No. 22-800

IN THE
Supreme Court of the United States

CHARLES G. MOORE AND KATHERINE F. MOORE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROFESSOR HANK ADLER AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTERESTS OF THE AMICUS CURIAE[1]

Hank Adler is an associate Professor of Accounting at Chapman University. Mr. Adler was in public accounting for thirty-four years, the last twenty as a tax partner at Deloitte & Touche. He joined the faculty of Chapman University in 2003. His research has been published by the Wall Street Journal, The Epoch Times, Tax Notes, Prentice Hall and Tax Magazine. His interests include general theories of taxation and alternative sources of tax revenue. He has been writing with respect to the constitutionality of the Mandatory Repatriation Tax since 2018. His writings regarding the Mandatory Repatriation Tax have appeared in the Wall Street Journal, The Epoch Times and Tax Notes.

Professor Adler is interested in this case both as a matter of constitutional principle and as a result of his concerns related to the harms that would flow to the many families who have planned their financial futures around the understanding that unrealized gains cannot constitutionally be taxed if the decision of the Ninth Circuit Court of Appeals is not reversed.

[1]No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae and his counsel, made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

The Mandatory Repatriation Tax (MRT), adopted as part of the Tax Cut and Jobs Act of 2017, 131 Stat. 2054 (2017) (TCJA), places a unique tax rate on the shareholders of a Controlled Foreign Corporation (CFC). The CFC shareholder's tax rate is 8% and/or 15.5% based upon the shareholder's pro-rata share of the CFC's accumulated post-1986 deferred foreign income. The tax rate of 8% and/or 15.5% is determined by the "cash position" of the CFC. The "cash position" is not an element of income.

The 15.5% rate applies to earnings held by the CFC in cash or cash equivalents, whereas the 8% rate applies to other assets of the CFC. The MRT is levied "solely because the U.S. shareholder is the owner of an asset that, as of an arbitrary date, has accumulated foreign earnings." Sean P. McElroy, The Mandatory Repatriation Act is Unconstitutional, 36 Yale J. Reg. Bull. 69, 82 (2018).

The MRT thus employs a unique two-tiered tax rate based on the make-up of a taxpayer's balance sheet rather than the progressive or regressive tax rates used in 100% of tax calculations since the advent of the Sixteenth Amendment. Under the MRT, taxpayers with identical taxable income and differing portions of personal assets and real estate assets pay differing amounts of tax. This unique differential tax rate that depends on ownership rather than a realization event results in the MRT constituting an unconstitutional direct tax.

Permitting tax rates to be determined by ownership indicia enables Congress to implement a

differential tax structure based on virtually any characteristic.

A tax rate that is based upon factors other than a rate table should be considered a direct tax, a tax based in whole or part on an element other than income. The MRT unconstitutionally includes unrealized sums in both the calculation of the amount taxed and the tax rate.

ARGUMENT

I. The Unique Differential Tax Rates in the MRT, Which Vary Depending on Ownership Attributes, Render the MRT a Direct Tax

The two-tiered rate structure applied to Petitioners as follows. Petitioners in 2006 made an investment of $40,000 in KisanKraft Machine Tools Private Limited ("KisanKraft"), a CFC that has supplied tools to small farmers in India. Petitioners received a stake slightly greater than 10% of the CFC's outstanding shares in exchange for that investment. KisanKraft generated profits over the years, but those profits were reinvested in the operations of the company.

Under the MRT, KisanKraft's "accumulated post 1986 deferred foreign income"—amounting to approximately $508,000—was treated as its 2017 Subpart F income. 26 U.S.C. § 965(a)(1)-(2). In turn, because Petitioners owned more than 10% of KisanKraft's shares, they were deemed to have an additional $132,512 in 2017 taxable "income" and therefore owed an additional $14,729 in taxes based

on their pro rata share of KisanKraft's 2017 Subpart F income. 26 U.S.C. § 951(a)(1).

The $14,729 tax amount (11.12%) shown directly above as "income taxes" resulted from the two-part MRT tax rate. That MRT tax rate was based upon the type and amounts of the assets and liabilities of the CFC. The MRT tax rate is neither a typical progressive or regressive tax rate. It is unique.

The Sixteenth Amendment permits Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the states." *Eisner v. Macomber*, 252 U.S. 189, 207 (1920) defines the indistinguishable characteristic of "income" as "a gain, a profit, something that is of exchangeable value" that is "*received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal (emphases in original)." A tax on income can only be imposed through the adoption of a tax rate, and therefore the definition of a "tax" must as a matter of logic embed the tax rate, for a "tax" cannot be a "tax" without a "tax rate." If the MRT rate is dependent upon items that separately would result in a direct tax, the MRT should be found to be an unconstitutional direct tax. This is the case with the MRT.

Historically, income taxes have been based upon a calculated amount such as taxable income or investment income multiplied by a progressive or regressive tax rate. (Taxable income is subject to a tax based upon a progressive rate table. Investment income is subjected to a tax at a fixed regressive rate.)

