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## Tax Profs Urge Justices To Uphold Repatriation Levy

By **Natalie Olivo**

Law360 (October 20, 2023, 7:56 PM EDT) -- A group of tax professors urged the U.S. Supreme Court to reject a challenge to the 2017 federal tax overhaul's repatriation provision, warning of "staggering" consequences if the justices find that the U.S. Constitution restricts Congress' ability to tax unrealized income.

Many sections of the Internal Revenue Code will be "constitutionally suspect" if the Supreme Court sides with a couple's case against a repatriation provision enacted under the 2017 **Tax Cuts and Jobs Act**, according to an **amici curiae brief** filed Thursday by tax law professors. The couple, Charles and Kathleen Moore, in August asked the high court to reverse a Ninth Circuit ruling that **upheld the levy**, which the pair has claimed **violates the 16th Amendment** of the Constitution.

Specifically, the Moores have contended that the one-time mandatory repatriation tax, which falls under Internal Revenue Code **Section 965**, runs afoul of the 16th Amendment's requirement for corporations and individuals to realize income, such as through earnings distributions, before Congress can tax it.

But according to the academics' brief, levies on unrealized income — including Section 965, which taxed deferred offshore earnings — are essential to the 16th Amendment's broader scheme of ensuring the comprehensive and consistent taxation of all income. A victory for the Moores will undermine this fundamental purpose, according to the brief from Reuven Avi-Yonah at University of Michigan Law School, Clinton G. Wallace at University of South Carolina School of Law and Bret Wells at University of Houston Law Center.

In warning that "the consequences would be staggering" if the high court were to side with the Moores, the professors contended that advisers would have grounds to conclude that companies could exclude tax without a realization event, notwithstanding laws and regulations that require including such income. The longer-term consequences "are bleak as well," the professors wrote.

"Even if this court attempts to craft a narrow version of constitutionalized realization, reversing Moore will upset careful policymaking in numerous areas which has established sturdy equilibria that have stood for many decades," the professors wrote. "This would reintroduce a decades-long whack-a-mole game of shutting down tax evasion."

Andrew Weiner of Kostelanetz LLP, counsel for the professors, told Law360 on Friday that the brief explains how exceptions to realization are essential to fulfilling the purpose of the 16th Amendment. That purpose is to allow Congress to tax income "from whatever source derived," he said, quoting the amendment's text.

"Tax planning and market innovations can manipulate realization," Weiner said. "In order to maintain a fair and progressive income tax, Congress needs to be able to respond with carefully calibrated exceptions to realization, as it has many times."

Under Section 965, shareholders of controlled foreign corporations were required to pay a one-time transition tax to repatriate billions of dollars they had collectively deferred offshore. The measure, which was passed as part of the TCJA's shift to a more territorial tax system, was designed to prevent shareholders who had not yet received CFC distributions from obtaining windfalls by never paying taxes on their undistributed offshore earnings.

The Moores paid about \$15,000 under Section 965 based on their small stake in a CFC, KisanKraft

Ltd., that provides equipment to small-scale farmers in India. The tax bill was based on earnings retained and invested by the company on earnings the Moores said they never received.

The Moores first brought their suit in 2019. A federal court in Washington state tossed the challenge, and in June 2022, the Ninth Circuit agreed with the lower court that the one-time repatriation tax served a legitimate purpose.

In addition to the brief from Avi-Yonah, Wallace and Wells, **the government** received support from an **amicus curiae brief** filed Thursday by the American Tax Policy Institute, a nonprofit organization that supports nonpartisan research on tax policy issues.

According to the institute, the income taxed under Section 965 was, in fact, realized by KisanKraft, in which the Moores owned a stake. Congress has the authority to tax U.S. shareholders on their share of income realized by a foreign corporation, the institute said.

Upholding the mandatory repatriation tax "as a tax imposed on realized income of the foreign corporation will fully dispose of the case, without taking on complicated questions like whether realization is always constitutionally required and what comprises realization," the institute said.

Adler & Stachenfeld LLP partner Stephen B. Land, counsel for the institute, told Law360 on Friday that realization is not necessarily all or nothing.

"Realization can be relevant in different ways in different circumstances," he said. "It is therefore best not to make blanket statements about realization, which is why we urged that the case be decided on the narrow ground that the income being taxed had already been realized."

The government was also backed Friday in an **amicus curiae brief** from a separate group of law professors, who said Congress passed the 16th Amendment in 1913 to "restore the broad power to tax" that had been undermined by an 1895 Supreme Court decision. In that case, **Pollock v. Farmers' Loan & Trust Co.**, the Supreme Court struck down a federal income tax that was not apportioned by state population, claiming that income derived from property was a direct tax.

The 16th Amendment subsequently made it clear that Congress could impose taxes on income "from whatever source derived," according to the brief. It was written by Bruce Ackerman at Yale Law School, Joseph Fishkin at UCLA School of Law and William E. Forbath at University of Texas School of Law.

"Given this original understanding," the professors wrote, "it would be truly unprecedented if this court nevertheless resurrected the 5-to-4 decision in Pollock."

Counsel for Ackerman, Fishkin and Forbath wasn't immediately available for comment Friday.

Representatives of the Moores and the U.S. government did not respond to requests for comment Friday.

Avi-Yonah, Wallace and Wells are represented by Andrew Weiner, Bryan C. Skarlatos, Caroline D. Ciralo and Heather K.P. Fincher of Kostelanetz LLP.

The American Tax Policy Institute is represented by Stephen B. Land of Adler & Stachenfeld LLP, by Lawrence M. Hill of Steptoe & Johnson LLP, by David M. Schizer of Columbia Law School, and by Philip Wagman of Clifford Chance LLP.

Ackerman, Fishkin and Forbath are represented by Kelsi Stayart White, Jane Langdell Robinson and Sammy Ford IV of Ahmad Zavitsanos & Mensing PLLC.

The Moores are represented by Andrew M. Grossman, David B. Rivkin Jr., Kristin A. Shapiro and Jeffrey H. Paravano of BakerHostetler and by Dan Greenberg, Sam Kazman, Devin Watkins and David McFadden of the Competitive Enterprise Institute.

The government is represented by Solicitor General Elizabeth B. Prelogar and by David A. Hubbert, Curtis E. Gannon, Ephraim A. McDowell, Francesca Ugolini, Michael J. Haungs and Douglas C. Rennie

of the U.S. Department of Justice, Tax Division.

The case is Charles G. Moore et al. v. U.S., case number 22-800, in the U.S. Supreme Court.

--Additional reporting by Dylan Moroses. Editing by Khalid Adad.

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