

## Lenity and Strict Construction — Overlooked Tools of Construction?

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In this article, the authors discuss the application of two tools of statutory construction, the rule of lenity and the strict construction canon, and the tensions between them and the deference doctrines.

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### A. Introduction

Lawyers, academics, and even judges have historically viewed tax law as unique, immune to concepts and developments in other areas. That myopia has been comforting to many, dispelling the need to explore unfamiliar territory. However, recent decisions, from the trial court to the Supreme Court levels, have dispelled that notion. The wake-up call came in *Mayo Foundation for Med. Education and Research v. United States*,<sup>1</sup> when the Supreme Court rejected a different deference standard for tax regulations than for other agency regulations. The Court held that it was “not inclined to carve out an approach to administrative review good for tax law only.”<sup>2</sup> Since then, the tax community has seen a substantial increase in arguments and opinions related to administrative law concepts such as the requirements in the Administrative Procedure Act (APA).<sup>3</sup> The Supreme Court’s pro-

<sup>1</sup>131 S.Ct. 704 (2011).

<sup>2</sup>*Id.* at 713; see also *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (“The IRS is not special . . . no exception exists shielding it — unlike the rest of the Federal Government — from suit under the” Administrative Procedure Act).

<sup>3</sup>5 U.S.C. section 551 et seq. Compare *Burks v. United States*, 633 F.3d 347 (2011) (highlighting the government’s practice of issuing temporary regulations without subjecting them to notice and comment procedures as required under the APA); and *Dominion Resources Inc. v. United States*, 681 F.3d 1313 (Fed. Cir.

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nouncement should remind taxpayers to explore tools of statutory construction not normally associated with tax law.

Two little-used tools of statutory construction in tax law are the rule of lenity and the related strict construction canon. As discussed below, the rules were recently applied by the Tax Court in two opinions released within one week of each other.<sup>4</sup> The rules provide that ambiguity in revenue-raising and penalty laws should be construed in the taxpayer’s favor. Given that many tax disputes revolve around the resolution of statutes and regulations that can be interpreted in different ways, application of the rules may be enough to bring taxpayers relief.

### B. The Rule of Lenity

The rule of lenity says that penal statutes should be construed in favor of the more lenient punishment. The rule is an ancient maxim that originated in 16th- and 17th-century English courts in response to broad enforcement of capital punishment. Almost 200 years ago, the Supreme Court, in a case involving homicide at sea, adopted the rule in *United States v. Wiltberger*: “The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”<sup>5</sup> Half a century later, in *Tiffany v. Nat’l Bank of Missouri*, the Court applied the rule in the context of whether a bank had overcharged interest to a customer and therefore was liable for a statutory penalty.<sup>6</sup> In *United States v. Brown*, the Court refined the rule, saying that it “is not an inexorable

2012) (invalidating a tax regulation in part as violating the arbitrary and capricious standard under the APA); with *Qinetiq U.S. Holdings Inc. v. Commissioner*, Tax Ct. Dkt. No. 14122-13, Order dated Dec. 27, 2013, motion to certify for interlocutory appeal denied Jan. 22, 2014 (stating that the APA judicial review procedures do not supplant the Tax Court’s longstanding *de novo* review procedures and that the APA’s arbitrary and capricious requirement for agency rulemaking does not apply to a notice of deficiency).

<sup>4</sup>*Rand v. Commissioner*, 141 T.C. No. 12 (Nov. 18, 2013); *Mohamed v. Commissioner*, T.C. Memo. 2013-255. A search on RIA Checkpoint for rule of lenity in the Federal Tax Cases database for Tax Court and Board of Tax Appeals reported decisions, memorandum opinions, and summary opinions returned only those cases. The Tax Court has acknowledged on several occasions that tax statutes that impose penalties should be narrowly construed.

<sup>5</sup>18 U.S. 35, 43 (5 Wheat. 76, 95) (1820).

