No. 20-36122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles G. Moore and Kathleen F. Moore

Plaintiffs–Appellants,

v.

United States of America

Defendant–Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:19-cv-01539-JCC
The Honorable John C. Coughenour

Petition for Panel and En Banc Rehearing of Appellants Charles G. Moore and Kathleen F. Moore

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Rule 26.1 Disclosure Statement

Appellants Charles and Kathleen Moore are individuals. Therefore, there is no parent corporation or stock-owning publicly held corporation to disclose.

Dated: July 19, 2022

/s/ Andrew M. Grossman
Andrew M. Grossman

Table of Contents

Table of Authorities

Cases

Constitutional Provisions and Statutes

Other Authorities

Rule 35(b)(1) Statement

This is a case of exceptional importance worthy of rehearing en banc. Confronted with a "novel" new tax, Op.8, the panel decision held for the first time ever that "realization of income is not a constitutional requirement" for Congress to impose a tax under the Sixteenth Amendment, Op.11. That holding shatters what had been an unbroken judicial consensus since the enactment of the Sixteenth Amendment that Congress's power to levy "taxes on incomes" exempt from apportionment among the states is limited to taxes on gains realized by taxpayers. While prior decisions have afforded Congress discretion in determining when taxpayers have constructively realized income so as to address tax avoidance, none dispensed with realization altogether. If permitted to stand, the panel decision would unshackle Congress to tax Americans on their stock holdings—the panel expressly holds as much—and other property. Rehearing is warranted to answer the exceptionally important question of whether the Sixteenth Amendment authorizes Congress to tax persons on "incomes" they have not realized.

Rehearing is also warranted because the panel decision conflicts with precedent of the Supreme Court, this Court, and other circuits. The tax at issue here, known as the "Mandatory Repatriation Tax," deems certain foreign corporations' accumulated earnings from as long ago as 1987 to be the 2017 income of their current U.S. shareholders and then taxes them on it, without apportionment. The panel held that nothing prohibits "Congress attributing a corporation's income pro-rata to its shareholders," including accumulations of retained income from previous years. Op.12. But the Supreme Court held precisely the opposite in *Eisner v. Macomber*: for Sixteenth Amendment purposes, a "stock-holder's share in the accumulated profits of the company is capital, not income" to its shareholders. 252 U.S. 189, 219 (1920). The panel decision's approval of the MRT's attribution of a corporation's accumulated earnings to shareholders like the Moores stands in plain conflict with *Macomber*.

More broadly, the panel decision conflicts with an unbroken line of cases holding there to be no Sixteenth Amendment "income" absent realization by the taxpayer. 252 U.S. at 214. Since *Macomber*, the Supreme Court has understood the "full measure" of Congress's income-taxing power to reach only "accessions to wealth, clearly realized" by taxpayers. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 429, 431 (1955); *accord James v. United States*, 366 U.S. 213 (1961); *Comm'r v. Kowalski*, 434 U.S. 77 (1977); *Comm'r v. Indianapolis Power & Light Co.*, 493 U.S. 203 (1990). This Court, too, has applied the realization standard. *Murphy v. United States*, 992 F.2d 929 (9th Cir. 1993); *Comm'r v. Fender Sales, Inc.*, 338 F.2d 924 (9th Cir. 1964); *United States v. James*, 333 F.2d 748 (9th Cir. 1964) (en banc). So have other courts. *Quijano v. United States*, 93 F.3d 26 (1st Cir. 1996); *Simmons v. United States*, 308 F.2d 160 (4th Cir. 1962). In holding that Congress may tax as "income" sums that have not been realized by taxpayers in any fashion, the panel decision stands alone.

Finally, the panel decision's approval of the MRT's retroactive taxation of Petitioners Charles and Kathleen Moore misapprehends the changes to the Tax Code that accompanied the MRT and consequently strays from the mode of analysis required by *United States v. Carlton*, 512 U.S. 26 (1994). Contrary to the panel decision, any future distributions to individual shareholders like the Moores remain subject to taxation as their income. Accordingly, the panel decision's view that the MRT rationally targets taxpayers who would otherwise receive a future "windfall" of untaxed income, Op.16, does not support the MRT's application to the Moores and the resulting impingement of their due process rights. The MRT's imposition of unprecedented retroactive liability based on "income" that the Moores have not and may never receive is precisely the kind of "arbitrary" and "illegitimate" exaction that *Carlton* warned against and far from the "modest period[s] of retroactivity" that prior cases have upheld. 512 U.S. at 32.

Congress's taxing power is broad, but not without limits. Ultimately, "Congress cannot make a thing income which is not so in fact." *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110, 114 (1925). Rehearing is required to vindicate that principle and the Moores' rights.

Background

In 2006, Charles and Kathleen Moore invested $40,000 in a new business launched by Charles's former colleague to supply equipment to India's underserved small-scale farmers. ER-24. In exchange for their investment, the Moores received 11 percent of the common shares of the India-based corporation, KisanKraft Machine Tools Private Limited. *Id*. KisanKraft has been profitable since 2006 but never issued a dividend to its shareholders. ER-25. Instead, the company reinvested its earnings to grow the business, which has expanded to serve farmers across India. ER-25, ER-37–38. The Moores didn't mind the lack of dividends; they viewed KisanKraft as a noble pursuit that could improve the lives of the poor. ER-23. In any event, as minority shareholders without any role in KisanKraft's management, the Moores had no ability to force the company to issue a dividend. ER-25, ER-37.

In 2018, the Moores learned that, under the recently enacted "Mandatory Repatriation Tax," they owed income tax on KisanKraft's reinvested earnings going back to 2006. ER-25. Specifically, the MRT deemed a portion of KisanKraft's earnings for each year proportional to the Moores' ownership stake in 2017 to be the Moores' 2017 income—despite that they hadn't received a penny from the company and might never. *Id.* Ultimately, the Moores had to declare an additional $132,512 as taxable 2017 income and pay an additional $14,729 in tax liability. ER-25.

