

Supreme Court To Hear *Moore* Case, With Major Implications

Social: The Supreme Court will hear a tax case of a seemingly insignificant amount of money – one that could open floodgates to billions in refunds to multi-nationals.

The U.S. Supreme Court has decided to take up a constitutional challenge to a tax in light of the U.S. Constitution's 16th Amendment concerns.

Late last month, the High Court granted certiorari with respect to the 9th Circuit's decision in [*Moore vs. United States*](#), which involves a one-time tax imposed by the 2017 Tax Cuts and Jobs Act. The TCJA restructured the U.S. international tax regime and added the transition tax to prevent accumulated earnings from going untaxed permanently.

The High Court will hear the case later this year and will probably issue a ruling shortly afterward.

'Surprise' income tax

Charles and Kathleen Moore own a 13% stake in KisanKraft Machine Tools Private Limited, a small company headquartered in Bangalore, India. KisanKraft was formed in 2006 by their friend and former coworker to import and distribute farming equipment. The couple invested \$40,000 in KisanKraft and retained about 11% of the common shares in the company, the revenues of which grew annually from 2006 to 2017.

The Moores received updates and annual financial statements but never exercised control over the company's earnings or operations, nor did they receive distributions, dividends or other payments. In 2018, they learned that under the TCJA, they were on the hook for their share of KisanKraft's lifetime earnings and would owe a tax of \$14,729. "This surprised the Moores," the case records say.

The couple paid the tax and filed a claim for refund, which was denied. They then filed a lawsuit in federal district court in Washington to recover the tax.

The implications

The Moores had run afoul of the TCJA's Mandatory Repatriation Tax, a one-time "transition tax" to facilitate the repatriation of foreign earnings.

The tax targeted U.S. shareholders who held 10% or more in a “controlled foreign corporation” (a foreign corporation whose ownership or voting rights are more than half owned by U.S. persons who each own at least 10%) that retained and reinvested its prior earnings overseas rather than distributing them to shareholders as dividends. Supporters said the transition tax will raise \$340 billion over 10 years.

Previously, though, those shareholders would have incurred only a tax liability when the foreign corporation distributed earnings and they repatriated the gains. The Mandatory Repatriation Tax simply deemed the foreign corporation’s retained earnings as the shareholders’ “income” and taxed them according to their proportional ownership stake.

The Moores argued that the transition tax is unconstitutional because it’s not apportioned. Last summer, the Ninth Circuit court sided with the District Court for the Western District of Washington and rejected the challenge.

“The Constitution does not allow Congress to point at any pot of money and call it ‘income’ and then income-tax it,” [said Andrew M. Grossman](#), the Moores’ lead counsel. “‘Income’ means the same thing now that it did when the 16th Amendment was ratified: gains that have been realized by the taxpayer. We are confident that the Supreme Court will vindicate that fundamental principle.”

The Tax Policy Center [noted](#) that in 1895 the Supreme Court struck down Congress’ early income tax, “because the Court labeled the tax ‘direct,’ which the Constitution requires to be apportioned among the states by population (which is impractical). But, in 1913, the U.S. adopted the [Sixteenth Amendment](#), to permit Congress to tax ‘incomes from whatever source derived,’ without apportionment.”

The question to the High Court: Is the transition tax is a “direct tax” that violates the Apportionment Clause of the Constitution? (The Supreme Court hasn’t invalidated a federal tax on constitutional grounds in 103 years.)

If the Supreme Court rules for the Moores, the Center continued, “it will entitle the Moores to receive a ... refund, plus interest. And it may permit a refund of all or a portion of the remaining \$340 billion, plus interest, overwhelmingly to large US multinational corporations.”

Taxpayers contemplating refund claims based on Moore need to know about the statute of limitations.

The transition tax was required to be reported on the 2017 (or, for some, the 2018) return, meaning time has run out on the three-year statute of limitations. Taxpayers that have agreed to extend the statute of limitations for assessment may claim a refund (under Sec. 6511(c)) up to six months after the expiration of the statute of limitations for assessment.

Sec. 6511(a) also provides that claims for refund are timely if filed within two years of a payment. Taxpayers that elected to pay the transition tax liability in installments may claim a refund under 6511(a) with respect to amounts paid within the last two years before their refund claim.

Claims for refunds should cite the pending decision in *Moore*.

“More broadly,” the Tax Policy Center adds, “the Court also could force Congress to rewrite major parts of our international, pass-through, and financial tax regimes.”

The result, observers say, would be an upheaval of more than a century jurisprudence on the international corporate income tax.

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