<sup>6</sup>85 U.S. 409, 410 (18 Wall. 409) (1873) (“In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal

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command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the ‘narrowest meaning’; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.”<sup>7</sup> More recently, the Court in *Barber v. Thomas* held that “the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.”<sup>8</sup>

The rule of lenity has been applied in the civil tax context, although its application has not been widespread or consistent. Over 50 years ago, the Supreme Court in *Commissioner v. Acker*, citing four nontax cases, held that IRC provisions imposing a penalty “‘are to be strictly construed’ and that one ‘is not to be subjected to a penalty unless the words of the statute plainly impose it.’”<sup>9</sup> Other courts, including the Tax Court, applied the principle on occasion over the years to both tax statutes and regulations on penalties.<sup>10</sup> The IRS itself has acknowledged and applied the rule.<sup>11</sup>

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construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it.”)

<sup>7</sup>333 U.S. 18, 25-26 (1948). Courts of Appeal have formulated their own version of the rule. Compare *United States v. Cornora*, 660 F.3d 360, 369 (9th Cir. 2011) (“The rule of lenity only applies, however, where there is a grievous ambiguity or uncertainty in the language and structure of the statute, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute”); *United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992) (“When ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in the favor of the defendant”); and *United States v. Minarik*, 875 F.2d 1186, 1193 (6th Cir. 1989) (“When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite”) (quoting *Williams v. United States*, 458 U.S. 279, 290 (1982)).

<sup>8</sup>130 S. Ct. 2499, 2508 (2010) (internal quotations and citations omitted). Applying the rule of lenity is not always clear-cut, and the Court has debated its scope and application over the years. For example, compare *United States v. R.L.C.*, 503 U.S. 291 (1992), with *United States v. Santos*, 128 S. Ct. 2020 (2010), for debates about whether an ambiguous statute can be construed against a criminal defendant on the basis of legislative history at the expense of the rule of lenity.

<sup>9</sup>371 U.S. 87, 91 (1959); see also *Hatfried Inc. v. Commissioner*, 162 F.2d 628, 633 (3d Cir. 1947) (“Further, it is well-settled that in the application of penalties ‘all questions in doubt must be resolved in favor of those from whom the penalty is sought.’ Crawford, Statutory Construction, Section 240, page 462.”)

<sup>10</sup>See, e.g., *Am. Nat’l Bank & Trust Co. v. United States*, 594 F.2d 1141, 1148 (7th Cir. 1979); *Wood v. Commissioner*, 95 T.C. 364, 372 (1990), *rev’d on other grounds*, 955 F.2d 908 (4th Cir. 1992).

<sup>11</sup>See, e.g., LTR 9627004 (“This interpretation is in accord with accepted principles of statutory construction. It is a settled rule that statutes imposing penalties should be strictly construed. All

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The Tax Court in late 2013 looked to *Wiltberger* and the rule of lenity in interpreting the application of an accuracy-related penalty under section 6662. In *Rand v. Commissioner*,<sup>12</sup> the question was whether the statute mandated that, in determining the amount of any underpayment, “the amount shown as the tax by the taxpayer on his return” could be a negative amount.<sup>13</sup> The parties disputed whether the statute was ambiguous and whether regulations addressed the issue. The taxpayer argued that in construing an ambiguous statute that imposes a tax, and particularly one that imposes a penalty, the court should interpret it in his favor. The court held that regulations did not apply and thus avoided any deference issues such as the ones discussed below and that “the amount of tax shown by the taxpayer on his return” could not be reduced below zero. The court, agreeing with the taxpayer, invoked the rule of lenity to confirm its interpretation of the statutes because they did “not plainly impose a penalty on refunds resulting from overstated earned income credits, additional child tax credits, or recovery rebate credits.”<sup>14</sup>

### C. The Strict Construction Canon

Although not quite as old as the rule of lenity, a well-established canon is that ambiguity in statutes that impose tax liability, not just penalties, are construed against the drafter. The seminal case in that area is *Gould v. Gould*, in which the Supreme Court held:

In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.<sup>15</sup>

That canon has also been applied in the context of regulations.<sup>16</sup> In contrast, rules that provide tax exemptions are strictly construed in favor of the government.<sup>17</sup> The Supreme Court applied the strict

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questions in doubt must be resolved in favor of those from whom the penalties are sought. Mertens Law of Fed. Income Tax section 3.53; Sutherland Stat. Const. sections 66.01 and 66.02 (5th Ed.).)

