

Event Transcript

[Moore v. United States: A panel discussion with legal experts and amicus brief authors](#)

November 1, 2023

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**Chye-Ching Huang | Tax Law Center at NYU Law:** Hi, everybody! I'm Chye-Ching Huang. I'm the executive director of the Tax Law Center at NYU Law. My center colleagues are 8 tax attorneys with practice, government and research expertise in tax, and we work to improve the integrity of the tax system. We're thrilled to welcome you to this panel that we're co-hosting with the American College of Tax Counsel and the American Tax Policy Institute.

As you know, the Moores have asked the Supreme Court to strike down the section 965 mandatory repatriation tax, arguing that there is a constitutional requirement that income must be realized before it can be taxed, and that the mandatory repatriation tax fails that requirement as a tax on unrealized income.

The 3 co-hosting organizations have submitted briefs setting out why we believe various aspects of the Moores' argument is incorrect. Today we're going to discuss those briefs and we're joined by George Callas, whose brief with Professor Hertzfeld also brings a unique perspective on the development of section 965.

We're just 4 of the 18 briefs in support of government in the case. That entire swath of briefs brings together a wide and unusual array of tax system stakeholders, including small business groups, conservative economists, tax and constitutional historians, and states.

The Tax Law Center has produced a guide, summarizing and linking to all of the briefs in the case, including those on the side of the petitioners, and we'll share those at the link in the chat. You also have links in the chat, or you also will have links in the chat, to the full bios of each of our speakers. And please note that today they are each speaking as representatives of their briefs and not any other organization. So, let's get right to it.

I would love to start off with Professor Andy Grewal of Iowa Law. Let me start with you. You led the ACTC's Amicus Committee's brief.

The ACTC, Professor Grewal, is a professional organization of some 700 of America's very best tax attorneys and Moore is obviously a really important tax case. But why, specifically, was it important for ACTC to weigh in here?

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**Andy Grewal | American College of Tax Counsel:** Yeah, as a member of the Amicus Committee, for every time we are solicited or motivated to write a brief we ask, "Is there something that we can add?" Because obviously there's a lot of commentary out there on Moore. And the question was, "Can we do something new?" In the brief, we flex our muscles and talk about how the decision in favor of the taxpayers, you could have adverse effects on the tax system.

So at a broad level, really the driving force was ensuring the integrity of the tax system. Can we, do we have something unique to add? And having answered both of those questions, we submitted our brief with the grateful and gracious Proskauer Rose.

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**Chye-Ching Huang | Tax Law Center at NYU Law:** Right, and I think that the brief is a really sort of excellent distillation of a number of the key legal issues in the case.

But I just want to sort of spotlight and ask you about one element of your argument, which is that it's unnecessary for the court to address whether the case *Eisner v. Macomber* imposes a constitutional realization requirement, because you argue that in the Moores' case the income was very clearly realized.

That's an argument that the government's merits brief doesn't at all concede, but I thought that your brief really sort of sharpened up and crystallized this point that there was realization. So can you say a little bit more about why you thought there was realization here.

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**Andy Grewal | American College of Tax Counsel:** And just taking a step back to understand the context of the argument. I think the concern is that this provision, section 965, isn't terribly unlike a lot of other code provisions.

This case would be different if maybe Congress passed a weird statute saying that someone realizes income when he or she just lives in their own home. In those circumstances, maybe the court would strike down the statute for want of realization. Those of us in the tax community might say, well, okay, that was a very strange statute. No serious person, maybe some serious persons in academia, but no one outside of academia would say you have income when you're just sitting on your couch. And so, if those were the facts of this case, then I think we could kind of stand by the side.

The concern here was that, I think, to many of the tax community, section 965 looks a lot like other provisions. That is, here there's no doubt everyone agrees that the foreign corporation has realized earnings and profits. No doubt about that. Everyone agrees. The concern is well, if the Supreme Court holds that there's no realization here, now there will be spillover effects in many other areas of the law. So, the thrust of the brief is well, you know what Court, this is an important issue, we get it. But the simplest path here is to just conclude that the foreign corporation did realize income. There was realization here and now you don't have to get into the threshold questions about is realization required, and as with any constitutional principle, how do you define its contours?

So that was the main goal of the brief, to try to explain that here there was accumulated earnings that were realized. This is not a circumstance where a shareholder is taxed when a corporation owns real estate and the real estate skyrockets in value and we're looking through the corporation to the shareholder saying, "You're taxed on the appreciation in the corporation's assets." That's not the case.

