



Written by [D. Michael DeRidder](#) on June 20, 2024

## Supreme Court Upholds Trump Tax on Overseas Investments

The U.S. Supreme Court ruled in *Moore v. United States* earlier today regarding the Trump-era tax on overseas investments enacted by Congress in 2017.

The question presented to SCOTUS asked if Congress can tax overseas investments on unrealized gains:

QUESTION PRESENTED: The Sixteenth Amendment authorizes Congress to lay “taxes on incomes ... without apportionment among the several States.” Beginning with *Eisner v. Macomber*, 252 U.S. 189 (1920), this Court’s decisions have uniformly held “income,” for Sixteenth Amendment purposes, to require realization by the taxpayer. In the decision below, however, the Ninth Circuit approved taxation of a married couple on earnings that they undisputedly did not realize but were instead retained and reinvested by a corporation in which they are minority shareholders. It held that “realization of income is not a constitutional requirement” for Congress to lay an “income” tax exempt from apportionment. App.12. In so holding, the Ninth Circuit became “the first court in the country to state that an ‘income tax’ doesn’t require that a ‘taxpayer has realized income.’” App.38 (Bumatay, J., dissenting from denial of rehearing en banc).

The question presented is: Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.



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The SCOTUS decision ruled 7-2 in favor of upholding the tax, with the majority opinion stating the Mandatory Repatriation Tax (MRT) did not exceed Congress’s authority, [stating in the decision](#):

Congress treats American-controlled foreign corporations as passthrough entities. Subpart F of the Internal Revenue Code attributes income of those business entities to American shareholders and taxes those shareholders on that income. §§951–952. Subpart F, however, applies only to a small portion of the foreign corporation’s income, mostly passive income. In 2017, Congress passed the Tax Cuts and Jobs Act. As relevant here, Congress imposed a one-time, backwardlooking, pass-through tax on some American shareholders of American-controlled foreign corporations to address the trillions of dollars of undistributed income that had been accumulated by those foreign corporations over the years. Known as the Mandatory Repatriation Tax, the tax imposed a rate from 8 to 15.5 percent on the pro rata shares of American shareholders. §§965(a)(1), (c), (d).

The MRT—which attributes the realized and undistributed income of an American-controlled foreign corporation to the entity’s American shareholders, and then taxes the American shareholders on their portions of that income—does not exceed Congress’s constitutional authority. Pp. 5–24.

Associate Justices Clarence Thomas and Neil Gorsuch dissented, [with Thomas writing that the tax is unconstitutional](#), and that the petitioners paid taxes on investments that yielded no profit:

Charles and Kathleen Moore paid \$14,729 in taxes on an investment that never yielded them a penny. They challenge that tax — the Mandatory Repatriation Tax (MRT) — as unconstitutional. As relevant, they argue that a tax on unrealized investment gains is not a tax on “incomes” within the meaning of the Sixteenth Amendment, and it therefore cannot be imposed “without apportionment among the several States.”



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