<sup>12</sup>141 T.C. No. 12 (2013).

<sup>13</sup>Section 6664(a)(1)(A).

<sup>14</sup>141 T.C. No. 12 (slip op. at \*29).

<sup>15</sup>245 U.S. 151, 153 (1917).

<sup>16</sup>*Falconwood Corp. v. United States*, 422 F.3d 1339, 1348 (Fed. Cir. 2005) (following *Gould* in interpreting reg. section 1.1502-75(d)(2)(ii)).

<sup>17</sup>*Helvering v. Northwest Steel Rolling Mills Inc.*, 311 U.S. 46, 49 (1940).

construction canon repeatedly in the first part of the 20th century,<sup>18</sup> but courts' use of it has diminished over time.<sup>19</sup>

The Second Circuit recently cited the rule when it addressed a question involving the global interest netting rules. In *Exxon Mobil Corp. v. Commissioner*,<sup>20</sup> the court noted that it was "particularly mindful" of the strict construction canon.<sup>21</sup>

In *Mohamed v. Commissioner*,<sup>22</sup> the Tax Court breathed more life into the strict construction canon and provided a comprehensive recitation of it. The court applied the rule of lenity and construed section 6651(f) narrowly. However, unlike in *Rand*, the court relied on opinions, including *Gould*, that applied the strict construction rule outside the penalty context. The court acknowledged that "the application of the strict construction canon to tax law no longer enjoys universal approval," but found controlling precedent in the D.C. Circuit<sup>23</sup> (the taxpayer resided abroad) appears to still follow *Gould*.

#### D. Tension With Deference Doctrines

In the civil tax context, the rule of lenity and the strict construction canon may create tension with judicial deference doctrines when an agency exercises its authority to issue guidance carrying the force of law or interprets that guidance. Tensions with those deference doctrines, referred to as *Chevron*<sup>24</sup> deference and *Auer*<sup>25</sup> deference, are discussed below.<sup>26</sup>

<sup>18</sup>See, e.g., *McFeely v. Commissioner*, 296 U.S. 102, 111 (1935); *Bowers v. N.Y. Albany Lingerie Co.*, 273 U.S. 346, 350 (1927); *United States v. Merriam*, 263 U.S. 179, 188 (1923).

<sup>19</sup>In *United Dominion Industries Inc. v. United States*, 531 U.S. 822, 839 (2001), Justice Thomas, in a concurring opinion, advocated "the traditional canon that construes revenue-raising laws against the drafter." In support of that rule, he cited five cases ranging from 1891 to 1923. Justice Stevens in his dissent agreed with that principle but noted the countervailing point that ambiguities should be resolved in the government's favor when the provision crafts an exception from a general revenue duty. *Id.* at 840, n.1.

<sup>20</sup>689 F.3d 191 (2d Cir. 2012).

<sup>21</sup>*Id.* at 199 (citing *Merriam*).

<sup>22</sup>T.C. Memo. 2013-255.

<sup>23</sup>*Murphy v. IRS*, 493 F.3d 170, 179 (D.C. Cir. 2007). Other cases acknowledging the strict construction canon enunciated in *Gould* include *Exxon Mobil*, 689 F.3d at 199; *Falconwood Corp.*, 422 F.3d 1339; *Royal Caribbean Cruises Ltd. v. United States*, 108 F.3d 290 (11th Cir. 1997); *Union Pacific Corp. v. United States*, 5 F.3d 523 (Fed. Cir. 1993); *United States v. Brown*, 536 F.2d 117 (6th Cir. 1976); *Tandy Leather Co. v. United States*, 347 F.2d 693 (5th Cir. 1965); *United States v. Maryland Casualty Co.*, 49 F.2d 556 (7th Cir. 1931); *Sec. Bank of Minn. v. Commissioner*, 994 F.2d 432 (8th Cir. 1993); *America Online Inc. v. United States*, 64 Fed. Cl. 571 (2005).

