Moore: "The Good, The Bad and The Ugly"

John Richardson - CitizenshipSolutions.ca

X.com/ExpatriationLaw

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Differing Perspectives On The MRT ...

In Moore, the Supreme Court of United States Ruled That ...

Congress could impose 31 years of retroactive taxation on the retained earnings of Controlled Foreign Corporations by attributing those retained earnings to the "U.S. Person" shareholders. In other words earnings that were never subject to U.S. taxation became subject to U.S. taxation all at once through a retroactive tax.

To be clear the U.S. Shareholders did
NOT actually receive any of the deemed distribution in the form of dividends.

https://www.supremecourt.gov/opinions/23pdf/22-800_jg6o.pdf

The Effect(s) Of the Moore decision: "The Good, The Bad and The Ugly

The Good: Multinational Corporations - they love it. It was part of the deal to lower the corporate rate (Clearly the smallest number of taxpayers). *Note that not a single multinational opposed the MRT.*

The Bad: Individuals who own their CFCs through S corps - they dodged a bullet and are okay (Who knows how many). *Note that not a single individual who was a shareholder in an S corporation opposed the MRT.*

The Ugly: Americans abroad - confiscated their retirement pensions which were accumulated when they lived outside the United States! - clearly the largest number of taxpayers

Observations: Subpart F, Americans Abroad and Citizenship Taxation

The MRT was one of the most egregious and visible injustices of the U.S. extra-territorial tax regime.

The US Supreme Court's majority decision is based on the assumption that CFCs ARE "pass throughs". This is incredibly dangerous assumption for Americans abroad!

There is NO reference in any of the decisions to individuals, let alone Americans abroad whose lives were destroyed by this.

Observation: A Snippet Of Justice Barrett's Decision That Discriminates Against U.S. Citizens Abroad

Justice Barrett:

"At oral argument, the Government identified a series of factors that the Court has considered in attribution cases …

A third is whether the corporation is foreign and thus outside the reach of an accumulated earnings tax. *Cf. Ivan Allen Co., 422 U.S., at 624.*

These factors may serve as a useful guide for lower courts when applying today's decision to taxes that attribute income from other types of corporation to an individual taxpayer."

The Supreme Court Wanted to Uphold the Constitutionality Of the MRT - The Majority Reminds Us That ...

And those tax provisions, if suddenly eliminated, would deprive the U. S. Government and the American people of trillions in lost tax revenue. The logical implications of the Moores' theory would therefore require Congress to either drastically cut critical national programs or significantly increase taxes on the remaining sources available to it—including, of course, on ordinary Americans. The

The Court's Dilemma: How To Uphold The MRT While Avoiding The Realization Issue

By refusing to consider retroactivity (even though in footnote 6 they acknowledge that are permitted to) and other due process issues, the court:

1. Refused to consider an issue that could invalidate the MRT, saving U.S. citizens abroad; and

2. Did so in a way that allowed the court to AVOID taking a position on whether realization of income was required AND uphold the MRT.

("Retroactivity would give the court a license to acknowledge how different the MRT was from other taxes. Compare Kavanaugh, Barrett and Thomas decisions.)

Footnote 6 Of the Kavanaugh Decision …

6. The MRT applies to income that was realized and accumulated in the past by foreign corporations, but not taxed by the United States. In the lower courts, the Moores raised a due process retroactivity argument— that the MRT taxes income that was earned too far in the past. The Ninth Circuit rejected that argument based on this Court's decision in United States v. Carlton, 512 U. S. 26, 30 (1994). And the Moores did not seek certiorari on that issue. "We do not normally consider a separate legal question not raised in the certiorari briefs," and "see no reason to make an exception here." Kasten v. Saint-Gobain Performance Plastics Corp., 563 U. S. 1, 17 (2011); see also this Court's Rule 14.1(a).

The Majority Decision In Moore ... What Was The Ruling? It's Very Narrow!

Page 23 - per Justice Kavanaugh:

"That said, we emphasize that our holding today is narrow. It is limited to: (i) taxation of the shareholders of an entity, (ii) on the undistributed income realized by the entity, (iii) which has been attributed to the shareholders, (iv) when the entity itself has not been taxed on that income. In other words, our holding applies when Congress treats the entity as a pass-through.8"

Unpacking The Moore Decision(s) - It's Quite Nuanced

A 7 to 2 decision in favour of upholding the MRT.

