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Moore Is Not Enough — How to Recover an Unconstitutional Tax

George Clarke, Sonya Bishop, Joseph Judkins, Ethan Kroll, Vivek Patel, and Varuni Balasubramaniam of Baker McKenzie analyze the upcoming decision by the Supreme Court in Moore v. United States on the constitutionality of the transition tax under the Tax Cuts and Jobs Act of 2017 and how taxpayers can recover a 2017 tax in 2024 if the transition tax is held unconstitutional.

Is it possible to recover a 2017 tax in 2024? In the context of *Moore*, the answer ought to be yes.

On June 26, 2023, the Supreme Court granted certiorari in *Moore v. United States*, a case challenging the constitutionality of the transition tax, the keystone provision of the Tax Cuts and Jobs Act of 2017. If the Supreme Court ultimately holds that the transition tax is unconstitutional because it is not a tax on income within the meaning of the Sixteenth Amendment, that decision will render it void *ab initio*. On this point, the authors are neither advocating for nor predicting a particular outcome. Instead, as indicated above, this article highlights one challenge we anticipate: If the transition tax is held to be unconstitutional, how can taxpayers recover a 2017 tax in 2024?

Background

The transition tax was generally implemented by increasing subpart F income by the amount of CFCs' historic E&P (*See* §965(a), (c)). Calendar-year taxpayers included their CFCs' E&P in income in their 2017 taxable year. Fiscal-year taxpayers included their CFCs' E&P in income in taxable years ending at some point in 2018.

The Moores are U.S. shareholders of a CFC that provided equipment to small farmers in India. They fully paid their §965 transition tax liability in 2017 and subsequently requested a refund, arguing that §965 is unconstitutional because they did not actually realize income under the Sixteenth Amendment. The Moores also contended that they lacked the ability to compel any kind of distribution from the Indian company and thus did not—and could not—receive anything tantamount to "income" as that term is used in the U.S. Constitution. The government prevailed in district court, and a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit agreed. The Moores asked the Ninth Circuit for *en banc* review. The Court denied that request, but four Ninth Circuit judges dissented (*Moore v. United States*, 53 F.4th 507 (9th Cir. 2022)). Those judges contended that a taxpayer must realize income in order to be taxed on it, contrary to the panel decision which held that "realization of income is not a constitutional requirement"

(36 F.4th 930, 936 (9th Cir. 2022)). At issue in the case is whether the tax imposed on the Moores under §965 violates the Apportionment Clause of the Constitution or is instead authorized under the Sixteenth Amendment.

Although the Moores were able to fully pay their $14,729 transition tax bill, for many other taxpayers, the transition tax amount far exceeded the cash they had on hand or could readily access. Congress was aware of this fact and allowed taxpayers to elect to satisfy their transition tax burden in eight installments to be paid from 2018 to 2025 (*See* §965(h)(1)). The installment regime did not change the character of the transition tax, however—it remained a single tax (*See* §965(h)(1) (referring to the "net tax liability under this section").

For taxpayers whose §6511 periods of limitations on their 2017-2023 tax years are still open, the best thing they can do to recover any transition tax paid is to keep those periods of limitations open. Should the transition tax be held unconstitutional in *Moore*, those taxpayers should then follow the ordinary process for filing an administrative claim for refund, discussed below. Unfortunately, not everyone is in this same situation. The purpose of this article is to address the more complicated cases of taxpayers with closed years.

To file suit for a "recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected" under 28 U.S.C. § 1346(a)(1), a taxpayer must satisfy three general prerequisites. First, a taxpayer must exhaust administrative remedies by giving the IRS a chance to review its claim (*See* United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 9 (2008) (referencing §6511 and §7422 as administrative exhaustion requirements)). Second, a taxpayer must fully pay the disputed tax before bringing suit (*Flora v. United States*, 362 U.S. 145, 155 (1960), *aff'g of reh'g*, 357 U.S. 63 (1958)). Third, the court must have subject matter jurisdiction over the refund suit under 28 U.S.C. §1346(a)(1) (district court) or 28 U.S.C. §1491(a) (Court of Federal Claims), both of which require the taxpayer to show that it has an "overpayment," i.e., it has paid more tax than it owes (§6402(a)).