No other federal tax is calculated in a remotely similar manner to the MRT. Prior to the TCJA, there was no similar federal income tax rate. Subsequent to the TCJA, there exists no similar income tax rate. There is no statutory definition, and no judicial precedent, to be relied upon to sanction the MRT tax as constitutional or permit its unique tax rate structure to transpose attributes of ownership into income.

The MRT tax rate(s) utilized to calculate the ultimate MRT depend exclusively on the liquidity of the CFC. The liquidity of the CFC is unconnected to the calculation of the "accumulated post-1986 deferred foreign income of the CFC" and only connected to the assets (both personal and real property) and short-term liabilities of the CFC. 26 U.S.C. § 965(d)(1).

To calculate the MRT, the taxpayer must first determine their share of the "accumulated post-1986 deferred foreign income of the CFC" and then apply two separate tax rates. The MRT tax rate was 15.5% on the "net cash position" of the CFC at the measurement date, 26 U.S.C. § 965(c)(3)(B)(i), and if the "accumulated post-1986 deferred foreign income" was greater than that "net cash position", there was an additional MRT tax of 8% on that amount. 26 U.S.C. § 965(c)(2).

In calculating the MRT's tax after determining "accumulated post-1986 deferred foreign income," for the first requirement of determining the "net cash position" of the CFC, the taxpayer looked only to the balance sheet of the CFC. In the Moores' case, the

CFC was KisanKraft, a foreign entity in which the Moores had only a small minority position and thus no ability to influence or direct any corporate decisions.

The CFC's balance sheet at the measurement date had nothing to do with the calculation of the "accumulated post-1986 deferred foreign income of the CFC." 26 U.S.C. § 965(a). It had only to do with the individual assets and liabilities on the CFC balance sheet. The calculation of the "net cash position" essentially divided the tax rate into two components, one that consisted solely of personal assets and certain liabilities while the other consisted of both personal assets and real estate assets.

The calculation of the "net cash position" was unrelated to taxable income. If KisanKraft had sold a sufficient dollar amount of new shares of stock for cash immediately before the "measurement date," the Moores' tax would have increased the MRT tax rate from 11.12% to 15.5%. The decision to sell shares would have had zero effect on the "accumulated post-1986 deferred foreign income," but dramatic effects on the MRT. One hundred percent of the impact on the MRT would have been the result of balance sheet activity having nothing to do with income. This factor is the key indicia of a direct tax.

II. The MRT's Unique Rate Structure Imposes Different Results on Identically Situated Taxpayers

The two-tax rate mechanism based upon the "net cash position" of the CFC creates a structure where companies with identical "accumulated post-1986

deferred foreign income" often have different MRT taxes due.

For example, assume on January 15, 2017, Companies A and B each sold their only asset, a zero-basis asset contributed to the company at formation. Each company's sales price, and therefore its taxable income, would be $1,000,000, and further assume each company was paid in cash. Company A continued to hold the cash through the end of the calendar year 2017. Company B immediately reinvested the $1,000,000 in land.

The MRT is calculated as follows:

	Company A	Company B
Accumulated post-1986 Deferred Foreign Income	$1,000,000	$1,000,000
Balance Sheet:		
Cash	$1,000,000	
Land		$1,000,000
Total Assets	$1,000,000	$1,000,000
Retained Earnings	$1,000,000	$1,000,000
Liabilities + Equity	$1,000,000	$1,000,000
Mandatory Repatriation Tax	$80,000	$155,000

The result: two companies with identical taxable income and identical "accumulated post-1986 deferred foreign income" would owe significantly different amounts of income taxes under the MRT.

Differential treatment of identically situated taxpayers offends the long-rooted principle of "horizontal equity." Horizontal equity is deeply ingrained in the concepts underpinning the rationales of our tax structure. "The concept of horizontal equity plays an important role in the evaluation of tax policy. For example, treating taxpayers with equal incomes equally was one of the central organizing principles of the landmark reform of the federal income tax that took place in the Tax Reform Act of 1986." Joseph J. Cordes, Horizontal Equity, *The Encyclopedia of Taxation and Tax Policy* (1999).

In the MRT, the concept of horizontal equity is egregiously offended. As the example above shows, two hypothetical identically-situated taxpayers, having precisely the same gross income, the same "accumulated post-1986 deferred foreign income," and the same taxable income end up paying significantly differing amounts of MRT. Such a differential is, again, the indicia of a direct tax.

Sanctioning such differential results conjures up an array of further issues and conjectures about what other factors might be considered in structuring future tax methodologies that transpose ownership indicia into differential income taxes due. Would a differential tax rate based upon the number of employees, or the degree of compliance with a particular administrative policy, or the net worth of ownership, pass constitutional muster with respect to whether a tax is on "income" notwithstanding the existence of or lack of a realization event? How far could Congress go in adopting differential rates

triggered by ownership attributes of the taxpayer or the real or personal property to be taxed? Such structures must be deemed outside the scope of Congressional powers conferred by the Sixteenth Amendment; such structures must be deemed an unconstitutional direct tax.

Its rate structure renders the MRT an unconstitutional direct tax.

III. Conclusion

The judgment of the Ninth Circuit should be reversed.

Respectively submitted,

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