A 4 to 1 decision upholding a realization requirement to be taxable as income.

Assuming realization of income, a 5 to 4 decision deciding that attribution to the shareholder was constitutional.

Assuming realization, two judges declined to consider the constitutionality of attribution.

Two judges on the right side of the moral issue dissented (no realization and if there was the attribution was suspect).

Ruling 1: The Kavanaugh Five - Justices Kavanaugh, Roberts, Sotomayor, Kagan and Jackson

- Assumed that there was income realization (the foreign corporation realized income)
- Did NOT consider whether realization was a constitutional requirement
- Considered ONLY whether the attribution of the realized income to the "U.S. Person" shareholder was constitutional
- Reasoned that MRT income was sufficiently similar to Chapter S, Subpart F so that attribution of the income was constitutional

Ruling 2: Justice Jackson

Although part of the "Kavanaugh Five", Justice Jackson ruled that:

There is NO constitutional requirement that income must be realized!

Ruling 3: Justices Barrett And Alito

- Ruled that REALIZATION of income IS a constitutional requirement
- Ruled that the attribution of realized income must meet due process standards (presumably including retroactivity)
- Did NOT consider due process/retroactivity issues becaue they were NOT raised in the cert petition or argument.

(The failure to continue with the retroactivity argument suggests the Moore's were NOT interested in striking down the MRT!)

Ruling 4: Justices Thomas and Gorsuch

First - realization is a requirement under the 16th Amendment:

"The Moores are correct. Sixteenth Amendment "incomes" include only income realized by the taxpayer."

Second - The MRT is NOT analogous to Subpart F, Chapter S or partnership taxation.

The Meaning Of Moore Is A 4 To 1 Ruling That "Realization" Is Required (A Win, Win, Win!)

1. The MRT stands! Retroactive taxation is the American way!
2. Four Justices take NO position on the realization issue (but warn that the decision in Moore should be limited to its facts).
3. Although the MRT stands, four Justices (Barrett, Alito, Thomas and Moore) rule that realization is a requirement.
4. Only Justice Jackson says that income realization is NOT a requirement.
5. Only one of Kavanaugh, Roberts, Sotomayor or Kagan is needed for a Supreme Court majority that realization is required.

Americans Abroad and A Ruling That "Realization" Is Required For Income Inclusion

I believe the ruling in Moore creates a defensible position that 877A is unconstitutional. Should a challenge be manufactured? Is there a covered expatriate subject to an exit tax assessment and be willing to be a plaintiff in a lawsuit?

Concluding Thoughts and Summary ... 1/5

A HUGE LOSS for Americans abroad and very likely a win for everybody else. **(Americans abroad are sacrificed at the altar of ensuring a wealth tax is unconstitutional.)**

1. A huge loss for Americans abroad which makes U.S. citizenship a clear threat to their "well being". A yawn to multinationals and S corp types.

Concluding thoughts and summary … 2/5

2. It's four to one in favour of a realization requirement. Four judges would not decide the question. But, I think this arguably means the 9th circuit is overruled on this point.

Four of the nine judges (Barrett, Alito, Thomas and Gorsuch) said that income requires "realization". Jackson appears to say that realization is NOT required. This leaves Kavanaugh, Roberts, Kagan and Sotomayor who have not taken a position on whether realization is required. That said, the majority opinion was clear that it was NOT taking a position on the realization issue. If one of these four were to agree that realization is a requirement …)

Concluding Thoughts and Summary … 3/5

3. Opening the door to a challenge to 877A: As per this Avi-Yonah article, 877A is NOT an attribution of actual income, but a tax on unrealized gains/distributions.

https://www.taxnotes.com/featured-analysis/what-best-candidate-post-moore-constitutional-challenge/2023/12/29/7hprx

In other words, 877A would force the court to consider whether actual realization is required or a fictional realization is okay.

Concluding Thoughts and Summary … 4/5

4. Support For 877A Challenge; Here is another article on Moore that seems to recognize 877A as open to challenge:

https://taxprof.typepad.com/taxprof_blog/2024/06/clarke-four-more-takeaways-from-moore.html

Concluding Thoughts and Summary … 5/5

5. This is not a new idea. Marc Berg (who wrote a superb Moore amicus) has been floating this idea since 2012:

https://klehr.com/naghoods/2023/04/Bar-the-Exit-Tax-Section-877A-the-Constitutional-Prohibition-Against-Unapportioned-Direct-Taxes-and-the-Realization-Requirement.pdf

The Road Forward For Americans Abroad ...

