© 2023 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

The Government's Brief in *Moore* Still Has a *Macomber* Problem

To the Editor:

Based on the government's brief in *Moore*,[1] the government sounds nervous. Note the request on page 49 for a remand to the Ninth Circuit to consider an issue (whether the tax is a constitutionally valid *excise* tax, even if it is unconstitutional as an income tax). The government may sense that its arguments on the income tax issue are quite weak. They could have been much stronger.[2]

The government brief seems to acknowledge, at page 40, that it has a problem with *stare decisis* if *Macomber*[3] held (as we think it did) that Standard Oil's corporate income could not be imputed to its shareholders without an actual distribution. The brief argues:

> Petitioners thus err in invoking (Br. 14, 26, 36) stare decisis. While *Macomber* still governs whether the type of stock dividends at issue there are income and informs application of the statutory concept of realization, this Court has already abrogated its broader relevance as a constitutional precedent. Accordingly, *Macomber* is not controlling here.[4]

If *stare decisis* is a problem, it's a problem because of the Court's second constitutional holding — that, even without regard to an admittedly valueless stock dividend, Congress couldn't tax Standard Oil on its corporate income and simultaneously tax its shareholders on the same income as if they were partners (and potentially tax them again since, in reality, they were shareholders, not partners). At page 33, the brief only acknowledges the first holding, and then proceeds to discuss some language it calls "dictum." (That term refers to a nonbinding, explanatory, almost unofficial statement.) The brief doesn't acknowledge or discuss the second holding, or even the possibility of a second holding. Of course, even RIA's headnotes give that second holding its own separate headnote, and the 1920 Court itself was very clear it was considering two "alternative" arguments and rejecting them both as a matter of constitutional law.

That said, has either holding been "abrogated"? Even the government's brief only says that the "broader relevance" of the case has been abrogated. That is probably true. The word "realization" may have been an imprecise word, or a throwaway line. It probably has no clear and definitive meaning in other contexts. But the key to *stare decisis* is what the Court actually held — not whether its holding has been accorded any "broader relevance" to other fact patterns.

The government appears to have made a tactical decision (at page 33) to assert — or to imply by omission — that there was only one holding in *Macomber*, which dealt with the stock dividend issue. But the 1920 Court did clearly reject what it called the government's alternative argument that, even without regard to the worthless stock dividend, the corporate income of Standard Oil itself could be taxed to Standard Oil under the corporate tax, and also simultaneously imputed to its shareholders as if they were partners, not shareholders. They rejected that as an "alternative" argument and rejected it as a holding of constitutional law.[5]

That second holding, that corporate income cannot be taxed to the corporation and simultaneously taxed to the shareholders as if the corporation were a passthrough entity, is certainly not "dictum." Indeed, the government almost

[1] *Moore v. United States*, No. 2:19-cv-01539 (W.D. Wash. 2020), *aff'd*, 36 F.4th 930 (9th Cir. 2022), *reh'g denied*, 53 F.4th 507 (9th Cir. 2022), *cert. granted*, No. 22-800 (June 26, 2023).

[2] *See* Donald B. Susswein and Ramon Camacho, "What Did *Macomber* Decide?" *Tax Notes Federal*, Oct. 16, 2023, p. 473; and Susswein and Camacho, "*Macomber*: We Can't Treat Domestic Shareholders as Partners," *Tax Notes Federal*, Sept. 11, 2023, p. 1906.

[3] *Eisner v. Macomber*, 252 U.S. 189, 214 (1920).

[4] Brief for the United States, *Moore*, No. 22-800, at 41 (Oct. 16, 2023).

[5] See Susswein and Camacho, "What Did *Macomber* Decide?" *supra* note 2, in which we walk through the full opinion.

For more *Tax Notes® Federal* content, please visit www.taxnotes.com.

concedes the point. There is no need for dictum to be abrogated. *Stare decisis* only applies to *holdings.*

Of course, there is no stock dividend in the *Moore* case, so the first holding is irrelevant. But has the second holding, prohibiting the imputation of corporate income to shareholders, been "abrogated" or "overruled"?

Boris I. Bittker and James S. Eustice think not. They may not like the holding (they call it "problematical"). But they do not assert that it has been overruled or abrogated by the Supreme Court. Indeed, they explain why the Supreme Court *never had to overrule it*. Congress pulled back. They never again tried to tax shareholders (at least shareholders of a domestic C corporation) as if they were partners. The treatise explains:

> Whether the Supreme Court would adhere to this view today is problematical, but *Congress has not attempted to compel shareholders to report undistributed corporate income, except in the limited instances of foreign personal holding companies and controlled foreign corporations (see paragraphs 15.40, 15.62).*[6] [Emphasis added.]

What about those foreign corporations? It can certainly be argued (as we suggest) that the Supreme Court, today, might not apply *Macomber*'s non-imputation rule to a CFC or foreign personal holding company. *But the Supreme Court has never so held.* That's why *stare decisis* is such a potential problem for the government.

