

funds were maintained offshore? One might persuasively argue that tax evasion is tax evasion, regardless of whether someone uses a foreign account to hide the income or simply doctors his company's books and records.

Presumably, none of these suggestions should be seen as earth-shattering. In creating various exceptions to the penalty structures in the initiatives, the IRS implicitly acknowledged that some conduct (and tax loss) should be differentiated from more willful actions that generated significant harm to the fisc. And, as noted above, a guideline framework has been used in other areas with the government's blessing.

Conclusion

As stated at the outset, this article simply seeks to start a thoughtful discussion about where we go from here. Taking an approach from a different area, such as federal sentencing, and attempting to analogize it to the IRS's voluntary disclosure practice won't be easy, but it could produce the uniformity, proportionality, and certainty necessary to bring many taxpayers back into compliance — and millions of untaxed dollars back into the system when they are most needed.

Make no mistake, developing an approach along the lines suggested would require compromise. To maximize tax revenues from voluntary disclosures, penalty ranges might have to be reduced (or possibly waived) from those in the most recent initiatives. This would seem unfair to the individuals who disclosed under the OVDP and the OVDI. But if punishment is the lodestar, no logical approach will work for the future because everything will proceed from the significant penalty structures of the past. If increasing tax revenues is instead the primary goal — as it must be — a pragmatic structure needs to be created and employed. With FATCA just around the corner, the time seems right for big thinking.

Home Concrete: Impressions From the Oral Argument

By Kristin E. Hickman



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In this article, Hickman, who filed an amicus brief in *Home Concrete*, discusses the case, the history of litigation leading up to it, and the oral argument; she believes the case is too close to call for either party.

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*Home Concrete & Supply LLC v. United States*¹ is a notable case. First and foremost, it concerns the meaning of section 6501(e)(1)(A): Does an overstatement of asset basis, and corresponding understatement of gain on the disposition of that asset, represent an omission of an amount from gross income extending the limitations period for assessing a deficiency from three to six years? The answer is relevant for many taxpayers, not just the participants in the son-of-BOSS tax shelter who are the primary targets of litigation in *Home Concrete* and other cases. Like many other statutory cases, however, *Home Concrete* is about much more than just the meaning of the statute.

The history of the litigation is well documented but worth summarizing. In 1958, in *Colony Inc. v. Commissioner*, the Supreme Court concluded that virtually identical predecessor language from the 1939 code did not encompass basis overstatements.²

¹*Home Concrete* is designated before the Supreme Court as No. 11-139, cert. granted 132 S.Ct. 71 (2011). The case under consideration before the Supreme Court in *Home Concrete* originated in the Fourth Circuit. See 634 F.3d 249 (4th Cir. 2011), Doc 2011-2674, 2011 TNT 26-7. The case is notable for representing a group of cases raising the same set of issues and yielding tremendous disagreement among several circuit courts. See also *Intermountain Ins. Serv. of Vail LLC v. Commissioner*, 650 F.3d 691 (D.C. Cir. 2011), Doc 2011-18052, 2011 TNT 164-10; *Salman Ranch Ltd. v. Commissioner*, 647 F.3d 929 (10th Cir. 2011), Doc 2011-11714, 2011 TNT 105-16; *Grapevine Imports Ltd. v. United States*, 636 F.3d 1368 (Fed. Cir. 2011), Doc 2011-5233, 2011 TNT 49-14; *Burks v. United States*, 633 F.3d 347 (5th Cir. 2011), Doc 2011-2857, 2011 TNT 28-12; *Beard v. Commissioner*, 633 F.3d 616 (7th Cir. 2011), Doc 2011-1764, 2011 TNT 18-10.

²357 U.S. 28 (1958).