The brief also emphasizes that this is not some workaround to reach fluctuations in the value of stock. The brief establishes that the earnings of a corporation, they can have many earnings, but that doesn't necessarily correlate to fluctuations in the value of the stock. You can have a whole bunch of accumulated earnings and profits and then those are invested unwisely and now the stock is low value, but meanwhile you have a lot of accumulated earnings.

So again, the goal of the brief is to say, you don't have to address all the thorny questions about realization because there's narrow grounds to support the government here. That is, the income was realized in the sense commonly accepted in the tax community.

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**Chye-Ching Huang | Tax Law Center at NYU Law:** Perfect. Thanks, Professor Grewal, and I agree that the brief really sort of steps through those issues very clearly. And now let me bring in Philip Wagman, who is a partner at Clifford Chance and who helped author the American Tax Policy Institute brief. And Philip, the brief that you submitted states that it was based on the extensive practical and technical expertise of many of the members of the nation's leading law and accounting firms. So, before you get into the substance, can you also say a little bit more about what perspectives the ATPI brief brings and why it weighed in here.

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**Philip Wagman | American Tax Policy Institute:** Sure. So, I think the ATPI brief grew organically out of conversations that a lot of tax practitioners had over the summer after cert was granted. I think a number of tax lawyers were surprised when the Supreme Court granted cert and at that point started examining the case pretty closely. And it started to come up for me in conversations with tax lawyers on the other side of a deal or in bar organizations or in other ways. And gradually those conversations sort of grew size and intensity as we unpacked the case and the issues that it presented. And I think I'm very grateful to Julie Divola, the president of ATPI, and the others in the leadership of ATPI for convening and coordinating a lot of those conversations. And that's really what resulted in ATPI's brief.

I think we felt the brief had to be written for a few reasons. First, we thought federal income tax was an area that the Supreme Court doesn't visit regularly, and we felt this case involved some fairly complicated principles and provisions of the tax law. We wanted to make sure that there was a voice that could help explain those provisions in a clear and accurate and hopefully simple way. We also, as I think Andy referenced a minute ago, saw that section 965 is not sort of divorced from other parts of the tax law. In fact, it is interconnected in a lot of ways with other parts of the tax law, so that if there were a ruling that section 965 was invalid under the 16<sup>th</sup> Amendment, that could raise questions about a lot of other parts of the tax law. We wanted to make sure that was explained in a clear way to the court. And last, as practitioners who work with clients on a day-to-day basis, a lot of us sort of saw pretty clearly the potential for real confusion to people planning how to operate their business and structure transactions and how to file their tax returns. And we thought it was important to convey that to the court as well. So, we thought we kind of had a duty to share that with the court.

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**Chye-Ching Huang | Tax Law Center at NYU Law:** I know that puts a killer point around the sort of potential for disruption and the ways in which 965 does sort of look like some of these other parts of the tax code. Could you explain a little bit more about how your brief lays out and works through some of those other parts of the code and what you see as that potential?

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**Philip Wagman | American Tax Policy Institute:** Sure. So, we thought if the court were to rule in favor of the petitioners, the court might hold that there is a realization requirement and in addition that realization requires that a taxpayer has to receive cash or property in the year when tax is imposed on income. And the more we thought about the code, the more examples we were aware of where that model of realization is not consistent with a lot of longstanding, sort of foundational parts of the code. So, as a first example, there a lot of rules, and I think Andy alluded to this, where one person is taxed on income where the corresponding cash or property is received by a different person. So, in addition to a controlled foreign corporation, sort of a partnership, a disregarded entity, an S corporation, a grant or trust, there are a lot of examples.

We also thought there are a number of common examples where someone is taxed on income before they've actually received the corresponding cash or property. So, for example, a business that uses the accrual method of accounting, or a creditor that owns debt with original issue discount, or a landlord that accounts for rent under section 467. And we also realize there are a number of places where a taxpayer may realize income without receiving necessarily cash or property. An example being a corporation that distributes an appreciated asset and recognizes gain under section 311(b). So, we felt when we added all that together, that these were fairly central parts of the code, and that there could be real constitutional questions that would be raised, and that it might take courts a while to sort through and could involve courts pretty heavily in determining the acceptable sort of outer boundaries of the tax law.

We noted in the petitioner's brief that they sort of seem aware of this issue as well and identified a concept called constructive realization in their brief, which we found to be sort of a novel concept, which would appear to include cases where one person is taxed on income that's actually received by somebody else, for example, under subpart F with a U.S shareholder. And we didn't feel that drew sort of a clear, cogent line between section 965 and all the examples I just mentioned.