When taxpayers don't know whether in the future they'll be entitled to a refund, but want to preserve their ability to claim one, those with currently open limitation periods may try to satisfy §6511(a) and §7422(a)'s administrative claim requirement by filing a so-called "protective claim." That said, the IRS has taken the position that administrative claims are subject to the *Flora* full payment rule: "The IRS routinely denies refund claims filed before the tax is paid in full, and until the tax is paid the district court cannot consider the validity of the taxpayer's position" (*Snyder v. United States*, 616 F.2d 1187, 1188-89 (10th Cir. 1980) (citing *Flora*); *see also Flora*, 362 U.S. at 155 (explaining that "the language of [28 U.S.C.] §1346(a)(1) was presumably taken" from "the claim-for-refund statute")). If courts accept the IRS and DOJ's positions on an "overpayment" and *Flora*, for taxpayers who paid the transition tax in installments, the protective claims won't amount to much until after *Moore* declares the tax unconstitutional and may be denied on the basis that the taxes have not been fully paid (although, more typically, the IRS just sits on refund claims without doing anything at all).

Relatedly, for taxes that can be paid in installments, §6403 authorizes a refund of an "overpayment" of one or more installments only if the amount of tax already paid exceeds the amount determined to be the correct amount of total tax. If the amount the taxpayer paid is less

than the total tax the taxpayer owes, "the overpayment shall be credited against the unpaid installments, if any" (§6403). Thus, for taxes paid by installment, the Code provides for an offset-based remedy if there are any unpaid installments. This is why the government routinely argues, and courts generally agree, that a tax paid in installments is "overpaid" only after the final installment has been paid (*See Blair v. United States*, 271 U.S. 348, 353 (1926) (treating installment payments as partial payments of a given tax); *see also Rocovich v. United States*, 933 F.2d 991, 995 (Fed. Cir. 1991) (dismissing for lack of jurisdiction because "the partial satisfaction of the tax by an installment payment under §6166 does not satisfy the *Flora* full payment rule")). Indeed, it took congressional action in the form of the 1998 addition of §7422(j) to account for the *Flora* full-payment rule in actions brought in district courts and the Court of Federal Claims to determine the correctness of an estate tax liability where the full amount of the liability has not been paid by reason of an installment payment election under §6166. The government has already argued that no similar provision exempts the transition tax from the strictures of *Flora* (more on that below).

What to Expect from the DOJ

Based on the above framework, taxpayers who do not have a timely administrative claim for the 2017 year should expect the DOJ to resist attempts to recoup installments of transition tax in the wake of a reversal in *Moore*. When a tax is declared unconstitutional, that decision renders the tax void *ab initio* (*See, e.g.*, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 99 (1993) (requiring the Supreme Court of Virginia to apply Supreme Court precedent retroactively)). Thus, if the Supreme Court decides that the transition tax is unconstitutional in 2024, the DOJ is likely to argue that taxpayers, who have not otherwise extended the period of limitations or timely filed an administrative claim under §6511(a), are unable to receive a refund of a large portion of their transition tax because of their purported failure to meet the timing requirements of those administrative exhaustion rules.

Section 6511(a) "provide[s] . . . a deadline for filing for administrative relief" (*United States v. Williams*, 514 U.S. 527, 534 (1995)). That period is the later of "3 years from the time the return was filed or 2 years from the time the tax was paid" (§6511(a)). In the context of the transition tax, applying the three-year rule to payments made for the 2017 tax year, the first date could be April 2021 (three years after April 2018). And only installments paid within a two-year lookback period from claim filing would be explicitly included in the second date.

Section 6511(b) similarly limits the *amount* of any administrative claim to the portion of the tax paid within the same two or three years. Section 6511(b)(2)(A) provides the amount-limit for claims filed within three years of the filing of the return: "[i]f the claim [is] filed by the taxpayer during the 3-year period prescribed in subsection (a)," i.e., three years from the date the return was filed, then the amount of "refund shall not exceed the portion of the tax paid within the [three-year] period, immediately preceding the filing of the claim," which period includes any extensions of time for filing the return. If the administrative claim for refund is filed within two years of payment and more than three years from the date the return was filed, §6511(b)(2)(B) limits the refund amount to "the portion of the tax paid during the 2 years immediately preceding the filing of the claim." Section 6511(b)(2)(C) addresses the amount-limitation in instances where "no claim [is] filed"— i.e., where the IRS allows a refund despite the taxpayer not having lodged a claim. Section 6511(b)(2)(C) provides that the refund amount

shall "not exceed the amount which would be allowable" under the two- or three-year period "if the claim was filed on the date the credit or refund is allowed" (*See also* §6514(b)(a refund shall be erroneous and recoverable if made after the expiration of the period of limitations for filing a claim)). None of the three provisions of §6511(b)(2) contemplates a tax paid in installments over eight years.