<sup>24</sup>*Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

**1. Chevron deference.** In *Chevron*, the Supreme Court set forth a two-part test for analyzing an agency's interpretation of a statute under its authority to issue guidance carrying the force of law.<sup>27</sup> Under the rule of lenity and the strict construction canon, an ambiguity in a tax statute should be resolved in the taxpayer's favor and against the government. However, if Treasury has issued regulations construing the statute in the government's favor, that interpretation could effectively override those rules. The tension is highlighted by the rules' competing purposes: The rule of lenity seeks to keep policymaking power in the hands of the legislature and not the judiciary, while *Chevron* deference places the power in the hands of the executive branch. The law is unclear on whether one trumps the other.

**2. Auer deference.** Similarly, the rule of lenity and strict construction canon create tension with the *Auer* deference doctrine. That doctrine says that an agency's interpretation of its own ambiguous regulation is generally entitled to controlling deference, subject to some limitations.<sup>28</sup> In the tax context,

<sup>25</sup>*Auer v. Robbins*, 519 U.S. 452 (1997). The *Auer* principles stemmed from the Supreme Court's opinion 50 years earlier in *Bowles v. Seminole Rock & Sand Co.*, 324 U.S. 410 (1945).

<sup>26</sup>*Skidmore* deference applies to pronouncements that do not carry the force of law. Those pronouncements (e.g., revenue rulings, revenue procedures, notices, and announcements) have historically been judged under the less deferential "power to persuade" standard. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>27</sup>In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court clarified when *Chevron*'s two-step approach applies. This initial inquiry, sometimes referred to as "*Chevron* step zero," requires that to qualify for *Chevron* deference Congress must have delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation claiming deference must be promulgated in the exercise of that authority. *Id.* at 226-227. See Patrick J. Smith, "Chevron Step Zero After *City of Arlington*," *Tax Notes*, Aug. 12, 2013, p. 713, for a recent discussion of *Chevron* step zero.

<sup>28</sup>For *Auer* deference to apply:

- ambiguity in both the statute and the agency rule must be present;
- the interpretation must reflect fair and considered judgment of the agency;
- the interpretation must be consistent and unchanged over time; and
- the agency may not, under the guise of interpretation of a rule, create a de facto new rule.

*Auer* deference is not warranted if the interpretation is plainly erroneous or inconsistent with the statute or rule. It is not available when agency interpretation involves a rule that merely paraphrases the statutory language.

*Auer* deference is potentially not available if an agency's position is not a matter of public record, where all affected parties are aware of and entitled to rely on it (e.g., published guidance, not private guidance).

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allowing the IRS to cure an ambiguous regulation through a subsequent interpretation conflicts with the canons that those ambiguities should be resolved against the IRS. Although the Supreme Court has cited the doctrine in recent cases, several of the current justices have indicated a willingness to reconsider it.<sup>29</sup>

**3. Reconciling the rules with the deference doctrines.** In the end, whether a court will in the civil tax context apply the rule of lenity or strict construction canon or a deference doctrine may come down to the particular situation. Congress plainly intended for agencies to have the flexibility to fill in the gaps of ambiguous statutes, and the deference doctrines accomplish that purpose. At the same time, taxpayers have the right to understand what Congress means when it drafts a statute and they should not be penalized either in the form of owing taxes or paying a penalty when the language is ambiguous.

Because the rule of lenity has traditionally been a criminal law concept, one possible solution is to apply it first in the criminal context and to apply *Chevron* deference first in civil cases. For example, in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Court in a footnote eschewed the rule of lenity in favor of *Chevron* deference in a challenge to an Environmental Protection Agency regulation.<sup>30</sup> Although that solution has some superficial appeal, it could cause problems when hybrid statutes apply. Moreover, there would still be the tension between the strict construction canon and *Chevron* deference in civil matters.