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**Chye-Ching Huang | Tax Law Center at NYU Law:** Really helpful. Thank you. And again, for all of the folks, you've got links to all of these briefs, and one of the reasons why I didn't sort of roll back up and step through the sort of the very basics of the case and the issues that it raises is because these briefs do such a great job of really explaining some of these issues and this potential for sort of fall out across the tax code.

So, let me now bring in George Callas, he is the executive vice president of public finance at Arnold Ventures. Your perspective on this case is pretty unique. So, what is that perspective that you and Professor Herzfeld [inaudible] and why did you think it was important that the court should have the benefit of that perspective?

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**George Callas | Arnold Ventures:** Yeah, well, first of all, thanks, Chye-Ching, for having me on and for running this panel, and I also want to congratulate all my co-panelists. I now know what is involved in submitting an amicus brief, and anybody who does it should be congratulated. But with regard to my co-panelists, not only on doing the work, but for making some really coherent and important arguments. In reading their briefs, there was a lot of “hey, they’re saying what I’m thinking” going on as I read them. So, I just want to congratulate all of them on excellent briefs that I hope the justices and their clerks pay close attention to because if you really digest these arguments, I think you really start to see what’s going on here—this is a tax on income.

With regard to the unique perspective that that led Mindy and I to co-author a brief, I would start by saying I can see where justices and clerks, who are brilliant legal minds but are not technical tax people and who may be seeing this stuff for the first time or had very little exposure to the international tax reforms in the TCJA, if somebody comes and drops section 965 in their lap and say, “Hey look at this thing. What is this thing? This is some new tax with its own rate structure and it kind of looks like the base of the tax is more property than income and it’s just a money grab because they needed to pay for this reconciliation bill and so they’re just grabbing money by creating this new one-time tax on property.” I can see where somebody even though they’re a brilliant legal mind might be misled into being like, “Oh yea, this doesn’t look right here.” And then maybe you add to that some very sweeping broad pronouncements by the 9<sup>th</sup> Circuit, which is known for making broad sweeping pronouncements, and you get some more conservative justices and their clerks going, “Okay that just makes us even more skeptical that there’s something weird going on here.” So, I can kind of see where that misunderstanding could happen. I think Mindy and I felt like where there might be a gap in the arguments being made both by the government and by the amici isn’t really providing the history and the context and walking the court through. This isn’t just some random thing that was airdropped in to grab some money. This is an integral provision that fits into a larger set of international tax reforms. It’s transitioning from an old system to a new system that’s trying to cure some very serious policy flaws in the old system: trapped cash overseas, incentives to do inversions, and IP migration and that sort of stuff. And we’re trying to address those issues. As part of transitioning from an old system to a new system, you need some provisions that helps facilitate that transition, and one of those provisions is a provision to effectively restrict or withdraw an income deferral benefit previously provided by Congress as legislative grace and the withdrawal of that income tax benefit as part of transitioning to a new system that will no longer rely so heavily on that old deferral benefit.

I think our view was that if people understood all of that, it’s not so “There’s good policy arguments, therefore, it’s constitutional.” I can see the flaw in that argument. If you see all of that, if you understand all of that, then you really start to see this is a tax on income. This is not some out-of-the-blue tax on property. This is just a partial tax on income because of the deductions. It is part of a larger set of income tax reforms. And I think my role, starting in 2010 at the staff level through 2017, in developing these rules, Mindy’s role on the outside as both an academic and a practitioner wearing both of those hats and really following this story throughout the years and commentating on its publicly and in the press, there are a few other people in positions like ours, however, when you take that very small group of people and you scratch off

the names of people who are conflicted out from signing on to an amicus brief for one reason or another, there's sort of a last man and woman standing element to this. We're the only ones who are kind of left, who are free to tell this story that we think is so important to understand, to put it into the context of no, this is really about taxing income that had been deferred.

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**Chye-Ching Huang | Tax Law Center at NYU Law:** Yeah. And I think that the brief does a terrific job of laying out that sort of policy story and where 965 came from. And I think you know you've admonished me, and I've taken it to heart although we didn't sort of follow your sort of suggestion in the brief. But you said previously that really this idea of it being a "mandatory repatriation tax" is of this moment because of the way that it sort of sits within subpart F and these other provisions.