The fact that a tax may be unconstitutional does not, standing alone, override §6511's administrative exhaustion scheme for refunds. In 1998, the Eastern District of Virginia declared that a coal export tax was unconstitutional under the Export Clause (*Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466, 469 (E.D. Va. 1998)). In 2000, the IRS acquiesced in that holding, and many taxpayers filed refund suits that year. Clintwood Elkhorn Mining Company filed administrative claims for refunds of the tax it paid in 1997, 1998, and 1999 (*Clintwood Elkhorn*, 553 U.S. at 6). For taxes it paid in the earlier years—1994, 1995, and 1996—the company bypassed filing an administrative claim and sued in federal court under the Export Clause and the Tucker Act (*See id.*). The Court of Federal Claims allowed the company to pursue its claim; the Federal Circuit affirmed, but the Supreme Court reversed. Critically, the Supreme Court held that the Code's administrative exhaustion refund framework in §6511 and §7422 controls even if the basis for the refund claim is unconstitutionality (*Clintwood Elkhorn Mining Co.*, 553 U.S. at 9-10). Per the Supreme Court, "Congress has the authority to require administrative exhaustion before allowing a suit against the Government, even for a constitutional violation" (*Id.* at 9).

Notably, in *Clintwood Elkhorn*, the Supreme Court did not hold that §6511 and §7422 were jurisdictional and therefore barred a court from even considering a claim for refund that did not comply with those Code sections' timing requirements. Though the Court did not make this point explicitly, other cases dealing with similar statutes suggest that the limitations that §6511(a), §6511(b)(2), and §7422(a) impose are claim-processing rules and do not rise to the level of jurisdictional requirements (*See Henderson v. Shinseki*, 562 U.S. 428, 436-38 (2011) (holding 120-day bar for filing notice of appeal with administrative court is non-jurisdictional claims-processing rule); *see also United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015) ("Time and again, we have described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." (quoting *Henderson*, 562 U.S. at 435))). One salient textual element suggests that defining jurisdiction is not the point of §6511(a) and §7422(a): neither section uses the term "jurisdiction." Instead, "in related statutory provisions," 28 U.S.C. §§ 1346(a)(1), 1491(a), Congress has explicitly stated that "[t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims," over refund suits (*Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1113 (2023) (holding claims-processing statute is not jurisdictional in part because it does not use the term "jurisdiction")). That lack of a "clear statement" required to make those sections jurisdictional means they probably aren't (*See id.* at 1112 (quoting *Arbaugh v. Y & H Corp.*, 546 U. S. 500, 515 (2006))). Under a very different set of facts, however, the Court has held that §6511(a) was not subject to equitable tolling, but the Court did not go so far as to call the Code section jurisdictional (*See United States v. Brockamp*, 519 U.S. 347, 353 (1997)).

The purposes of administrative exhaustion are to allow the agency to make a factual record, apply its own expertise, and conserve judicial resources. Although exhaustion of administrative

remedies is ordinarily required as a condition of judicial review, courts will not require it where those purposes are not served. Specifically, exhaustion is not required where the administrative proceeding would be "meaningless as a practical matter" (*See Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 500 (9th Cir. 1980) ("In deciding how to exercise its discretion, the court should balance the litigant's need for judicial resolution against the agency's interests in having an opportunity to make a factual record and exercise its discretion without the threat of litigious interruption, in discouraging frequent flouting of the administrative process, and in correcting its own mistakes to obviate unnecessary judicial proceedings."); *see also Honig v. Doe*, 484 U.S. 305, 327 (1988) (the administrative process may be bypassed "where exhaustion would be futile"); *Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984) (favorably citing authorities allowing "appropriate relief" where administrative exhaustion would be futile); *cf. Santos-Zacaria*, 143 S. Ct. at 1113 ("If exhaustion is jurisdictional, litigants must slog through preliminary nonjudicial proceedings even when, for example, no party demands it or a court finds it would be pointless, wasteful, or too slow.")). Until the Supreme Court holds §965 unconstitutional, filing an administrative claim arguably is futile because an installment taxpayer would always (under the government's reading of the statutes and *Flora*) be unable to obtain a refund prior to 2025 (when full payment is made). Since the DOJ and the IRS have taken the position that the IRS could not grant relief under such circumstances, it would be "meaningless" to force a taxpayer to file such a claim.