"All Roads Lead To Renunciation NOW!"

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John Richardson

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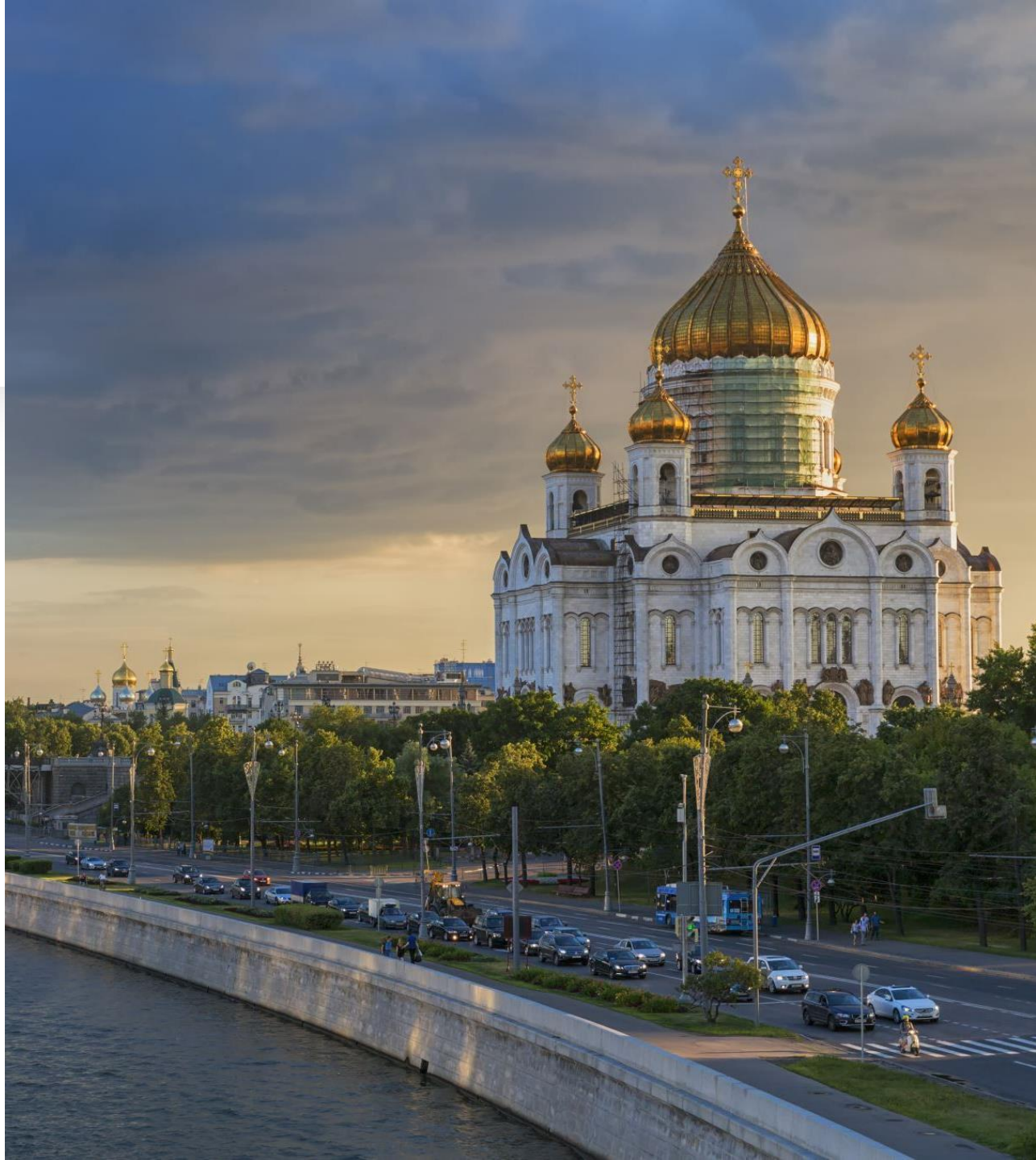
Citizenshipsolutions@protomail.com