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**George Callas | Arnold Ventures:** Right, Right. Yeah. So, you know that I've been on that hobby horse, this is political George as opposed to legal or constitutional George. I think maybe less so in the Article III branch than in the other two, you know Article I and Article II, but I do believe that political messaging and communications and framing matters even when you're operating in the Article II branch. And nowhere in the Internal Revenue Code will you find the phrase "mandatory repatriation tax." That is not actually in the statute anywhere. That is a phrase that was created to describe this. The petitioners chose to use this phrase, capital M, capital R, capital T, I believe as part of their attempt, and I think this is critical to their case, to frame this thing as a quote on quote wholly new tax. They describe it as a wholly new tax. They talk about having a bifurcated rate structure, its own rate structure, and a base that is more property than income. And that is incorrect. But I do think the framing of it as the mandatory repatriation tax kind of subconsciously helps strengthen the vibe. You know, that this is some new tax that's being dropped into the Code rather than what I describe it as, no, this is an income inclusion. Right? This is not a tax; this is an income inclusion. I think Andy refers to it. He actually spends a lot of, or the ACTC spends a lot of its brief talking about how this is a tax item, not a new tax. And so, when I say, "income inclusion" and they say, "tax item," we're really making the same argument here. This is within the income tax. And I worry that adopting the messaging of the petitioners is really unnecessarily ceding ground to them by playing on their playing field that this is some new tax and then we have to fight on the ground of is it on property or not. And I don't think we concede that, and I urge everyone to not just sort of adopt their language.

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**Chye-Ching Huang | Tax Law Center at NYU Law:** So you know, speaking of entirely new taxes, you sort of tee up in your interest of amici statement that you believe in strong constitutional limits on the power of the federal government, and you also note that you think that a wealth tax is likely unconstitutional as a direct tax. Why do you think it's also important for the court to know that given that were talking about some income inclusion that's part of something that you sort of step through as being pretty core to the existing international tax regime.

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**George Callas | Arnold Ventures:** Sure. Well, so, I think I want, you know the court, the makeup of the court right, and this may be an oversimplification, we're basically talking about six conservatives and three liberals, and the swing vote, the fifth vote, in this case is going to come from the conservative wing of the court. And I think those members of the court, those justices, probably are sort of philosophically, like me (I want to make sure they understand that I agree with this), are uncomfortable with just plenary power of Congress to do whatever it wants and maybe uncomfortable with the notion that there is no limiting principle whatsoever in the 16<sup>th</sup> Amendment. And I want to make sure they understand that I'm coming from a similar place where I'm also uncomfortable with those things. I don't just come in thinking that Congress should be able to do whatever it wants whenever it wants. I do believe there should be limitations on Congress's powers. A wealth tax specifically, and again I sort of refer to the Sanders-Warren wealth tax as being a direct tax; it's not on income and not apportioned. So, I think I want to make sure the court understands that I'm not coming from the perspective that there should be no limitations on Congress's power. I do believe in limitations, but even with that general philosophical disposition, 965 is fine.

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**Chye-Ching Huang | Tax Law Center at NYU Law:** Well, thanks so much, George. Let me finally bring in and delighted to welcome Rebecca Kysar, Professor at Fordham Law and visiting professor at NYU Law. She submitted a brief with us at The Tax Law Center as well as professors Ari Glogower, David Kamin, and Darien Shanske.

Hi Rebecca. Your brief (our brief) starts by discussing *Eisner v. Macomber*, the primary authority that the petitioners rely on for saying there is a constitutional realization requirement. Why did you think (did we think) it was important to address this case pretty head on and show how we thought the court should think about it?

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**Rebecca Kysar | Fordham Law:** Sure, and thanks Chye-Ching for having me represent our brief. We, you know, I think, saw *Eisner v. Macomber* as really the linchpin of the petitioners' arguments, and were concerned that the court would seize upon the broad language in the *Macomber*, and so we thought it was necessary to both distinguish and contextualize *Macomber* and sought to do just that in the brief. I think the tax professors among us, of course, teach the case and so have spent some time thinking about how to situate it within the broader evolution of the case law and of the statute, and we understood that although *Macomber* and its holding that there is a constitutional realization requirement have never been overruled, the decision has been confined to its facts. And you know at the time of the decision, *Macomber* was heavily criticized, and you see even in Brandeis's dissent prescience that the ghost of *Macomber* really might come back and haunt the income tax, and I think we're seeing that now. You could ask why the ghost of *Macomber* has been dormant for so long and now it's sort of awakening, and I think it's because of recent proposals for wealth taxation and marked-to-market taxation that have revitalized debate over its continuing validity. *Macomber* is a means to that end, but as others have pointed out, there may be a lot of collateral damage there.

