

Proskauer Files Amicus Brief Before the U.S. Supreme Court on Behalf of the American College of Tax Counsel

Proskauer For Good on November 6, 2023

On October 23, 2023, Proskauer attorneys submitted an *amicus* brief in connection with the U.S. Supreme Court case of *Moore v. United States*^[1] on behalf of the American College of Tax Counsel—a nonprofit professional association of tax lawyers in private practice, law school teaching positions and government that is widely recognized for its excellence in, and substantive contributions to, the tax profession. *Moore* is widely viewed as a significant case, as it represents the first time in decades in which the Supreme Court will consider the constitutionality of a federal income tax statute. Furthermore, the Court’s decision has the potential to upend years of well-settled tax law and planning principles, introduce unprecedented uncertainty into the Code and spawn voluminous litigation.

According to the Moores, their case centers around a definition of income and whether it must be “realized” as a prerequisite to the imposition of an income tax under the Sixteenth Amendment of the U.S. Constitution, which generally grants Congress the power to “lay and collect taxes on incomes, from whatever source derived. . .” The Moores were subject to a one-time mandatory repatriation tax under Code Section 965 due to their approximately 11% ownership interest in an Indian corporation. Section 965—enacted in 2017 in connection with the conversion of the U.S. tax system from its historical worldwide tax model to a territorial regime—imposes a one-time tax on a significant U.S. shareholder’s share of the accumulated, untaxed, and undistributed post-1986 earnings and profits of a foreign corporation. *In appealing the Ninth Circuit’s ruling (upholding the taxing statute as constitutional), the Moores contend that Section 965 is unconstitutional because the undistributed profits that accrued in the Indian corporation (but were not distributed to shareholders) do not meet the definition of “income” under the Sixteenth Amendment. The Moores rely on the 1920 case of *Eisner v. Macomber* to argue that the Sixteenth Amendment does not permit Congress to tax “unrealized” income—i.e., profits or gains that were not actually received by a taxpayer, such as the accrued but undistributed corporate-level earnings of the Indian corporation.*

The Proskauer *amicus* urges the Court to avoid ruling on the constitutionality of the realization requirement altogether. The brief explains that it is unnecessary for the Court to reach a conclusion on the constitutionality of the realization requirement under *Macomber*, as the income at issue was clearly realized by the Indian corporation owned in part by the Moores. In making this argument, the Proskauer brief takes the position that an originalist interpretation of “income” under the Sixteenth Amendment is consistent with the imposition of tax on shareholders of a foreign corporation with respect to undistributed corporate earnings not otherwise subject to U.S. income tax. The brief further discusses the background of Section 965 and explains that it constitutes a tax on income and not a tax based on mere property ownership, while alerting the Court to the potentially negative and cascading consequences of a broad opinion in favor of the Moores.

The Proskauer team is led by partners Richard M. Corn and Stuart L. Rosow and includes associates Yomarie S. Habenicht, Lucas Kowalczyk and J. Tyler Moser.

[1] Docket no. 22-800 (cert. granted Jun. 26, 2023).

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Related Professionals

- **Richard M. Corn**
Partner
- **Stuart L. Rosow**
- **Yomarie S. Habenicht**
Associate
- **Lucas Kowalczyk**
Senior Counsel