



Omissions from Gross Income & Retroactivity

PRACTICE AREAS

Tax

Tax Accounting

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Tax Notes

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Regulations treating overstated basis as an omission from gross income for purposes of the extended statute of limitations have renewed attention on the retroactivity rule in the original 1954 version of section 7805(b) regulations, which authorized retroactive regulations.

However, because of the expansion of agency rulemaking discretion authorized long after the 1954 enactment of section 7805(b) by the Supreme Court's decisions in *Chevron* and *Brand X*, and the recent confirmation in *Mayo* that expanded agency discretion applies to tax regulations, it is unreasonable to conclude that Congress in enacting the original 1954 version of section 7805(b) intended to authorize retroactive application of the expanded agency discretion that was not authorized by the Supreme Court until many years later.

Thus, the traditional *Anderson, Clayton* factors for evaluating the propriety of retroactive regulations under section 7805(b) should be viewed as obsolete. Instead, retroactive tax regulations should be evaluated using the same standards that apply to retroactive regulations issued by any other agency, under the principles of *Bowen* and *Landgraf*. Under those principles, the overstated basis regulations are considered impermissibly retroactive.