The MRT was enacted as part of the Tax Cuts and Jobs Act of 2017. It targets U.S. shareholders who own 10 percent or more (by value or voting power) of foreign corporations that are primarily owned or controlled by U.S. persons. 26 U.S.C. § 965. The MRT deems these corporations' retained earnings from each year after 1986 to be the 2017 income of their U.S. shareholders in proportion to their ownership stakes in 2017. *Id.* § 965(a). The shareholders are then taxed on that deemed "income" at a rate based on how the corporation holds the retained earnings: 15.5 percent for earnings held in cash or cash equivalents and 8 percent otherwise. *Id.* § 965(a), (c); *see also id.* § 951(a).[1] Shareholders are subject to MRT liability irrespective of whether they owned shares at the time the corporation earned and retained the income on which they're being taxed and irrespective of whether they ever had the ability to force the corporation to make a distribution. All that matters is that a shareholder owned the requisite number of shares in 2017.

The principal legislative purpose of this one-time tax was to partially fund the TCJA's shifting of U.S. corporate taxation from a worldwide system toward a territorial one—that is, one where U.S. corporations are taxed only on their domestic-source income. To accomplish this shift, the statute prospectively relieved U.S. corporations from paying taxes on most distributions received from foreign corporations, including subsidiaries. 26 U.S.C. § 245A. That change was limited to corporate taxpayers, *id.*; individual shareholders like the Moores remain liable for income tax on distributions they receive, *id.* § 61(a)(7).

The Moores filed this action to obtain a refund. ER-90. Their first claim alleged that the MRT is an unapportioned direct tax in violation of the Constitution's apportionment requirements, U.S. Const., art. I, § 2, cl. 3; *id.* § 9, cl. 4, because it taxes the ownership of personal property, such as the Moores' KisanKraft shares. ER-95–96. Their second claim alleged that the MRT violated their rights under the Fifth Amendment's Due Process Clause by imposing

[1] The effective tax rates for individuals are 17.54 percent and 9.05 percent, respectively. Mark Berg & Fred Feingold, The Deemed Repatriation Tax—A Bridge Too Far?, 158 Tax Notes 1345, 1349 (2018).

retroactive tax liability in a manner that was "'so harsh and oppressive as to transgress the constitutional limitation.'" ER-96–97 (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).

The district court granted the Government's motion to dismiss and denied the Moores' cross-motion for summary judgment. ER-4. On the direct-tax claim, it acknowledged that *Macomber* and *Glenshaw Glass* adopted a "realization framework" for Sixteenth Amendment "income," ER-7, but it concluded that "*Macomber*'s realization standard" had been undercut by lower-court decisions and was therefore not controlling, ER-8–9. Without further analysis, it declared the MRT "a tax on income." ER-9. On the due process claim, the district court concluded that the MRT rationally facilitated the TCJA's shift to territorial taxation. ER-12.

The Moores appealed, and a panel of this Court affirmed. The panel decision held that the MRT is a tax on income authorized by the Sixteenth Amendment. Op.12. It declared that "realization…is not a constitutional requirement" for Congress to attribute "income" to taxpayers and then tax them on it. Op.11. It found support for that principle in cases involving taxpayers' constructive realization of taxable income. Op.10–11. On that basis, it concluded that "there is no constitutional prohibition against Congress attributing a corporation's income pro-rata to its shareholders." Op.12.

The panel decision also held that the MRT effects no violation of the Moore's due process rights. It regarded the MRT's unprecedented retroactive reach as a rational means to prevent "shareholders who had not yet received distributions from obtaining a windfall by never having to pay taxes on their offshore earnings that have not yet been distributed." Op.16. Though recognizing that "the MRT's retroactive period is long," the panel decision observed that there is no "bright-line rule" and that, anyway, the "period of retroactivity" is just "one, non-dispositive consideration." Op.16–17.

Argument

I. The Panel Decision's Holding that the MRT Is a Valid Exercise of Congress's Sixteenth Amendment Power Conflicts with Binding Precedent and Implicates a Question of Extraordinary Importance

The panel decision upheld the MRT as a valid exercise of Congress's Sixteenth Amendment power to impose "taxes on incomes, from whatever source derived," without apportionment. To reach that result, it had to hold that "realization of income is not a constitutional requirement" for Sixteenth Amendment taxes. Op.11. That unprecedented holding conflicts with governing precedent, which has consistently applied a realization requirement for Sixteenth Amendment "incomes." The panel decision's contrary holding presents a question of exceptional importance because of its massive legal and practical import—including the panel decision's conclusion that Congress may attribute any corporation's income and accumulated earnings to its shareholders and then tax them on it. Op.12. That has never been the law, and such a momentous shift in the understanding of Congress's Sixteenth Amendment power warrants consideration by the en banc court.

A. The Panel Decision Conflicts with Governing Authority that a Corporation's Accumulated Earnings May Not Be Attributed to Its Shareholders as Their Taxable Income

The panel decision conflicts with the Supreme Court's holding in *Macomber* that a corporation's previously accumulated earnings are its shareholders' capital, not their income, and therefore cannot be taxed as shareholders' income under the Sixteenth Amendment. At issue in *Macomber* was a federal tax on stock dividends that, to account for accumulated earnings, corporations distributed to shareholders in proportion to their existing interests, without altering their ownership stakes. The government defended the tax on the ground, *inter alia*, that the Sixteenth Amendment authorizes taxing a shareholder on "the gains accumulated by the corporation [that] have made him the richer." 252 U.S. at 214. The court flatly disagreed: "enrichment through increase in value of capital investment is not income" within the meaning of the Sixteenth Amendment. *Id*. at 214–15; *see also id*. at 219 ("[T]he stockholder's share in the accumulated profits of the company is capital, not income"). To avoid any doubt, the court spelled out its conclusion: taxing a shareholder on his "share of the undivided profits previously accumulated by the corporation" is "taxation of property because of ownership, and hence would require apportionment." *Id*. at 217.

