

December 5, 2023

Justices Hear Oral Arguments on Taxpayer Challenge to Mandatory Repatriation Tax

On December 5, 2023, the Supreme Court heard oral arguments in *Moore v. United States*, a case challenging the mandatory repatriation tax (the “MRT”) imposed on unrepatriated earnings held by the foreign subsidiaries of U.S. corporations.

The Tax Cuts and Jobs Act introduced the MRT as part of a broader overhaul of the U.S. international tax system. The MRT was a one-time tax on undistributed earnings of foreign corporations owned by U.S. shareholders—at a reduced rate but limiting further deferral. Charles and Kathleen Moore were minority shareholders in an Indian corporation who owed approximately \$15,000 as a result of the MRT and sued to challenge it on the grounds that it taxed unrealized income unconstitutionally. The district court dismissed the case, and the Ninth Circuit upheld the dismissal on appeal.

The key issues in the case are whether the Constitution requires realization before income can be taxed and, if so, whether the MRT meets that requirement. Under the Sixteenth Amendment, Congress can impose taxes on “incomes, from whatever source derived, without apportionment among the several states,” but direct taxes, such as property taxes, must be apportioned among the states by population. This case raises the question of whether unrealized income constitutes income within the meaning of the amendment and thus whether it can be taxed without apportionment. The controversy over the realization requirement goes back to *Eisner v. Macomber*, a 1920 case in which the Supreme Court decided that a stock dividend was not “income” within the meaning of the Sixteenth Amendment. A line of cases subsequently limited *Macomber*, but the Supreme Court has never overruled the case or offered an unequivocal statement that realization is or is not required for a tax to be constitutionally imposed without apportionment. Because the Internal Revenue Code currently contains several provisions that arguably impose pre-realization taxes, a victory for the Moores could have far-reaching consequences, potentially invalidating large parts of Subchapters K (partnerships) and S (S corporations), the Subpart F and Global

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Intangible Low-Taxed Income regime, the various mark-to-market provisions, the corporate alternative minimum tax, the tax on original issue discount bonds, and the expatriation tax imposed by sections 877 and 877A. As a result, the tax and business communities have been keenly following the development of the case.

The oral argument for the case was heard on December 5, 2023. During oral arguments, a number of key justices seemed to be interested in exploring a narrow decision that could uphold the MRT on the grounds that it taxes income realized by the corporation and attributed to the shareholder, without deciding whether realization is constitutionally required. In the alternative, some justices were interested in the theory that shareholders like the Moores constructively realized corporate income because of their significant stake in the corporation. The Court was largely skeptical of the petitioners' attempts to distinguish the MRT from similar pre-realization tax provisions and appeared to share the government's concern over the far-reaching effects invalidating the MRT could have. However, certain justices pressed the government as to whether its theory of the case would support the constitutionality of more exotic taxes, including a broad wealth tax. Although the wealth tax was not directly at issue in this case, the justices appeared inclined toward the position that upholding the MRT would not commit the Court to upholding a wealth tax if it were ever enacted.

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