Only lower courts have addressed similar issues for foreign entities, and with almost no analysis of *Macomber*. Bittker and Lawrence Lokken explain that a few lower courts have considered that issue, but without any real analysis of *Macomber*. That case, they say, is only "fleetingly mentioned":

> The constitutionality of the foreign personal holding company rules and subpart F were both attacked shortly after their enactments, but no constitutional impediment to their implementation was found. *Eisner v. Macomber* is only fleetingly mentioned in the opinions.[7]

That footnote cites three lower court decisions, but the Supreme Court itself has never reversed or overruled *Macomber*, even as applied to foreign corporations.

In sum, the government clearly could win — as we have suggested. The L.E. Simmons amicus brief (supporting the government as to the result only, but urging the Court to vacate the Ninth Circuit's opinion for other reasons) argues that the government *should* win on that ground. It distinguishes *Macomber* as applying only to domestic corporations that are subject to a U.S. corporate tax, not to foreign corporations with foreign-source income where there is no "double tax" requiring the corporation and the shareholders to be treated as distinct persons.

But the government does not even acknowledge that the second holding exists. That might be a tactical error. The Supreme Court itself might read *Macomber* (or the L.E. Simmons amicus brief) and conclude that the government has not provided them with a complete analysis of what *Macomber* actually decided. In our view, it hasn't even presented the Court with an analysis of *Macomber* that should (taken alone) win the case. We think the government's strongest argument is the fact that the mandatory repatriation tax is the only U.S. tax imposed on MRT income. There is no entity-level corporate tax system to maintain or defend. The petitioners' company is a de facto passthrough entity for purposes of *Macomber*. But others may disagree.

Indeed, petitioners still have the option of submitting a reply brief. At this point, petitioners could argue, perhaps more forcefully than before, that *Macomber* applies to all corporations, even foreign entities (like an Indian public limited company) that are deemed to be per se corporations under the 1996 Treasury regulations. They might argue that Treasury cannot have it both ways — declare them to be "corporations" in the 1996 regulations but deny the protection that *Macomber* (since 1920) afforded to "corporations."

[6] Bittker and Eustice, *Federal Income Taxation of Corporations and Shareholders*, para. 1.02.

[7] Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, para. 1.2.4 n.41.3.

For more *Tax Notes® Federal* content, please visit www.taxnotes.com.

© 2023 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

© 2023 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

The government could (and should) respond with the argument that foreign corporations with only foreign-source income should be distinguished.[8] That is a good, strong argument in our view. But the government may not be able to put that in writing at this point. They can argue for that distinction (between a domestic C corporation and a foreign corporation) in oral argument. But there is generally no reply permitted to the petitioner's reply brief. The petitioner's reply brief may be the last document filed with the Court. In addition, it may be hard to credibly distinguish a holding, in oral argument, that one's brief has not even acknowledged existing in the first place.[9]

Donald B. Susswein
Ramon Camacho
Washington National Tax office,
RSM US LLP
Oct. 18, 2023 ■

The UTPR Reconsidered: A Response to Fadi Shaheen

To the Editor:

In the October 16 issue of *Tax Notes International*, professor Fadi Shaheen published a fascinating new analysis of the OECD/G-20/inclusive framework's UTPR (formerly known as the undertaxed payments rule).[1] In his article, Shaheen demonstrates that the UTPR is equivalent to a 100 percent withholding tax on deemed distributions from the subsidiary subject to the UTPR to its parent. Shaheen argues that such a tax is "confiscatory" and that it violates tax treaties.

I do not fault this analysis as far as it goes. But I disagree for two reasons. First, the analysis applies an obsolete conception of multinational enterprises, which is contrary to the conception embraced by the countries that have adopted pillar 2. Second, the analysis has no practical implications.

I. Shaheen's Analysis Is Obsolete

We accept as given that each country can tax its own corporations on worldwide income. A fortiori it can tax them on local income. Therefore, the qualified domestic minimum top-up tax (QDMTT) is clearly legitimate even if it applies to some income that does not really belong to the taxing country because of inadequate transfer pricing enforcement.

We also accept since the 1960s that the country in which the parent of an MNE is resident (however that is defined under domestic law) can tax the entire MNE group. That is justified because of the control it exercises over the subsidiaries and can be seen as a form of constructive receipt. Until recently the United States used deemed dividends, but with the corporate alternative minimum tax it taxes the entire MNE directly, like most other countries do under their controlled foreign corporation rules. This makes sense because the distinction between branches and subsidiaries is tenuous, especially under check-the-box. In all those cases the tax is imposed on the parent.

[8] *See* Susswein and Camacho, "What Did *Macomber* Decide?" *supra* note 2.

[9] The views expressed are solely the authors' and are not tax advice or advice of any kind.

[1] Fadi Shaheen, "Is the UTPR a 100 Percent Tax on a Deemed Distribution?" *Tax Notes Int'l*, Oct. 16, 2023, p. 321.

For more *Tax Notes® Federal* content, please visit www.taxnotes.com.