The Supreme Court subsequently approved *Macomber*'s rule "distinguishing gain from capital" in *Glenshaw Glass*, 348 U.S. at 431. More recently, the Second Circuit recognized that *Macomber*'s "treatment of capital as distinct from income" remains good law and applied it. *Nathel v. Comm'r*, 615 F.3d 83, 92 (2d

Cir. 2010). Even the Government in this case acknowledged that *Macomber* has not been overruled. ER-19.

The panel decision cannot be squared with *Macomber*'s holding that, as to shareholders, a corporation's accumulated earnings are capital and not income taxable under the Sixteenth Amendment. The MRT attributes foreign corporations' accumulated earnings from years after 1986 to shareholders as their 2017 income and then taxes them on it. 26 U.S.C. §§ 965(a), 951(a)(1). Under *Macomber*, Congress may levy such a tax on capital, but only if it is apportioned among the states, which the MRT is not. The panel decision took no account of this aspect of *Macomber*—indeed, the word "capital" appears nowhere within it. The closest that it came to addressing this issue was to declare that *Macomber* provides no "universal definition of income." Op.14. But no universal definition is needed when Congress relies on the Sixteenth Amendment to do the very thing—taxing shareholders on a corporation's accumulated earnings—that *Macomber* disapproved. However "flexible" the meaning of "income" may be, Op.10, this Court may not read it to reach items the Supreme Court has already ruled out of bounds.

B. The Panel Decision Conflicts with Governing Authority that Realization Is Required for Sixteenth Amendment "Incomes"

It is no exaggeration to observe that the panel decision's holding that realization is unnecessary for Sixteenth Amendment income conflicts with all authority on that question. *Macomber*, one of the first cases to interpret the Sixteenth Amendment, rejected the Government's argument that it could tax stock dividends directly, holding that a shareholder receiving such a dividend "has not realized or received any income in the transaction." 252 U.S. at 212. The court refused to "indulge the fiction" that such shareholders "have received and realized a share of the profits of the company which in truth they have neither received nor realized"—and that was dispositive of the constitutional question. *Id*. at 214–15. In turn, *Glenshaw Glass* traced the "full measure" of Congress's Sixteenth Amendment power as reaching "accessions to wealth, clearly realized" by the taxpayer. 348 U.S. at 429, 431. And subsequent Supreme Court decisions have recited and applied that formulation. *James*, 366 U.S. at 218–19 (the "full measure" of Congress's power has "been held to encompass all accessions to wealth, clearly realized, and over which the taxpayers have complete dominion") (quotation marks omitted); *Kowalski*, 434 U.S. at 83, 94 (same); *Indianapolis Power & Light Co*., 493 U.S. at 209–210 (similar). The panel decision's position that *Glenshaw Glass* set no standard is incorrect and also inconsistent with *James*, which recognized that it did. *See Simmons*, 308 F.2d at 167–68 (holding as much).

This Court has also recognized that Sixteenth Amendment income requires realization. *Fender Sales* rejected a constitutional challenge to taxation of a convoluted debt-forgiveness-in-exchange-for-shares transaction because the taxpayers enjoyed "realization of income…in the amount of the fair market value of the stock." 338 F.2d at 929. Likewise, the Court's en banc decision in *James* held *Glenshaw Glass*'s conception of "income"—including that it be "clearly realized"—controlling on the question of whether a widow's allowance constituted Sixteenth Amendment "income." 333 F.2d at 752. And *Murphy* rejected a constitutional challenge to taxation of commodities contracts because "the gains inherent in them are properly treated as constructively received." 992 F.2d at 931. Other decisions identify the same language from *Glenshaw Glass* as setting the standard. *Vukasovich, Inc. v. Comm'r*, 790 F.2d 1409, 1414 (9th Cir. 1986); *Roemer v. Comm'r*, 716 F.2d 693, 696 n.2 (9th Cir. 1983).

Sister circuits have likewise recognized the realization requirement. For example, the First Circuit in *Quijano v. United States* rejected a constitutional challenge to taxation of transactions regarding a foreign home on the basis that the taxpayers had received "realized income, fully taxable under the Constitution." 93 F.3d at 31. The governing standard, *Quijano* held, was *Glenshaw Glass*'s, including its requirement that income be "clearly realized." *Id*. at 30. The Fourth Circuit held the standard applicable in *Simmons*. 308 F.2d at 167–68.

The panel decision's conclusion that realization is unnecessary finds no support in the authorities it cited. *See* Op.11. *Heiner v. Mellon* did not dispense with the realization requirement under the Sixteenth Amendment, but merely interpreted the statutory term "distributive," without approaching any constitutional issue. 304 U.S. 271, 280–81 (1938). *Helvering v. Griffiths* did not question *Macomber*'s holding on realization but its treatment of stock dividends and expressly declined the Government's request to reconsider *Macomber*. 318 U.S. 371, 394, 404 (1943). And *Helvering v. Horst*, 311 U.S. 112 (1940), most certainly did not hold that "realization of income is not a constitutional requirement." Op.11. Rather, *Horst* recognizes that "not all economic gain of the taxpayer is taxable income" because of "the rule that income is not taxable until realized." 311 U.S. at 115–16. Realization, *Horst* holds, need not involve actual receipt of money or property by the taxpayer but can occur when the taxpayer "has fully enjoyed the benefit of the economic gain represented by his right to receive income"—for example, when (as in *Horst*) a bondholder clips a coupon for payment, delivers it to his son, and then diverts the coupon payment to the son. *Id*. at 116. In other words, "[t]he exercise of that power to procure the payment of income to another is…the realization of the income by him who exercises it." *Id*. at 118.[2]

The lower-court cases cited by the panel decision are of a piece with *Horst*. *See* Op.10–11. All involved various theories of constructive realization, typically where taxpayers sought to "interpos[e] a foreign corporate framework between themselves and income over which they had complete control." *Whitlock's Estate v. Comm'r*, 59 T.C. 490, 507 (1972), *aff'd*, 494 F.2d 1297 (10th Cir. 1974). This case does not. The Moores are no differently situated from the millions of American shareholders who own minority stakes in corporations.

