

## The Supreme Court Takes a Deep Dive Into Potentially Perilous Water with the Moore Case

**December 08, 2023**

Oral argument began on Tuesday in *Moore v. United States*. Commentators have blogged, tweeted, and written about the potential resounding implication of a verdict in this case. Here's why:

By way of background, the case involves Charles and Kathleen Moore, a married couple residing in the U.S. who owned a controlling interest in a foreign entity that for U.S. purposes, is a Controlled Foreign Corporation (a "CFC" because it is a foreign corporation which is greater than 50% owned by U.S. Shareholders and defined as shareholders who each own 10%.) The company generated profit which remained in the company and was not repatriated by the Moores (i.e. was not brought back into the U.S.).

The Tax Cuts and Jobs Act of 2017 introduced a provision under the Internal Revenue Code's then new Section 965 which is referred to as a "deemed repatriation" which affects CFCs. What this means is that shareholders of CFCs like the Moores, which had shares in CFCs and certain retained profit, as a result of Section 965 had to pay a toll-charge on this foreign profit irrespective of whether they brought the funds back to the U.S.

The discussion in the tax world centers on whether this tax, which some say is imposed on "unrealized income" (i.e. the Moores did not repatriate same) is unconstitutional on its face. Some say there is a requirement in tax laws that a taxpayer "realize" income in order to have a taxable event. Some do not and take the position that there has been a long-standing view of taxing US taxpayers on gains in foreign corporations.

The whole case is fascinating, and while involving a small amount in controversy (approximately \$15,000 tax bill) could be far reaching for those who argue that wealth taxes are also inappropriate in the same reasoning of Moore's counsel. Moreover, hundreds of billions of dollars have apparently been collected under the transition tax.

Needless to say, there is a lot of uncertainty about the scope. Stay tuned.

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