How courts approach the question of whether a statute is ambiguous and the proper role of legisla-

tive history in answering that question may shed some light on how to reconcile the rules with the deference doctrines.<sup>31</sup> Some decisions indicate that the rules only apply after a court determines that the statute is ambiguous and the legislative history does not give a clear indication of Congress's intent.<sup>32</sup> That raises several questions.

First, are the rules to be used in *Chevron* step one or step two? The rule of lenity and strict construction canon are tools of statutory construction;<sup>33</sup> thus, it appears they should operate at step one.<sup>34</sup> *National Cable & Telecommunications Ass'n v. Brand X Internet Services*<sup>35</sup> can be read to mean that the rule of lenity be used in the initial determination of whether the statute is ambiguous under step one. In that case, the Court found that a statute was ambiguous and therefore the Federal Communications Commission could issue regulations that overruled existing appellate court case law.<sup>36</sup> Perhaps significantly, the Court noted that the prior decision had not invoked any other rule of construction, including the rule of lenity, which would have required it to conclude that the statute was unambiguous.<sup>37</sup> Thus, if the rule of lenity is properly considered at step one and determined to be applicable, it would foreclose any contrary agency interpretation because the analysis would end at the first step of *Chevron*.<sup>38</sup>

Second, how directly must Congress have spoken on the issue? The government advocates in tax cases, based in part on *Brand X*, that any ambiguity in a statute means that a court must advance to step two and uphold a regulation unless unreasonable.

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See Roger J. Jones and Andrew R. Roberson, "Home Concrete: The Story Behind the IRS's Attempt to Overrule the Judiciary and Lessons for the Future," *The Tax Executive* (Winter 2012), available at <http://www.tei.org/news/articles/Pages/HomeConcrete.aspx>.

<sup>29</sup>See *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013) (Roberts, J., concurring, joined by Alito); *Talk America Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254 (2011) (Scalia, J., concurring); *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995) (O'Connor, J., dissenting, joined by Scalia, Souter, and Thomas); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994) (Thomas, J., dissenting, joined by Stevens, O'Connor, and Ginsburg); see also *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) (discussing the limits of, and risks associated with, granting *Auer* deference and adopting Justice Scalia's rationale in his concurrence in *Talk America* that *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking").

<sup>30</sup>515 U.S. 687, 704, n.18 (1995). However, the Court's brief discussion indicates that it was relying on the EPA regulation being long-standing and that the party had fair warning of the consequences of the law.

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<sup>31</sup>See, e.g., Antonin Scalia, *A Matter of Interpretation* 28 (1997) ("How ambiguous does ambiguity have to be before the rule of lenity . . . applies?").

<sup>32</sup>See, e.g., *Liparota v. United States*, 471 U.S. 419, 427 (1985).

<sup>33</sup>*United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 510, 518, n.10 (1992) (Souter, J., plurality opinion) ("The rule of lenity, however, is a rule of statutory construction whose purpose is to give authoritative meaning to statutory language").

<sup>34</sup>*Chevron*, 467 U.S. at 843, n.9 (indicating that tools of statutory construction should be applied at step one).

<sup>35</sup>545 U.S. 967 (2005).

<sup>36</sup>Justice Stevens observed that the Court's rationale "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity." 545 U.S. at 1003 (Stevens, J., concurring). Justice Scalia was more certain; he characterized the Court's holding as "not only bizarre," but "probably unconstitutional." *Id.* at 1017 (Scalia, J., dissenting). In *United States v. Home Concrete & Supply LLC*, 132 S. Ct. 1836, 1843 (2012), the Court held that because it had "already interpreted the statute . . . there is no longer any different construction that is consistent with [its earlier opinion] and available for adoption by the agency."

<sup>37</sup>545 U.S. at 985.

<sup>38</sup>It should be noted that in *Moskal v. United States*, 498 U.S. 103 (1990), the Court stated that "the touchstone of the rule of lenity is statutory ambiguity" (quotations and citations omitted).