The panel decision, however, failed to appreciate the difference between the constructive-realization cases, where the parties spar over what qualifies as realization, and this case, where the Government has never disputed that the Moores realized nothing. There is a world of difference, in Sixteenth

[2] Moreover, *Glenshaw Glass* and *James* postdate *Horst*, contradicting any claim that *Horst* undermines the constitutional realization requirement. *See Simmons*, 308 F.2d at 168.

Amendment terms, between taxing income a person has constructively realized and taxing a person who has realized nothing. *Macomber*, *Glenshaw*, and their progeny approve the former. But they reject the latter as taxes on the ownership of property that are unconstitutional absent apportionment.

The MRT is of the latter sort. It taxes the Moores not because they realized anything, or even because they owned shares when KisanKraft received and retained earnings in past years, but only because they happened to own more than 10 percent of its shares in 2017. The MRT is a tax on the ownership of shares, not on income. And because it is not apportioned, governing precedent dictates that it is unconstitutional.

C. Rehearing Is Warranted for the En Banc Court To Consider a Question of Exceptional Importance

The question of Congress's power under the Sixteenth Amendment to tax persons on "incomes" they have not realized in any form is exceptionally important, warranting consideration by the en banc Court. Neither the Government nor the panel decision identified any precedent approving a Sixteenth Amendment tax that operates in the absence of realization. The reason is that, following *Macomber*, Congress refrained from overstepping the line the Supreme Court drew. *See Helvering v. Nat'l Grocery Co.*, 304 U.S. 282, 288 n.4 (1938) (describing evolution of tax treatment of corporations' retained earnings); *Griffiths*, 318 U.S. at 389–93 (describing Congress's care in following *Macomber*). It abandoned that restraint with the MRT, which the panel decision recognized to be a "novel concept" in taxation. Op.8. Indeed, some consider the MRT to be "best characterized as a direct tax on wealth." Sean P. McElroy, The Mandatory Repatriation Tax Is Unconstitutional, 36 Yale J. Reg. Bull. 69, 82 (2018). It is, at a minimum, a marked departure from Congress's historic exercise of its Sixteenth Amendment power.

As such, the MRT puts at issue long-accepted limitations on that power. Following *Macomber*, Congress ceased its brief experiment in taxing shareholders on corporations' retained earnings. *Nat'l Grocery Co.*, 304 U.S. at 288 n.4. The MRT, however, conflicts with the long-held view that Congress lacks the power to levy such a tax without apportionment. And the panel decision enthusiastically embraces what the MRT implies, holding that nothing prohibits Congress from "attributing a corporation's income pro-rata to its shareholders." Op.12. That is, to say the least, no minor thing.

Similarly, the MRT's taxation based on ownership of property—shares in covered foreign corporations—calls into question the longstanding consensus that Congress lacks the power to tax property without apportionment. The Supreme Court held as much in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895) ("taxes on personal property…are [] direct taxes" requiring apportionment), and confirmed that holding as recently as 2012, *Nat. Fed. of Indep. Bus. v. Sibelius*, 567 U.S. 519, 571 (2012). But the MRT's novel structure compelled the Government to argue the opposite in this case. That claim to power merits scrutiny.

Finally, the panel decision expressed the view that the question of the MRT's constitutionality implicates "the constitutionality of many other tax provisions." Op.15. Although Petitioners respectfully disagree with that view, it does underscore that the issue presented here is consequential. The en banc Court should consider it.

II. The Panel Decision's Holding that the MRT Does Not Violate the Moores' Due Process Rights Rests on a Misapprehension of the TCJA's Effect on Individual Taxpayers and Conflicts with Supreme Court Precedent

The panel decision's due process holding rests on a misapprehension of law that led it to overlook that, as applied to individual taxpayers like the Moores, the MRT is precisely the kind of "arbitrary" and "illegitimate" retroactive tax that fails constitutional muster under the Supreme Court's decision in *Carlton*.

The panel decision's reasoning turns on the proposition that taxpayers subject to the MRT would otherwise never pay tax on foreign corporate earnings retained prior to 2018. Op.16. That, in turn, supplied the "legitimate purpose" necessary to support the MRT's unprecedented retroactive sweep: "it prevents [foreign corporation] shareholders who had not yet received distributions from obtaining a windfall by never having to pay taxes on their offshore earnings that have not yet been distributed." *Id.*

That conclusion is unsound because the proposition underlying it is wrong. The TCJA's shift from worldwide taxation toward territorial taxation was limited to corporate taxpayers: the centerpiece deduction for foreign-source dividends benefits only "domestic corporation[s]," to the exclusion of individual taxpayers. 26 U.S.C. § 245A(a). Individual taxpayers are still taxed on dividend income. *Id*. § 61(a)(7). The MRT does not serve to prevent the Moores from receiving a "windfall." Indeed, the Government never argued that it did and took care in its briefing to limit its "windfall" policy argument to corporate taxpayers whose due process rights are not at stake in this case. Gov't Br. 68 (addressing "corporate shareholders"); *id*. at 9 (similar). It is irrelevant to the Moores' due process rights that Congress might rationally tax someone else. *See United States v. Hemme*, 476 U.S. 558, 569–71 (1986) (examining application of tax to individual taxpayers).

Whether or not Congress had a legitimate purpose in retroactively taxing corporate taxpayers, it had no basis to impose the uniquely harsh and oppressive MRT on individual taxpayers like the Moores. As applied to them, the MRT violates every limitation identified by the Supreme Court in *Carlton*. It is "illegitimate," 512 U.S. at 32, as a matter of due process, to attribute taxable income to persons who "have no right to demand that income and are uncertain ever to receive it," *N.C. Dep't. of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2221 (2019), which is precisely what the MRT does to the Moores. And it is completely "arbitrary," 512 U.S. at 32, to do so based on a rationale—avoiding windfalls—that has no application whatsoever to those taxpayers. And where *Carlton* approved "only a modest period of retroactivity" in taxation, 512 U.S. at 32, no court has ever considered, let alone upheld, anything like the MRT's unprecedented retroactive sweep. *Compare id.* at 33 (discussing the "customary congressional practice" of tax retroactivity "confined to short and limited periods required by the practicalities of producing national legislation") (quotation marks omitted).