But regardless of whether the provisions are jurisdictional or claims-processing rules, and regardless of whether the IRS could have even paid any claimed refunds (under *Flora*), we expect that the DOJ will argue that §6511(a) and §6511(b) prevent taxpayers from recovering amounts they paid prior to 2021 on the grounds that taxpayers' claims for refund with respect to these periods are time-barred and that, being time-barred, no suit is allowed to demand payment of those claims (*See Leveroni v. United States*, No. C 05-04295 SI, 2006 U.S. Dist. LEXIS 75083, at *6 (N.D. Cal. Oct. 3, 2006) ("Defendant asserts that the initial three installments were paid by plaintiff more than two years prior to the filing of the refund claim and thus recovery of these payments is barred by the statute of limitations [of §6511(a)]."); *Blatt v. United States*, 830 F. Supp. 882, 885 (W.D.N.C. 1993) (DOJ arguing §6511(b)(2)(A)bar applied to tax paid in installments)). The DOJ's position would mean that taxpayers who elected to pay the transition tax in installments will allegedly be time-barred from filing refund claims for (and/or suing for the recovery of) payments they made in 2018, 2019, and likely 2020. But this argument assumes that the taxpayer had the ability to exhaust administrative remedies within the relevant period and that the IRS had the ability to provide the remedy (pay the refund) during that same period. As we explain below, the IRS and the DOJ have taken the position that no such remedy was available with respect to the transition tax.

Due Process Remedies this Unfairness

Governments previously have tried to block a refund of unconstitutionally levied taxes on procedural grounds. Indeed, similar problems have arisen in the context of state taxes held to be unconstitutional and those cases are illustrative. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Supreme Court held that Hawaii's liquor excise tax scheme—which allowed tax preferences for alcoholic beverages manufactured from certain products grown in the State—had the purpose and effect of discriminating against interstate commerce. Florida had a similar rule and, after *Bacchus*, it revised its own scheme to provide special rate reductions for specified

products commonly grown in Florida and used in alcoholic beverages produced there. McKesson, a wholesale liquor distributor whose products did not qualify for the new rate reductions, was forced by the structure of the revenue laws of Florida to pay, under protest, taxes under the new scheme for a number of months and then file suit in state court for a refund. The Florida courts (all the way to the Florida Supreme Court) held that, although the scheme was unconstitutional, McKesson was not entitled to a refund.

The Supreme Court took up the case and held that, although it was allowable for Florida to prevent taxpayers from challenging the tax on a "pre-deprivation" basis, the Due Process Clause of the Fourteenth Amendment required the state to "provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one" (*McKesson Corp. v. Div. of AB & T*, 496 U.S. 18, 39 (1990) (citations omitted)). As the Court explained in *McKesson*, "the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional" (*Id.* at 22). The Court gave specific guidance as to what would be considered a "meaningful" "clear and certain" "post-deprivation" remedy in this context, including that a state could enforce "relatively short statutes of limitation applicable to such actions" (*Id.* at 45).

The Court of Appeals for the Federal Circuit applied *McKesson* to the Federal Harbor Maintenance Tax in *Stone Container Corp. v. United States*, 229 F.3d 1345, 1351 (Fed. Cir. 2000). The taxpayer in *Stone Container* sought a refund of the HMT. Importantly, the court also held that the Due Process Clause of the Fifth Amendment contained the same animating principles as the Due Process Clause of the Fourteenth Amendment. Thus, at least from the perspective of the Federal Circuit, as they relate to remedies for unconstitutional taxes, the same due process rules apply to the states and the federal government. This makes the Supreme Court's jurisprudence in the context of state tax constitutional violations relevant to federal violations.

The Federal Circuit also recognized that, "[i]n the federal context, as in the state context, a taxpayer is generally barred from injunctive relief, thus giving rise to the obligation to provide meaningful backward-looking relief" (*Id.* at 1349 n.2). While it was sufficiently "clear and certain" "to apply a statute of limitations" to the unconstitutional HMT, the Federal Circuit noted that it would be a different case altogether if a taxing authority held out a "postdeprivation remedy and then declare[d], only after the disputed taxes have been paid, that no such remedy exists" (*Stone Container*, 229 F.3d at 1351 (citing *Reich v. Collins*, 513 U.S. 106, 108 (1994))). Because no prior decision had led taxpayers to believe that Tucker Act jurisdiction (involving a six-year period of limitations) was available, the Federal Circuit did not find such a "bait and switch" in *Stone Container* (*Id.*).