COMMENTARY / VIEWPOINTS

After two federal circuit courts relied on *Colony* to reject a contrary IRS interpretation of section 6501(e)(1)(A),³ Treasury issued temporary regulations in 2009⁴ and final regulations in 2010⁵ providing that basis overstatements constitute omissions from gross income under section 6501(e)(1)(A).⁶ Since the Court's holding last year in *Mayo Foundation for Medical Education and Research v. United States*⁷ that Treasury regulations are entitled to judicial deference under the *Chevron* standard of review,⁸ the government has claimed *Chevron* deference for its interpretation of section 6501(e)(1)(A) in several cases. In 2010, in *Intermountain Insurance Service of Vail LLC v. Commissioner*, the Tax Court invalidated Treasury's temporary regulations on the ground that *Colony* controlled the interpretation of section 6501(e)(1)(A).⁹ Circuit courts later considering the same question split over the meaning of section 6501(e)(1)(A), the significance of *Colony* in interpreting that provision, and the eligibility of Treasury regulations for *Chevron* deference.¹⁰ In September of last year, the Supreme Court granted certiorari in *Home Concrete* to consider the meaning of section 6501(e)(1)(A) and the validity of the regulations interpreting it. The parties and several amici filed briefs in November and December.¹¹ On January 17 the Court heard oral argument.

Given the centrality of section 6501(e)(1)(A) and *Colony* for resolving *Home Concrete*, it is not surprising that briefs for the government and the taxpayers extensively discussed the statute's text, history, and purpose, as well as Justice John Marshall Harlan's *Colony* opinion. Among the questions they asked:

- Is the meaning of section 6501(e) clear enough for the Court to resolve the case at *Chevron* step one? Or is section 6501(e) sufficiently ambiguous for the Court to step back and defer to Treasury's interpretation at *Chevron* step two?

- Did the Supreme Court in *Colony* resolve the meaning of section 6501(e), and does the *stare decisis* effect of that opinion control the outcome of this one? Or is *Colony* limited in its scope to the 1939 code?

The parties and amici raised several other issues concerning the circumstances surrounding Treasury's adoption of the temporary and final regulations interpreting section 6501(e)(1)(A) and whether *Chevron* deference applies to them:

- In *National Cable and Telecommunications Association v. Brand X Internet Services*, the Supreme Court held that a federal circuit court decision construing ambiguous statutory language would not preclude an administering agency from claiming *Chevron* deference for a contrary interpretation later adopted through notice and comment procedures.¹² Does *Brand X* extend to the Supreme Court's interpretations of statutes? And assuming that *Colony* even construes section 6501(e) rather than merely its 1939 predecessor, did Harlan's opinion leave sufficient room for Treasury to adopt an alternative interpretation?
- Should the Court care that Treasury adopted its regulation in the midst of litigation — effectively reopening tax years that otherwise seemed closed — with the goal of altering the outcome of pending cases? Should the Court care that Treasury first issued its regulation in temporary form with only post-promulgation notice and comment, arguably in violation of the Administrative Procedure Act?
- Is the meaning of the regulations unclear? If so, should the Court recognize the government's interpretation in the preamble and in its briefs as controlling under *Auer v. Robbins*?¹³

Consistent with the parties' briefs, at oral argument, most of the justices' questions explored the text, history, and purpose of section 6501(e)(1)(A), as well as the significance of Congress's amendment of that provision in 1954. The justices also carefully parsed the Court's opinion in *Colony*.

Chief Justice John G. Roberts Jr. and Justice Antonin Scalia appeared the most sympathetic to the taxpayers' position, and Justice Elena Kagan seemed the least. The justices expressed little interest in Treasury's regulations. From their questions, one could easily envision the Court holding that the meaning of the statute is clear — although in which

³See *Salman Ranch Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009), Doc 2009-17311, 2009 TNT 145-13; *Bakersfield Energy Partners LP v. Commissioner*, 568 F.3d 767 (9th Cir. 2009), Doc 2009-13801, 2009 TNT 115-10.

⁴T.D. 9466, Doc 2009-21297, 2009 TNT 184-9.

⁵T.D. 9511, Doc 2010-26662, 2010 TNT 240-11.

⁶See reg. section 301.6501(e)-1(a)(1)(iii).

⁷131 S.Ct. 704 (2011), Doc 2011-609, 2011 TNT 8-10.