Even if there is no "bright-line rule" for retroactive taxes, Op.17, retroactive liability that upsets settled expectations going back many years, imposes liability on income that taxpayers have not and may never receive, and targets them for no good reason must transgress constitutional limitation. To hold otherwise is to effectively deny any limit on retroactive taxation, which this Court may not do.

Conclusion

The Court should grant rehearing or rehearing en banc.

Respectfully submitted,

/s/ Andrew M. Grossman

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This brief complies with the type-volume limitations of Circuit Rule 40-1(a) because it contains 4,179 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT typeface.

Dated: July 19, 2022

/s/ Andrew M. Grossman
Andrew M. Grossman

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 19, 2022

/s/ Andrew M. Grossman
Andrew M. Grossman

Addendum

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES G. MOORE; KATHLEEN F. MOORE, *Plaintiffs-Appellants*, v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 20-36122 D.C. No. 2:19-cv-01539-JCC OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted January 14, 2022
San Francisco, California

Filed June 7, 2022

Before: Ronald M. Gould, Jacqueline H. Nguyen, and
Mark J. Bennett, Circuit Judges.

Opinion by Judge Gould

SUMMARY*

Tax

The panel affirmed the district court's dismissal of an action seeking to invalidate the Mandatory Repatriation Tax.

Taxpayers invested in a controlled foreign corporation (CFC), which is a foreign corporation whose ownership or voting rights are more than 50% owned by U.S. persons. Traditionally, U.S. taxpayers generally did not pay U.S. taxes on foreign earnings until those earnings were distributed to them. However, when particular categories of undistributed earnings were repatriated to the U.S.—through a distribution or loan to U.S. shareholders, or an investment in U.S. property— U.S. shareholders who owned at least 10% of a CFC could be taxed on a proportionate share of those earnings. The primary method used to tax a CFC's U.S. shareholders on foreign earnings held offshore was a provision of the tax code called Subpart F.

In 2017, the Tax Cuts and Jobs Act (TCJA) created a new, one-time tax: the Mandatory Repatriation Tax (MRT). Under the MRT's modified version of Subpart F, U.S. persons owning at least 10% of a CFC are taxed on the CFC's profits after 1986, regardless of whether the CFC distributed earnings. Additionally, going forward, a CFC's income taxable under subpart F includes current earnings from its business.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Taxpayers challenged the constitutionality of Subpart F's ability to permit taxation of a CFC's income after 1986 through the MRT. The district court dismissed the action for failure to state a claim, denied taxpayers' cross-motion for summary judgment, and taxpayers appealed.

The panel first held that, given the background of the government's power to lay and collect taxes, the MRT is consistent with the Apportionment Clause. That clause requires that a direct tax must be apportioned so that each state pays in proportion to its population. The panel acknowledged that the Sixteenth Amendment exempts from the apportionment requirement the category of "incomes, from whatever source derived." The panel observed that courts have consistently upheld the constitutionality of taxes similar to the MRT notwithstanding any difficulty in defining income, that the realization of income does not determine the tax's constitutionality, and that there is no constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders' income. The panel explained that Subpart F only applies to U.S. persons owning at least 10% of a CFC, the MRT builds upon a preexisting liability attributing a CFC's income to its shareholders, and taxpayers were, and continue to be, treated as individuals who have some ability to control distribution.

The panel also held that, assuming without deciding that the MRT is retroactive, the MRT does not violate the Fifth Amendment's Due Process Clause. The panel explained that the MRT serves the legitimate purpose of preventing CFC shareholders who have not yet received distributions from obtaining a windfall by never having to pay taxes on their offshore earnings that have not yet been distributed. The MRT accomplished this legitimate purpose by rational means: by accelerating the effective repatriation date of undistributed CFC earnings to a date following passage of the TCJA.

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OPINION

GOULD, Circuit Judge:

Charles and Kathleen Moore (the "Moores") seek to invalidate the Mandatory Repatriation Tax ("MRT") on the grounds that it violates the Constitution's Apportionment Clause and Fifth Amendment's Due Process Clause. The Moores, however, have staked out a position for which we can find no persuasive authority. We affirm the district court's dismissal of the Moores' action.

FACTS AND PROCEDURAL HISTORY

In 2005, the Moores invested in KisanKraft, a company owned by their friend which supplies modern tools to small farmers in India. The Moores invested $40,000 in return for 11% of the common shares. KisanKraft is a controlled foreign corporation ("CFC"), which means that it is a foreign corporation whose ownership or voting rights are more than 50% owned by U.S. persons.

KisanKraft is located in India, and the Moores have never participated in its day-to-day operations or management. While KisanKraft has turned a profit every year, KisanKraft has never distributed any earnings to its shareholders. Instead, KisanKraft has reinvested all of its earnings as additional shareholder investments in its business.

Traditionally, U.S. taxpayers generally did not pay U.S. taxes on foreign earnings until those earnings were distributed to them. This system created a strong incentive for CFCs to separately incorporate their foreign operations, allowing U.S. taxpayers to pay taxes only if and when earnings were repatriated to the U.S. By 2015, CFCs had accumulated an estimated $2.6 trillion in earnings offshore that were not presently subject to U.S. taxation.

Before 2017, the primary method used to tax a CFC's U.S. shareholders on foreign earnings held offshore was a provision of the tax code called Subpart F. *See* 26 U.S.C. § 951 (2007). Subpart F permitted the taxation of certain types of a U.S. person's CFC earnings when that U.S. person owned at least 10% of a CFC's voting stock. *Id.* Specifically, U.S. shareholders who owned at least 10% of a CFC could be taxed on a proportionate share of particular categories of its undistributed earnings such as dividends, interest, and earnings invested in certain U.S. property. *Id.* § 951(a). Neither Subpart F nor any other provision of the tax code permitted the U.S. Government to tax U.S. shareholders on the CFC's active business income attributable to the CFC's own business held offshore, such as when a CFC manufactures and sells products to a third party in a foreign country. Such income was only taxable if and when repatriated to the U.S. through a distribution to U.S. shareholders, loan to U.S. shareholders, or an investment in U.S. property.