So, our brief really goes through the context and evolution of case law so that the court can see *Macomber* for what it is. It's a case that the court has consistently retreated from, and Congress has very much relied on that retreat in legislating, you know, a rich array of tax rules that really push on realization, if not entirely disregard it. And so, just starting with the case law, we go through the decades to show that the court when confronted by *Macomber* chooses again and again to not apply its constitutional holding. Just a year after *Macomber* was decided, the author of *Macomber* wrote an opinion in *Phellis* that held stock dividends received in reorg qualified as income even though the corporation retained the same assets and the transaction did not impact the stock price. And so, that is very much in tension with the *Macomber* holding. There was a dissent on that case that said it, you know, violated the *Macomber* holding. Then in 1936, in *Koshland*, the court read *Macomber* very narrowly in the stock dividend context, affirming Congress's power to tax stock dividends in many circumstances. And then you get a case like *Helvering v. Bruun* that holds that a landowner realized taxable income when a leaseholder simply walks away, simply abandoned a building on his land, and the court held that abandonment alone and nothing else constitutes income. And there the *Bruun* court explicitly stated that *Macomber* was not controlling outside of a stock dividend context. And, in that same year, the court decides *Horst*, in which the court states that the realization requirement was founded on administrative convenience. And so, by the 1940s, the court had really walked all of the reasoning back, so much that any kind of continuing vitality of *Macomber* was limited to its facts and to the stock dividend context. Since then, I think, very much in contrast to the petitioners' interpretation of *Macomber*, the court has really continued to allow Congress a lot of latitude in taxing income. Famously in 1955, the *Glenshaw Glass* court states that *Macomber* was not meant to provide a touchstone to all future income questions, and most recently in 1991, in *Cottage Savings*, which Justice Roberts then was arguing for the government, the court reaffirmed that realization is a matter of administrative convenience and interpreted the statute at issue as really only requiring the very slightest difference in legal entitlements in finding realization. And you know, I think this evolution is just indicative of the fact that the need to deviate from a strict realization requirement is necessary to protect the integrity of the income tax, and I think that's especially true with regard to entity taxation where owners can take advantage of the separateness of the entity to get deferral on income.

And so, in the other main part of our brief, we go through congressional practice to show that the income tax is indeed kind of grown up around this understanding that an expansive interpretation of *Macomber* could not be the law of the land, from subchapter K through subchapter F through subpart F and others that Philip and his co-authors also argue cannot be distinguished from the transition tax. Some of the other briefs like the Avi-Yonah-Wallace brief have pointed out that, even in the stock dividend context, section 305 allows for the taxation of stock dividends in a way that really can't be reconciled with *Macomber*, so that's a pretty remarkable fact. And, in the merits brief, even the petitioners seem to recognize that there would be problems putting so much of the tax code at risk, and so they begin to acknowledge that realization is some sort of legislative determination. They then pivot to this argument that really the transition tax is taxing property even though it taxes net gain, and that really has nothing to do with realization or *Macomber*. So, our hope I think is that the court comes away with a better understanding of *Macomber* and its influence in the broader case law and broader statutory landscape, and if the court were to readopt some of this broad language in *Macomber*, it would be sweeping away this history with very problematic consequences as others have pointed out.



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**Chye-Ching Huang | Tax Law Center at NYU Law:** Perfect. Thanks Rebecca. I think this is a great time to welcome all of the panelists back because I'd like to sort of pick up on the way that we sort of circled back to some of the points that were made earlier, which is the way that the sort of fairly expansive interpretation of *Macomber* that the Moores are asking for, as we've discussed, could create problems for the rest of the tax code. I think Philip mentioned that they and some briefs in support of them have offered various arguments for why the court shouldn't really worry about any of that: some of this could be saved by constructive realization or various other routes that have been put forth. So, I'd really sort of like to open it up to folks to ask, "Are you influenced by some these arguments that the damage could be potentially contained if the court were to find that there is a constitutional realization requirement? Do others have the same view of the constructive realization argument as Philip did?"

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**George Callas | Arnold Ventures:** Yes, and in fact, because the ATPI brief came out few days before the deadline, I had a chance to see it before we submitted our brief, I kind of half tongue in cheek, asked if we could incorporate the entire brief by reference, like in a footnote in our brief because I absolutely agreed with the arguments. You know, Chye-Ching, earlier I mentioned a limiting principle. I kind of shied away from realization, and I mentioned more vaguely a limiting principle. I believe there is some limiting principle in the 16<sup>th</sup> Amendment, but I think you have to be really careful about it. A strict realization, especially today with the level of sophistication of taxpayers and tax advisors, it's not hard to achieve what I refer to as "monetization without realization." And so, I think a strict realization requirement makes an income tax almost impossible to administer effectively and it can't be that the amendment to the Constitution authorizing an income tax also makes it impossible to administer effectively, right? So, I actually think it would be fun to work on doctrine called "constructive realization," but I agree that the petitioners didn't actually do that.

