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The Moores — Nobody Expects the Spanish Inquisition

To the Editor:

Professor Reuven S. Avi-Yonah, for whom I have the highest respect, didn't care[1] for my response[2] to professor and *Tax Notes* contributing editor Mindy Herzfeld's criticisms[3] of the Moores' tax planning (or lack thereof) when they invested in an Indian company in 2006.[4]

Avi-Yonah faults the Moores for not considering the use of a domestic corporation to invest in the Indian company. He says:

> Had they invested either through [their friend Ravindra Kumar Agrawal's] corporation or through their own holding corporation, there would be no *Moore* case because the corporation would shield them from any tax liability under 965.[5]

This statement is misguided. There was no section 965 or global intangible low-taxed income regime in 2006, nor any way of knowing that anything like them might be enacted or how they would operate (favorably for corporations, especially C corporations, and extremely unfavorably for individuals). There is also no evidence that Agrawal would have allowed the Moores to invest through his corporation (if I were advising Agrawal, I would have told him not to take on a minority investor in his holding company). It's rather telling that, as Avi-Yonah noted, Agrawal was investing "a much bigger amount."

Consider the economics of the Moores establishing their own corporation just to make a $40,000 investment which, as the law stood in 2006, was treated almost identically to an investment in a domestic corporation. I still haven't heard why this was wrong. Had they checked a little more deeply, they might have learned about section 962, which in many cases makes the use of a corporation by individuals unnecessary. I can't help feeling that the message from the two professors is that a U.S. person should not make a modest investment abroad unless they can afford to hire them (or me) as well as a battery of expensive tax accountants to handle the computations and the compliance. Perhaps that is where the Moores went wrong.

Avi-Yonah is also living in a dream world where the Moores were avidly following legislation proposals that purportedly put them "fully on notice" about a proposal made eight years after their original investment. Is he saying that the Moores should have restructured in response to a controversial proposal that in fact never got enacted and where restructuring would only fortuitously have helped them? Taxpayers cannot be expected to jump every time some tax proposal that might affect them gets floated by a congressional taxwriter. It took the 2016 election and Republican takeover of both houses of Congress to get us to the 2017 legislation. Should the Moores have predicted that, too, in 2006, or even 2014? In fact, it was only at the last minute that it became clear that the full weight of the 2017 changes were going to fall upon individuals. It reminds me of the classic Monty Python line: "Nobody expects the Spanish Inquisition!"[6]

[1] *See* Reuven S. Avi-Yonah, "Moores Needed Clear Tax Advice, Not Crystal Ball," *Tax Notes Int'l*, Oct. 9, 2023, p. 261.

[2] Michael J.A. Karlin, "*Moore*: Due Diligence Would Not Have Helped," *Tax Notes Int'l*, Oct. 2, 2023, p. 105.

[3] Mindy Herzfeld, "*Moore*, Part 3: Should the Supreme Court Help Taxpayers Who Don't Help Themselves?" *Tax Notes Int'l*, Sept. 25, 2023, p. 1671.

[4] *Moore v. United States*, No. 22-800.

[5] Avi-Yonah, *supra* note 1.

[6] *Monty Python's Flying Circus*, series 2, episode 2. The inquisitor's next line is: "Our chief weapon is surprise!"

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I am also still having trouble understanding why investing through a corporation would have solved anything to do with the complexities of Indian tax. Those complexities applied to the Indian company, not to its shareholders, but they would have been a concern to a domestic corporate shareholder. There was no individual exposure to India other than Indian withholding tax on dividends, and had the Moores investigated this, they would have discovered that the tax withheld, as permitted by the U.S. treaty with India, would have been largely or wholly creditable by the United States.

Part of the problem with section 965 was that it was effectively retroactive. Not in the sense that we normally understand it, in which Congress can enact changes in the law within a reasonable period of time after income was earned or a transaction undertaken. But rather in the sense that it applied to income earned years and decades before enactment. We granted deferral and then took it away. As a matter of policy, we should legislate with some regard for the reasonable expectations of taxpayers. I don't have a problem with the basic concepts of subpart F and GILTI (although many of the details could use some refinement). I don't think the *Moore* case should overturn them. But section 965 is another matter. Unlike GILTI, which began to be applied in 2018, section 965 tried to pick up income earned many years before for which taxpayers had been granted deferral tied to when profits were actually distributed. At least individual taxpayers should have been left alone. ■

Sincerely,

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Oct. 17, 2023

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