In 2017, Congress passed, and President Trump signed into law, the Tax Cuts and Jobs Act ("TCJA"). *See* 131 Stat. 2054 (2017). The TCJA transformed U.S. corporate taxation from a worldwide system, where corporations were generally taxed regardless of where their profits were derived, toward a territorial system, where corporations are generally taxed only on their domestic source profits. As part of this change, the TCJA created a new, one-time tax: the MRT. The MRT modified Subpart F by classifying CFC earnings after 1986 as income taxable in 2017. *See* 26 U.S.C. §§ 965(a), (d) (2017). Under this revised version of Subpart F, U.S. persons owning at least 10% of a CFC are taxed on the CFC's profits after 1986 at either 15.5% for earnings held in cash or 8% otherwise. *Id.* § 965(c). The MRT imposes this tax regardless of whether the CFC distributed earnings. It also modified CFC taxes going forward: effective January 1, 2018, a CFC's income taxable under Subpart F includes current earnings from its business.

The TCJA also included tax benefits for shareholders of CFCs. When CFCs repatriate untaxed earnings as dividends to U.S. shareholders subject to the MRT, those earnings are generally not taxed. *See* 26 U.S.C. § 245A(a). Further, the TCJA effectively eliminated any other taxes on a CFC's undistributed earnings and profits before 2018.

The Government estimates that the MRT will generate $340 billion in tax revenue.

In 2018, the Moores learned about the MRT. According to their CPA's calculations, their tax liability for 2017 increased by roughly $15,000 because of the MRT. This tax liability was based on their pro rata share of KisanKraft's retained earnings of $508,000, subjecting them to an additional $132,512 in taxable income.

The Moores challenged the constitutionality of Subpart F's ability to permit the taxation of a CFC's income after 1986 through the MRT. The district court granted the Government's motion to dismiss for failure to state a claim and denied the Moores' cross-motion for summary judgment. It held that the MRT taxed income and, although it was retroactive, did not violate the Fifth Amendment's Due Process Clause.

After the district court's dismissal, the Moores timely appealed. We affirm the district court's order.

STANDARD OF REVIEW

We review *de novo* both the constitutionality of a statute and a motion to dismiss for failure to state a claim. *United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016) (constitutionality of statute); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (motion to dismiss for failure to state a claim).

DISCUSSION

The Moores raise two constitutional challenges to the MRT: (1) they contend that it violates the Apportionment Clause, and (2) they contend that it violates the Fifth Amendment's Due Process Clause.

Because the MRT imposed on CFCs is a novel concept, it is worth dwelling for a moment on some general principles that guide us. The federal government is, of course, a government of limited and specified powers. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 567 U.S. 519, 533–534 (2012). One of those enumerated powers of Congress is the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Congress's power to tax was a central force behind the Constitution. *See Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) ("The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government"). Further, it has long been established that the federal government may adopt laws that are necessary and proper to effectuate its legitimate purposes. The Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18; *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323–25 (1819).

Once the federal government decides to tax something, then, subject to any constitutional limitations, its power to tax and flexibility as to how to accomplish that must necessarily be broad. *See, e.g., Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (stating that the Spending Clause "provides Congress broad discretion to tax"); *NFIB*, 567 U.S. at 573 ("[T]he breadth of Congress's power to tax is greater than its power to regulate commerce"). It is also clear that Congress has sought to exercise the full scope of its constitutionally provided power to tax. *See Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955) (noting that the definition of "gross income" to be reported by taxpayers "was used by Congress to exert in this field 'the full measure of its taxing power.'" (quoting *Helvering v. Clifford*, 309 U.S. 331, 334 (1940))). Given Congress's expansive intent in taxing gross income, "exclusions from gross income are construed narrowly in favor of taxation." *Comm'r v. Dunkin*, 500 F.3d 1065, 1069 (9th Cir. 2007). It is against this background that we must decide whether the MRT offends the U.S. Constitution's Apportionment Clause or its Due Process Clause.

I. The MRT does not violate the Apportionment Clause

The Constitution's Apportionment Clause provides that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4. "This requirement means that any 'direct Tax' must be apportioned so that each State pays in proportion to its population." *NFIB*, 567 U.S. at 570. The Apportionment Clause traditionally applied to only capitations[1] and land taxes. *See id.* at 571 ("[*D*]*irect taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." (quoting *Springer v. United States*, 102 U.S. 586, 602 (1881))). While the Supreme Court in *Pollock v. Farmers' Loan & Tr. Co.,* held that income from personal property was subject to the Apportionment Clause, *see* 158 U.S. 601, 618 (1895), the Sixteenth Amendment overruled this result, further

[1] "Capitations are taxes paid by every person, without regard to property, profession, or any other circumstance." *NFIB*, 567 U.S. at 571 (simplified).

reinforcing the narrow reach of the Apportionment Clause, *see NFIB*, 567 U.S. at 571.

The Sixteenth Amendment, ratified in 1913, exempts from the apportionment requirement the expansive category of "incomes, from whatever source derived." *See* U.S. CONST. amend. XVI. In *United States v. James*, we noted the difficulty of categorically defining everything that constitutes income. *See* 333 F.2d 748, 753 (9th Cir. 1964) (en banc) ("The courts have given a wide scope to the income tax, but have realized that the borderline content of 'income' must be determined case by case. Essentially the concept of income is a flexible one . . . ." (quoting Stanley S. Surrey & William C. Warren, *The Income Tax Project of the American Law Institute: Gross Income, Deductions, Accounting, Gains and Losses, Cancellation of Indebtedness*, 66 Harv. L. Rev. 761, 770–71 (1953))).