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**Philip Wagman | American Tax Policy Institute:** I have a couple of thoughts about that. First of all, thank you, George, and, speaking for ATPI, I'm sure we would have been very glad to do that. Second, I wonder whether there already is perhaps somewhat of a limiting principle in the due process clause, in the sense that there seems to be case law that sort of addresses what in some ways seem to be the real issue in this case, and we try to at least nod at that in our brief. You know, I agree with Andy. It seems to me income was realized here. You know, farm equipment was sold, and customers presumably paid. The question is perhaps whether the right person paid tax on that income, and that seems to be a question, you know, Supreme Court cases we were looking at that the court has analyzed them in the context of the due process clause, which may provide for some more flexibility in terms of is there sort of a reasonable nexus between the person being taxed and the income that is being subjected to tax. So, just a thought there.

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**Andy Grewal | American College of Tax Counsel:** On this point about realization, I think it makes sense for folks to brace themselves for the court to do something affirmative, saying

there's a realization requirement. I was shocked and surprised that the court took this case. Usually, the Supreme Court takes two categories of cases. One category is when the circuits are split. The other category is when a federal court declares a federal law unconstitutional. Neither of those factors were present here. So, scratching my head, I didn't think the court would grant cert, but they did. Why is that? I think George mentioned this. The 9<sup>th</sup> Circuit, depending on your perspective, went a little bit off the ledge, slamming *Eisner v. Macomber*. The Supreme Court has multiple times told the lower courts to not infer that we've overruled our precedents. The lower courts do this with some frequency: "Well, yeah, there's this old case, but we don't think the Supreme Court is really applying it anyone." The Supreme Court grants cert and says, "Don't do that. We will tell you when our law is bad." And I think the 9<sup>th</sup> Circuit essentially did that with *Eisner v. Macomber*. They read [inaudible]. And so, we would expect the court (and I was wrong about the cert prediction), in some form or another, to say there's a realization requirement. In that respect I found the government's brief very interesting. The government didn't, to me, affirmatively say there's no realization requirement. Instead, they kept castigating the taxpayer's rigid realization requirement. The government, through their strategic ambiguity, were they saying there's no rigid realization requirement? Or were they saying there's no realization requirement and it would be rigid if it were? I think they were deliberately ambiguous on that point. So, I would guess that, in some form or another, the Supreme Court is going to say realization. And then, I don't think, in terms of the consequences, that the sky is going to fall, just because there's lots of constitutional principles that are a little bit rough around the edges. Can't yell "fire" in a crowded theater. Similar principles could extend to realization. A realization requirement could be applied such that subpart F, partnerships, and lots of lots of things are plainly constitutional. I think the ACTC gives a nice explanation. So, anyway, that's my prediction. But I was wrong about the cert grants.

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**Rebecca Kysar | Fordham Law:** Yeah, on realization, you know, I think you can readily distinguish *Macomber* on the facts. Here we have an entity that does not pay tax at the corporate level, which was not the case with Standard Oil, and since the corporation was not taxed, it's entirely appropriate to attribute those earnings to the shareholders. *Macomber* was really about the taxation of the stock dividend itself, rather than the taxation of those earnings, which is what this case is about. Philip is right that there is a question of attribution here, and that's a long-held principle in the tax law that there may be some limits on. Their brief does a nice job of going through that.

On the potential for disruption, I do think it's very difficult to distinguish the transition tax from some of these other regimes. The court could try to do so if they held in favor of the petitioners. Or it would be easier to preserve those regimes if they didn't and still stated that there was a constitutional realization requirement in the background. I think also it's important to take into account different perspectives here. There is a brief from Main Street Alliance and Small Business Majority that nicely makes the point that small businesses in particular are vulnerable to uncertainty here since they're relying on many of those vulnerable provisions that provide

pass-through taxation and also don't have a lot of resources to weather the uncertainty here. So, those are important perspectives as well.