But courts have not universally applied that bright-line test. For example, in both *Cuomo v. Clearing House Ass'n LLC*<sup>39</sup> and *Home Concrete*, the Supreme Court determined the meaning of statutes that were not unambiguous without the need to defer or consider agency regulations. Applying the rule of lenity and strict construction canon to determine Congress's intent for an otherwise ambiguous statute comports with *Chevron's* reference to tools of statutory construction in step one.

Third, assuming that the canons are properly applied in *Chevron* step one, should the court apply a hierarchy of traditional tools of statutory construction that, after examining the language of the statute, looks to the legislative history before considering the rule of lenity?<sup>40</sup> A review of some cases on the issue suggests that is the prevailing rule. The approach of the court may depend on whether the presiding judge is more of a "textualist" or a "purposivist."<sup>41</sup>

Finally, assuming that the rule of lenity and strict construction canon are more properly applied after step one, should the analysis be any different? Application of the rule of lenity and strict construction canon may result in a determination that Congress did not clearly intend to impose an additional tax or penalty. Thus, it could be argued that a contrary agency construction is unreasonable.<sup>42</sup>

<sup>39</sup>129 S. Ct. 2710 (2009).

<sup>40</sup>Another question is whether the blue book has any place in this analysis after *United States v. Woods*, 134 S. Ct. 557 (2013), which dismissed the blue book as little more than a law review article and "not a legitimate tool of statutory interpretation."

<sup>41</sup>Steve R. Johnson, "Mayo and the Future of Tax Regulations," *Tax Notes*, Mar. 28, 2011, p. 1547.

<sup>42</sup>*Entergy Corp. v. Riverkeeper Inc.*, 129 S. Ct. 1498, 1505 (2009) ("But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable"); see also *Brand X*, 545 U.S. at 1017, n.12 (Scalia, J., dissenting) ("Once a court has decided upon its *de novo* construction of the statute, there is no longer a 'different construction' that is 'consistent with the court's holding' . . . and available for adoption by the agency"). It's worth noting that the majority opinion in *Home Concrete* used language almost identical to that in Justice Scalia's dissent in *Brand X* (see n.36).

In a recent lengthy and thorough concurring opinion in *Carter v. Welles-Bowen Realty Inc.*,<sup>43</sup> Judge Jeffrey S. Sutton addressed that tension head-on and concluded that all manner of presumptions, substantive canons, and clear statement rules should take precedence over conflicting agency views. He provided several reasons for his conclusion, including that deference should only come into play after deployment of all pertinent interpretative principles and that the rule would operate at step one of *Chevron*. He noted several "uninvited oddities" that would arise if courts, but not agencies, must adhere to the rule of lenity. Finally, Sutton read the Supreme Court's footnote in *Sweet* narrowly and said that the Court had expressly declined to decide the issue in a later opinion.

In the end, a court's determination of whether to apply the rule of lenity or a deference doctrine when both are raised may come down to a combination of factors. Those might include the form of the agency guidance and how long it has been in existence, the type of deference being sought (*Chevron*, *Skidmore*, or *Auer*), the statute's legislative history, and the type of statute (criminal or civil) involved.<sup>44</sup> Because *Chevron* deference is predicated on the agency's expertise on the subject matter,<sup>45</sup> another consideration could be the content of the statute. For example, the rule of lenity, not *Chevron* deference, may be more appropriate to apply to an ambiguous statute that relates to the statute of limitations for asserting a penalty.

## E. Conclusion

Taxpayers should embrace the rule of lenity and the related strict construction canon for laws that impose taxes and penalties. That will require determining whether raising those rules is appropriate and how the relevant circuit applies them.

<sup>43</sup>No. 10-3922 (6th Cir. Nov. 27, 2013).

<sup>44</sup>Others have examined the tension in more detail. Two recent examples, with citations to other articles on the subject, are Note, "Justifying the Chevron Doctrine: Insights From the Rule of Lenity," 123 *Harv. L. Rev.* 2043 (2010) and Kristin E. Hickman, "Of Lenity, Chevron, and KPMG," 26 *Va. Tax Rev.* 905 (2007).

<sup>45</sup>*PBGC v. LTV Corp.*, 496 U.S. 633, 651-652 (1990).