Despite the difficulty in defining income, courts have held consistently that taxes similar to the MRT are constitutional. In *Eder v. Commissioner of Internal Revenue*, the Second Circuit held that the inclusion of foreign corporate income under a statute predating Subpart F was constitutional. *See* 138 F.2d 27, 28–29 (2d Cir. 1943). Thirty years later, the United States Tax Court upheld pre-MRT provisions of Subpart F against constitutional challenges, and the decisions were affirmed by the Second and Tenth Circuits. *See Whitlock's Est. v. Comm'r*, 59 T.C. 490, 508 (1972), *aff'd in part, rev'd in part*, 494 F.2d 1297, 1298–99, 1301 (10th Cir. 1974) (upholding constitutionally of Subpart F provision taxing "a corporation's undistributed current income to the corporation's controlling stockholders."); *Garlock Inc. v. Comm'r*, 489 F.2d 197, 202 (2d Cir. 1973) (affirming Tax Court's ruling that a CFC's Subpart F income was attributable to shareholders even if that income had not been distributed and stating that the argument it is unconstitutional "borders on the frivolous in the light of [the Second Circuit's] decision in *Eder*").

Whether the taxpayer has realized income does not determine whether a tax is constitutional. In *Heiner v. Mellon*, the Supreme Court stated that whether or not a "partner's proportionate share of the net income of the partnership" was distributable was not material to whether it could be taxed. 304 U.S. 271, 281 (1938). Similarly in *Eder*, the Second Circuit noted that "[i]n a variety of circumstances it has been held that the fact that the distribution of income is prevented by operation of law, or by agreement among private parties, is no bar to its taxability." 138 F.2d at 28 (citing *Heiner*, 304 U.S. at 281; *Helvering v. Enright's Est.*, 312 U.S. 636, 641 (1941)). And, the Supreme Court has made clear that realization of income is not a constitutional requirement. *See Helvering v. Horst*, 311 U.S. 112, 116 (1940) ("[T]he rule that income is not taxable until realized . . . . [is] founded on administrative convenience . . . and [is] not one of exemption from taxation where the enjoyment is consummated by some event other than the taxpayer's personal receipt of money or property."); *see also Helvering v. Griffiths*, 318 U.S. 371, 393–94 (1943) (explaining that *Horst* "undermined . . . the original theoretical bases" of a constitutional realization requirement).

What constitutes a taxable gain is also broadly construed. In *Helvering v. Bruun*, the Supreme Court determined that a lessee's improvements to the land were a taxable gain when the lessor regained possession of the land. 309 U.S. 461, 469 (1940). The Court instructed that a taxable "[g]ain may occur as a result of exchange of property, payment of the taxpayer's indebtedness, relief from liability, or profit realized from the completion of a transaction." *Id.* We applied this precedent nearly half a century later, holding that the cancellation of indebtedness was a taxable gain. *See Vukasovich, Inc. v. Comm'r*, 790 F.2d 1409, 1415 (9th Cir. 1986) ("We have no doubt that an increase in wealth from the cancellation of indebtedness is taxable where the taxpayer received something of value in exchange for the indebtedness.").

Further, there is no blanket constitutional ban on Congress disregarding the corporate form to facilitate taxation of shareholders' income. In other words, there is no constitutional prohibition against Congress attributing a corporation's income pro-rata to its shareholders. *See, e.g.*, *Dougherty v. Comm'r*, 60 T.C. 917, 928 (1973) (noting that nothing "prevent[s] Congress from bypassing the corporate entity in determining the incidence of Federal income taxation."). And here, there is no dispute that KisanKraft actually earned significant income, though all tax that the Moores' owed the U.S. Government on their pro-rata share of KisanKraft was deferred until the MRT went into effect in 2017.

Given this background, we hold that the revised Subpart F is consistent with the Apportionment Clause. As modified by the MRT, Subpart F only applies to U.S. persons owning at least 10% of a CFC. The MRT builds upon these U.S. persons' preexisting tax liability attributing a CFC's income to its shareholders. Before the MRT, U.S. persons owning at least 10% of a CFC were already subject to certain taxes on the CFC's income. Minority owners like the Moores were, and after the passage of the MRT continue to be, treated as individuals who have some ability to control distribution. *See id.* ("In subpart F, Congress has singled out a particular class of taxpayers . . . whose degree of control over their foreign corporation allows them to treat the corporation's undistributed earnings as they see fit."). Further, the MRT applies to taxable gains. Clearly, KisanKraft earned significant income, and the MRT assigns only a pro-rata share of that income to the Moores.

Relying on *Eisner v. Macomber*, 252 U.S. 189, 219 (1920), and *Glenshaw Glass*, 348 U.S. at 431, the Moores argue that the MRT is an unapportioned direct tax. Specifically, the Moores argue that *Macomber* and *Glenshaw Glass* require income to be realized before it can be taxed. They urge us to adopt and apply the purported definition of income used in *Glenshaw Glass*, which would require "[1] undeniable accessions to wealth, [2] clearly realized, and [3] over which the taxpayers have complete dominion." 348 U.S. at 431. The Moores' reliance on these cases is misplaced: the Supreme Court, our court, and other courts have narrowly interpreted *Macomber* and *Glenshaw Glass*, and *Glenshaw Glass*'s definition is not applicable here.

First, *Macomber* and *Glenshaw Glass* themselves foreclose the Moores' arguments. In *Macomber*, the Court was clear that it was only providing a definition of what "[i]ncome may be defined as," 252 U.S. at 207, not a universal definition. *Glenshaw Glass* reiterated the limited scope of *Macomber*'s definition of income by emphasizing that, while the definition "served a useful purpose . . . , it was not meant to provide a touchstone to all future gross income questions." 348 U.S. at 431. *Glenshaw Glass* similarly cabined the definition of income it used, prefacing its definition of income by saying "[h]ere we have instances of," signaling that the Court was focused on the specific facts before it. *See id*. The Court in *Glenshaw Glass* never stated or suggested that the definition it used was a universal (or even broadly applicable) test. Realization was also not even disputed in *Glenshaw Glass*, explaining why the Court did not make more than a passing reference to realization. *See id.* at 428–29 (discussing how both taxpayers had realized damages and simply disputed their need to pay taxes on them).