**00:42:58.020 --> 00:44:06**

**George Callas | Arnold Ventures:** Yeah, I agree with Rebecca and the others. The attempts to distinguish 965 from these other regimes, I think really they clearly knew they had to achieve that, but I think they fell very short. In fact, I would go even further and say to the extent there's distinguishing features, those distinguishing features tend to put 965 on even more solid ground than some of the other regimes. Rebecca mentioned that the entity level is not taxed. We're dealing with a foreign corporation, there's a greater potential for tax avoidance in the cross-border context. You've got a degree of control here. You know there's a definition of CFC: 5 or fewer, 10 percent or more. You don't need to have control in subchapter K or subchapter S. So, to the extent there's difference, in some cases, I think some of these other regimes would be even more vulnerable constitutionally than 965 is.

**00:44:06.280 --> 00:45:09.449**

**Chye-Ching Huang | Tax Law Center at NYU Law:** We've got a question in the chat from Michael Goldstein, who asked, "Is there a concern about this due process question that was discussed in the 9<sup>th</sup> Circuit?" I think we touched on this a little bit with Andy's comments. Rebecca, our brief also did sort of pick up on this and note that the merits brief for the petitioners did somewhat try to resurrect some of these arguments in a way that wasn't entirely clear. It was a sort of a mix of a retroactivity argument and the idea that somehow income becomes property if you leave it long enough. Were there additional points you wanted to make in response to that question or others? George, I also thought your brief had a useful point here about why the 1986 date was used and again sort of important to sort of understand the pieces that came together. So, I just want to flag that question for folks in case you wanted to weigh in.

**00:45:10.210 --> 00:46:21.390**

**Rebecca Kysar | Fordham Law:** Yeah, I mean, I think, you know, as you mentioned, this really is an argument that the petitioners had made below, that they rightly lost, in my opinion, under well-established doctrine, and then wisely abandoned. And so they are trying to kind of repackage it in this brief, and our brief tries to kind of swat that away. They can't smuggle in the same argument through the back door, claiming that it represents a 16<sup>th</sup> Amendment problem when it really is just a retroactivity concern. They're saying that if you reach too far back in time that somehow transforms the tax into one that's not an income tax, and so we go through some of the case law under the 5<sup>th</sup> Amendment and argue that it's just inappropriate for the court to decide this issue given the procedural posture.

**00:46:21.730 --> 00:48:21.150**

**Andy Grewal | American College of Tax Counsel:** On retroactivity, usually in the tax context, retroactive limitations arise when Congress passes a big tax bill. Nine months later they realize we screwed something up. And then they pass another bill saying, with the technical correction, it's retroactive to the date of the original enactment. In a case called *United States v. Carlton* in the early 1990s, the Supreme Court addressed Congress's power to enact retroactive tax legislation, and essentially, they said you're not getting any special protections. Substantive due process and the rational basis test [inaudible]. There's some interesting questions if Congress

went back 5 years, 10 year, 20 years or something like that. But in the present context, this really isn't retroactive taxation. Company could have earnings not just in 1986 but in, I don't know, 1922 and then just make nothing for a long time, and I buy the stock today, and it makes a distribution to me. I would have dividend income. In a very colloquial sense to the person on the street, maybe it's retroactive. I'll be taxed on earnings from 1922. But that's not usually what we mean when we say retroactive. I'm not being taxed after the fact. We're not going back in time and changing the consequences of my behavior through a law that happens after the fact. So, I think the petitioners here, the taxpayers, are using this retroactive point to kind of argue that there's no constructive receipt as opposed to subpart F. I don't think it's a strong distinction. Our brief points it out. But they're saying, "Well, alright, you can tax people when they don't touch money when it's earned while they have an interest in the corporation." But that just on how the corporate tax system and other systems have worked. So I think this retroactive argument is not very good. I can't imagine the court just go off on retroactivity. It seems limited to kind of being this indirect point about [inaudible].

**00:48:23.550 --> 00:48:25.430**

**Chye-Ching Huang | Tax Law Center at NYU Law:** George, anything you want to add on that?

**00:48:25.940 --> 00:49:06.340**

**George Callas | Arnold Ventures:** I was just going to comment that 965 is kind of analogous to a 481 adjustment in a sense. If this notion prevails that you couldn't look back at deferred income because that was retroactive, any legislative change that triggered a 481 adjustment (moving from cash to accrual method or changing your inventory accounting method from LIFO to FIFO or anything like that) would be constitutionally dubious. Just kind of working backwards from that, it's like that can't be right.

**00:49:11.360 --> 00:49:39.819**

**Chye-Ching Huang | Tax Law Center at NYU Law:** On the theme of working backwards, let's work backwards all the way. I think, Andy, the ITPI brief also sort of places some emphasis on the idea that an originalist court should find for the government here. Could you say a little bit more about, again, sort of that perspective that you bring? And interested if others have additional thoughts.

