer circuit court splits. Relatedly, the likelihood that the Tax Court rule will eventually be the settled rule increases the degree of certainty in tax practice. Moreover, decisions based on tax expertise increase with the likelihood that the Tax Court rule will eventually be the settled rule.[50]

Consider the controversy over contingent and statutorily awarded attorneys' fees that resulted in Banks v. Commissioner (2005).[51] The Tax Court had held for some time that, despite the inequities, the assignment of income doctrine brought attorneys' fees within the gross income of the litigant. The circuit courts of appeals split three ways. Some circuit courts, including the 9th, held that contingent and statutorily awarded fees were includable in the litigant's gross income if state law gave the attorney a creditor's claim over the fees, but not includable in the litigant's gross income if state law gave the attorney an equity claim. This rule results in intra-circuit non-uniformity, because the tax consequence depended then on which state in the Ninth Circuit the litigant resided. The Sixth Circuit held that attorneys' fees were never includable in the litigant's gross income because the litigant is not in control of the case, while the Seventh Circuit held that they are always includable in the litigant's gross income because the litigant is always in control of the case. After decades of non-uniformity and indeterminacy, the Supreme Court affirmed the Tax Court's rule. Deferential review of the Tax Court might have avoided or at least shortened the length of that controversy.

Deference to Tax Court interpretations of law also promote both judicial and resource efficiency. Taxation is the bane of some judge's existence. According to Harold Bruff, "Tax appeals are not welcomed in the generalist appellate courts. The complexity of the code has for many years daunted federal judges."[52] And according to Justice Souter, "One must stay on the good side of the Chief Judge, or else you will get the tax cases."[53] De novo review of tax law places a serious, perhaps unreasonable burden on inexpert appellate judges. Deferential review, on the other hand, promotes judicial efficiency because an inexpert panel of circuit court judges should affirm a Tax Court rule unless the petitioner demonstrates an obvious flaw in the Tax Court's reasoning. Deferential review also promotes resource efficiency because de novo review of the Tax Court wastes the millions of dollars taxpayers spend on maintaining a panel of 19 experts in their own, impressive building in northwest Washington, D.C. Tax

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[50] Shores, *supra* note __; Smith, *supra* note __.
[51] Commissioner v. Banks, 543 U.S. 426 (2005); Laura Sager & Stephen Cohen, *How the Income Tax Undermines Civil Rights Law*, 73 SO. CAL. L. REV. 1075 (2000).
[52] Harold Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991).
[53] Caron, *supra* note __.

Court expertise is already subverted to a small degree by the requirement that they apply either Chevron or Skidmore/Mead deference to IRS pronouncement. Then, de novo appellate review neuters whatever expertise the Tax Court has exercised.

Conclusion

Deference is an elusive concept. But this much is clear, de novo review means "anew." So, even if a unanimous court conference of 19 tax experts, supposedly in cahoots with the Internal Revenue Service, actually rejects an IRS attempt to change the rules midstream—in the midst of an adjudication—de novo review requires circuit courts of appeal to pretend it never happened. The argument that prudence requires a circuit court of appeals to at least read the Tax Court opinion in this instance concedes that deferential review is appropriate.

What degree of deference is another matter? Dobson v. Commissioner held that Tax Court conclusions of law are to be set aside only for "clear-cut mistakes" of law. But recently decided Mayo Foundation v. United States requires us to reject the deferential standard in Dobson v. Commissioner in favor of the standard in Chevron v. NRDC. Therefore, an interpretation of law adopted by the Tax Court should be overturned only if arbitrary, capricious, or if it represents an interpretation already foreclosed by Congress.