Second, the Supreme Court has subsequently made clear that *Macomber* and *Glenshaw Glass* do not provide a universal definition of income. In *Horst*, the Supreme Court explained that the concept of realization is "founded on administrative convenience" and does not mean that a taxpayer can "escape taxation because he did not actually receive the money." 311 U.S. at 116. In *Griffiths*, the Supreme Court explicitly stated that this holding from *Horst* "undermined . . . the original theoretical bases of the decision in *Eisner v. Macomber*." 318 U.S. at 394. The Supreme Court recently reiterated *Horst*'s statement that "the concept of realization is founded on administrative convenience," *Cottage Savings*, 499 U.S. at 559 (quoting *Horst*, 311 U.S. at 116), without adopting the test from *Glenshaw Glass* that the Moores urge upon us; in fact, the Court did not even cite to *Glenshaw Glass*.

Third, we have not adopted the definition of income the Moores advocate. In *James*, we cited a passage from *Glenshaw Glass* that included the definition of income the Moores favor, but we never adopted it then or later. *See* 333 F.2d at 752 (noting also that "insofar as [*Macomber*] purported to offer a comprehensive definition of the term income as used in the Sixteenth Amendment, it has been discarded."). Instead, we stated that there was no set definition of income under the Sixteenth Amendment. *See id.* at 752–53. Similarly, in *Comm'r v. Fender Sales, Inc.*, we did not cite to *Glenshaw Glass* or adopt the Moores' preferred definition when determining whether a tax was constitutional under the Sixteenth Amendment. *See* 338 F.2d 924, 927 (9th Cir. 1964) (noting also that "[i]n this context, *Eisner v. Macomber* . . . is not even apposite, let alone controlling.").

Finally, although it does not control our analysis, holding that Subpart F is unconstitutional under the Apportionment Clause would also call into question the constitutionality of many other tax provisions that have long been on the books. *See* Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 52 (1999). We decline to do so today.

II. The MRT does not violate the Fifth Amendment's Due Process Clause

Retroactive legislation may violate the Fifth Amendment's Due Process Clause. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265. We assume, without deciding, that the MRT is retroactive.

While there is a presumption against retroactive laws, retroactive tax legislation is often constitutional. *See, e.g., United States v. Carlton*, 512 U.S. 26, 30 (1994) ("[The Supreme Court] repeatedly has upheld retroactive tax legislation against a due process challenge."); *United States v. Hemme*, 476 U.S. 558, 568 (1986) ("[The Supreme Court] has . . . made clear that some retrospective effect is not necessarily fatal to a revenue law."). To analyze a due process challenge to retroactive tax legislation, we use the "deferential" standard of "whether [the] retroactive application itself serves a legitimate purpose by rational means." *Quarty v. United States*, 170 F.3d 961, 965 (9th Cir. 1999) (citing *Carlton*, 512 U.S. at 30–31).

The MRT passes muster under *Carlton*. The TCJA was a significant change in the U.S. tax code, shifting from a worldwide toward a territorial tax system, at least in part because of companies offshoring roughly $2.6 trillion in profits. The MRT eliminated other taxes on CFCs' undistributed earnings before 2018. So, if the MRT did not tax the undistributed earnings, shareholders would have been able to avoid taxation indefinitely on pre-2018 earnings. The MRT, then, serves a legitimate purpose: it prevents CFC shareholders who had not yet received distributions from obtaining a windfall by never having to pay taxes on their offshore earnings that have not yet been distributed.

The MRT accomplishes this legitimate purpose by rational means. The MRT accelerates the effective repatriation date of undistributed CFC earnings to a date following passage of the TCJA. Having a single date of repatriation is a rational administrative solution. The 30-year repatriation period also coincided with additional IRS reporting requirements, simplifying the calculation of taxes by both taxpayers and the IRS.[2]

The Moores' counterarguments are unpersuasive. Although the Moores may have expected their tax to remain deferred, their "reliance alone is insufficient to establish a constitutional violation. Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Carlton*, 512 U.S. at 33. Further, while the MRT's retroactive period is long, it does not decide the analysis.

[2] The MRT also provided a lower tax rate than many shareholders would likely have paid otherwise: the MRT taxes CFC earnings at either 8% or 15.5%. And, taxpayers may also elect to pay the MRT in installments over an eight-year period. *See* Section 965 Transition Tax, The Internal Revenue Service, https://www.irs.gov/businesses/section-965-transition-tax (last visited May 30, 2022).

The Moores cannot cite a bright-line rule regarding how long ago a retroactive tax can apply because courts deferentially review tax legislation's purpose on a case-by-case basis. *See Quarty*, 170 F.3d at 965. Moreover, courts that have considered the retroactive nature of tax legislation often only view the period of retroactivity as one, non-dispositive consideration. *See, e.g.*, *GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136, 1142 (Fed. Cir. 2015) (discussing five "considerations," of which retroactivity was only one).

Nor is the MRT a "wholly new tax," a label applied to unconstitutionally retroactive taxes by early cases "under an approach that has long since been discarded." *Quarty*, 170 F.3d at 966 (quoting *Carlton*, 512 U.S. at 34). We have very narrowly interpreted what qualifies as a "wholly new tax," determining that a "a new tax is imposed only when the taxpayer has 'no reason to suppose that any transactions of the sort will be taxed at all.'" *See Quarty*, 170 F.3d at 967 (quoting *United States v. Darusmont*, 449 U.S. 292, 298 (1981)). The MRT is not a "wholly new tax" because prior to the MRT, U.S. shareholders were taxed on CFC earnings when they were distributed. The Moores had reason to expect that such transactions would eventually be taxed. *See id*. This is especially true because as 11% shareholders of KisanKraft, the Moores were already subject to certain pre-MRT taxes that applied to shareholders who owned at least 10% of a CFC regardless of whether earnings were distributed. *See* 26 U.S.C. § 951(a)(1) (2007).

CONCLUSION

For the above reasons, we **AFFIRM** the district court's grant of the Government's motion to dismiss and denial of the Moores' cross-motion for summary judgment.