⁸The *Chevron* standard of review derives from *Chevron USA Inc. v. Natural Resources Defense Council Inc.* and instructs a reviewing court to determine first whether the statute being interpreted is ambiguous and, if so, whether the administering agency's interpretation is reasonable or permissible. See 467 U.S. 837, 842-843 (1984). If the statute is ambiguous and the administering agency's interpretation is reasonable, then the reviewing court must defer. See *id.*

⁹T.C. Memo. 2009-195, Doc 2009-19672, 2009 TNT 168-5.

¹⁰See *supra* note 1 (listing circuit court cases).

¹¹The author filed one of the amici briefs; see Doc 2011-26930 or 2011 TNT 247-15.

¹²545 U.S. 967 (2005).

¹³519 U.S. 452, 461 (1997) (describing an agency's interpretation of its own regulations as controlling unless plainly erroneous or inconsistent with the regulation, and quoting other cases to that effect).

party's favor is more difficult to predict — despite Harlan's description of the statutory text as ambiguous.¹⁴

Indeed, several statements from the justices discounted Harlan's reference to statutory ambiguity and reflected a relatively flexible approach toward applying *Chevron* step one and limiting the reach of *Brand X*. Here are a few examples:

- From Roberts: "But [Justice Harlan] was writing very much in a pre-*Chevron* world. [He] was certainly not on notice that [the word 'ambiguous'] was a term of art or would become a term of art. . . . I don't think you necessarily can take the use of the word 'unambiguous' in his opinion to mean what it does today."
- From Justice Stephen Breyer: "I would have thought the point of *Brand X* is you look at the language of the statute and you look at what Congress intended, and where they intended the agency to have power to interpret, you follow the agency. And you could do that after the event if the basis for your decision is that it isn't clear. But that isn't Harlan's opinion at all. He goes and looks at what Congress meant . . . and he gathers that from the legislative history. And so I don't see the basis for saying now the agency still has power."
- From Scalia: "So the only question here is, as the Chief Justice put it, whether [what] indeed *Colony* meant by 'ambiguous'. . . . It depends on what the meaning of 'ambiguous' is, right?"
- From Justice Samuel Alito: "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?"
- Also from Breyer: "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?"

One cannot read too much into those statements. The justices did not clearly signal any intention of finding the statute's meaning sufficiently clear to satisfy *Chevron* step one. Kagan described *Colony* as "doing a lot of tap dancing" to find an answer in the legislative history. And Justice Ruth Bader Ginsburg more than once observed that Harlan found the statute's text unclear. Nevertheless, the justices did not seem to believe that either a lack of textual

precision or Harlan's statement regarding that ambiguity would preclude a *Chevron* step one resolution in *Home Concrete*.

Resolving *Home Concrete* at *Chevron* step one, on the basis of *Colony* or otherwise, would obviate the need for the Court to consider the myriad issues surrounding Treasury's regulations interpreting section 6501(e)(1)(A). Yet it would be a mistake to conclude outright that the justices' focus on the text, history, and purpose of section 6501(e)(1)(A) and the *Colony* decision signals a *Chevron* step one outcome. The *Mayo* oral argument similarly focused on statutory text, history, and purpose and included only a few questions or statements from the justices about whether *Chevron* or *National Muffler Dealers Association Inc. v. United States*¹⁵ provided the appropriate standard of review. Nevertheless, the Court in *Mayo* found the statute ambiguous and discussed extensively why *Chevron* rather than *National Muffler* applied.¹⁶

By the end of the *Home Concrete* arguments, the justices' questions and statements seemed to trend toward a conclusion that *Colony* is limited to the 1939 code. With or without *Brand X*, the Court could easily decide that section 6501(e)(1)(A) is just ambiguous enough to push the case into the realm of *Chevron* step two. Amicus briefs questioned whether *Brand X* extends to Supreme Court decisions, and Roberts pointedly made the government concede that the Court has never extended the reasoning of *Brand X* to its own decisions. But even Scalia, who in dissenting from *Brand X* suggested that its extension to Supreme Court determinations would be "bizarre" and "probably unconstitutional,"¹⁷ seemed at one point during the *Home Concrete* arguments to acquiesce to *Brand X*'s applicability to Supreme Court decisions if the statute is ambiguous: "But according to *Brand X*, if there is ambiguity, despite a holding of this Court, the agency can effectively overrule a holding by a regulation, right? Isn't that what *Brand X* says?"