Oh, sorry. I will just make sure that you're unmuted.

**00:49:43.010 --> 00:52:24.429**

**Andy Grewal | American College of Tax Counsel:** Yeah, this question of originalism. Of course, it's all the rage in the Supreme Court these days. I think it has a lot of purchase in a lot of contexts. But here there really was no meaningful original understanding of income in the 16<sup>th</sup> Amendment because the 16<sup>th</sup> Amendment was about whatever income might be, we don't care if it relates to real property or personal property, you can tax it without apportionment. So, there wasn't this constitutional moment. If there were a constitutional moment (Congress debated and the people discussed what is an income tax), then I think that Justice Thomas and so one would

be very, very interested in what income meant around the time of ratification. That's just not what the debates were about. There's no Federalist Papers for the 16<sup>th</sup> Amendment. So, I do think the starting point with all legal interpretation is to try to figure out what did the words mean when they were enacted. [Inaudible/Unintelligible]. That's the starting point. Might not be the end point for others, but that's a starting point. I imagine the court will take that into account. But more pressing is just *Eisner v. Macomber*. I think you have a case there, and the 9<sup>th</sup> Circuit may have been happy to override it. I don't think the Supreme Court is. There's a case called *Brown v. Commissioner* from the 1980s where the court dealt with when does a principal-agent relationship exist in the tax law. They had previously decided a case called *National Carbide*, and the court, in this *Brown* case, said, in tax lore, tax attorneys and professors have written articles about the *National Carbide* factors (6-factor test), everyone was applying the 6-factor test. The court in *Brown v. Commissioner* said we do not read our own opinions as if they were statutes. We don't care that you're reading this word, this word, and that word. All statements and opinions have to be read in the context in which they were issued. Academics might say *Cottage Savings* referred to realization as administrative convenience. That's not how the court reads its own opinions. So, I think more pressing than originalism is just that *Eisner v. Macomber* says what it does. There is some fashion of a realization requirement. How far it goes, and I don't think it's rigid as the taxpayers here suggest, I think they should lose, but I think *Eisner v. Macomber* is a much bigger factor than the debate about [inaudible/unintelligible].

**00:52:26.470 --> 00:53:33.690**

**Rebecca Kysar | Fordham Law:** On the originalist point. I think that it's really important to look at the context of the 16<sup>th</sup> Amendment. If you take a broad interpretation of *Macomber* that leaves the income tax toothless and contravention of the basic thrust of the amendment, which was to give power to Congress to tax income from whatever source derived. Professor Brooks and Gamage have a nice brief that roughly argues that the "derived" language that the petitioners seize upon is not a limiting principle and thus evidence of realization as the petitioners are trying to argue but is instead a repudiation of *Pollock*, which held, wrongly, that income from property couldn't be taxed under the direct tax clause. So, that "from whatever source derived" language made clear that income from property could be taxed even if property itself could not. To understand that context, I think, is important.

**00:53:35.220 --> 00:53:58.250**

**Philip Wagman | American Tax Policy Institute:** I would just add a brief point that the government, I think, makes in their brief, which is what the 16<sup>th</sup> Amendment doesn't say, which, of course, doesn't use the word "realize," even though that was a word, as the government points out, in common usage at the time the amendment was drafted.

**00:53:59.050 --> 00:55:44**

**Chye-Ching Huang | Tax Law Center at NYU Law:** Perfect. Well, thank you all so much. Let me just sort of wrap up now. I want to sort of echo something that George said previously. I know that not only the folks that have joined us here today, but there many colleagues and many other brief authors have dedicated countless hours towards sharing their knowledge and concerns

about an issue that has potentially pretty major implications for the tax system. That's not always easy to do so. It takes a lot of working including sort of footnoting and all sorts of fun things. But it's an important public service, and I think it's really laudable and heartening that a wide range of tax system stakeholders have done so in this case. So, thank you all of you that are weighing in with your thoughts on this important issue. I'd also like to remind you all that in the chat we have a link to our guide summarizing all of the amicus briefs and more, including many of the terrific briefs that were mentioned today but not represented here on the panel, including ones that take a look at that historical angle, which was the subject of a panel that we co-hosted with the Tax Policy Center and other many important perspectives on this case.

You can also sign up for our mailing list and those of American Tax Policy Institute and ACTC and check out The Tax Law Center's careers page for a posting for an attorney who will help build out our public interest tax litigation and amicus brief work on cases like *Moore*.

Thank you all again so much for joining and for your participation and your questions in the chat. Thanks so much.