Should the Court reach *Chevron* step two in *Home Concrete*, little from the oral argument would suggest an outcome in favor of the taxpayers. Several questions concerned the potential for taxpayers to know the government's interpretations of the tax laws before planning their transactions and filing their tax returns. Breyer was passionate at times in proclaiming the unfairness of the government's treatment of taxpayers in *Home Concrete* and like cases. Yet he admitted there are "worse unfairnesses

¹⁴To be precise, Harlan opined regarding the predecessor to section 6501(a)(1)(A) that "it cannot be said that the language is unambiguous" before turning to legislative history to resolve the case. *Colony*, 357 U.S. at 33.

¹⁵440 U.S. 472 (1979).

¹⁶*Mayo*, 131 S.Ct. at 711-714.

¹⁷*Brand X*, 545 U.S. at 1017 (Scalia, J. dissenting).

in the world,” and he said, “If you live by loopholes, you will die by regulation.”

Prognosticating Supreme Court decisions from oral arguments is always a dicey business. Nevertheless, a small but growing body of scholarly literature analyzes the extent to which questions and comments during oral arguments signal eventual case outcomes.¹⁸ Unlike some legal scholars, I did not apply a hostility index or otherwise attempt to evaluate systematically the content of the justices’ questions and comments in *Home Concrete*. Still, one theory holds that the party receiving the most questions will lose the case. Counting questions and comments is imprecise, given the number of instances in which the justices and the parties talk over one another, the justices clarify themselves, and so forth. For what it’s worth (which probably is not very much), the counts taken by other attendees with whom I spoke and my own quick breakdown of the transcript yielded slightly different results but reflected only small variances in the number of questions and comments directed at each side. That rough parity is consistent, I think, with the overall tone of the justices’ engagement with the parties, which seemed to drift from one side to the other and then back again. My impression, both before and after oral argument, is that *Home Concrete* is too close to call.

¹⁸See, e.g., Timothy R. Johnson et al., “Inquiring Minds Want to Know: Do Justices Tip Their Hands With Questions at Oral Argument in the U.S. Supreme Court?” 29 *Wash. U. J.L. & Pol’y* 241 (2009); Sarah Levien Shullman, “The Illusion of Devil’s Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument,” 6 *J. App. Prac. & Process* 271 (2004).

Social Security Reform

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In this article, Nash argues that the goals of benefit protection and long-term solvency can be accomplished with innovative changes to the social insurance system. She proposes Social Security reform that would provide reasonable social insurance for future retirees and restrain future social insurance costs.

Social Security reform is a critical component in the legislative debate surrounding tax reform and deficit reduction. To ensure that the social insurance system continues to provide economic security for the elderly in retirement, reform proposals that go beyond simply increasing the current contribution base, tax rate, or retirement age must be given serious consideration. With nearly 80 million baby boomers retiring during the next two decades, the looming Social Security tax shortfall is a central concern for Congress and the administration. Social Security must be reformed in a manner that strengthens the system for future generations and ensures its long-term solvency.¹ The tenets of benefit protection and long-term solvency can be accomplished with innovative changes to the system.

In this article, I propose Social Security reform that provides reasonable social insurance for future retirees on earnings up to the annual average wage and permits taxpayers to set aside additional savings for retirement by contributing an amount, referred to as the tax differential, to an individual defined contribution account (IDCA). I show that benefits for future retirees under the social insurance reform I propose remain comparable to the benefits available under the current Social Security system for a worker earning at, below, or above the U.S. annual average wage when the worker takes full advantage of an IDCA. The reform I propose provides a reasonable social insurance benefit and restrains future social insurance costs.

¹A guiding principle of Social Security reform of the current administration. See Office of Management and Budget, “Budget of the United States Government, Fiscal Year 2012,” at 26-27 (Feb. 14, 2011), *Doc 2011-3135*, 2011 *TNT* 31-36.