Here, however, we do have a "bait and switch." Congress introduced the transition tax in late 2017, presenting taxpayers with a new regime that imposed tax on post-1986 untaxed E&P. Taxpayers had a "choice" to pay the tax in full or over the installment period. But that choice was illusory for many. With the transition tax base often equal to years, if not decades, of offshore operating earnings, many taxpayers did not have the cash to pay the tax and therefore

had no choice but to elect installment treatment. That meant that many taxpayers would have to elect into a framework where they could not satisfy their transition tax liability until 2025.

As detailed above, the government will likely argue that a taxpayer must pay all installments before seeking a refund of the disputed tax. This position follows from *Flora* and *Clintwood Elkhorn*. If an unconstitutional tax is a tax for the recovery provisions of the Code, then it is indeed a tax for all of those recovery provisions. Under the government's logic, for installment taxpayers, lack of full payment would have barred a suit under *Flora* to challenge the tax before 2025. Installment taxpayers also were prohibited from challenging the tax under the Declaratory Judgment Act (28 U.S.C. § 2201) because even an unconstitutional tax can only be challenged pre-enforcement "if it is clear that under no circumstances could the Government ultimately prevail" (*Enochs v. Williams Packing & Nav. Co., Inc.*, 370 U.S. 1, 7 (1962); *see also Davis v. United States*, No. 07-3039-CV-S-RED, 2007 U.S. Dist. LEXIS 45825, at *2 (W.D. Mo. June 25, 2007) (holding Declaratory Judgment Act and Anti-Injunction Act barred taxpayer from enjoining IRS's ability to examine and collect); *Silver v. IRS*, No. 20-1544, 2022 U.S. Dist. LEXIS 202566, at *9-10 (D.D.C. Nov. 7, 2022) ("The AIA has 'almost literal effect' … The AIA's main aim is to 'protect[] the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, and to require that the legal right to the disputed sums be determined in a suit for refund." (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 737 (1974))).

Indeed, the IRS and the DOJ made it loud and clear that installment taxpayers had no remedy until they satisfied their transition tax liability in full. In its transition tax "Q&As," the IRS explained that a taxpayer may not receive a refund or credit of the taxpayer's 2017 payments "until the amount of payments exceeds the entire unpaid 2017 income tax liability, including all amounts to be paid in installments under section 965(h) in subsequent years" (*Questions and Answers About Reporting Related to Section 965 on 2017 Tax Returns*, IRS (Sept. 29, 2022)). Even after taxpayers expressed concern about this position, the Office of Chief Counsel doubled down, releasing a memo (PMTA 2018-16) which concluded that payments in excess of the first installment amount due under §965(h)(1) for 2017 are not "overpayments" because the entire transition tax is a 2017 tax liability and cited to case law involving the §6166 election in the estate tax context (*Estate of Bell v. Commissioner*, 928 F.2d 901, 903-04 (9th Cir. 1991)) for support. According to the IRS, absent an overpayment of the entire 2017 tax liability (which includes all eight installments of the transition tax), the IRS has no statutory authority under §6402or §6403 to issue a credit or refund. Instead, the IRS may only credit the excess payment to the next future annual installments due per §6403.

The DOJ took the same position. In *Kyocera AVX Components Corp. v. United States*, the DOJ argued that the court does not have subject matter jurisdiction because of the *Flora* full payment rule:

"The full payment rule equally applies in cases involving installment payments expressly authorized by statute … The *Rocovich* court's reasoning applies with equal force here. The installment scheme in section 6166 is analogous to section 965(h), the section under which Plaintiff has elected to make installment payments of TCJA's transition tax. Both sections permit taxpayers to defer payment of a single tax over a designated number of years. And the section

965 tax, like the estate tax in *Rocovich*, is not a divisible tax because it arose from a single taxable event. Congress chose to tax corporations' entire accumulated, tax-deferred foreign income all at once (*See* I.R.C. §965(a), (d)). The transition tax thus does not fall within any exception to the full payment rule" (No. 6:22-cv-02440-TMC, Gov't Motion to Dismiss, at *8 (D. S.C. Dec. 6, 2022) (citing *Rocovich*, 933 F.2d at 993-94 and *Diversified Grp., Inc. v. United States*, 123 Fed. Cl. 442, 451-52 (2015))).

Indeed, the Supreme Court in *Flora* debated the unfairness of a statutory bar for refunding installment payments. As Justice Harlan explained in his dissent, the government's interpretation of *Flora*'s full payment rule is problematic because "taxpayers who pay assessments in installments would be without remedy to recover early installments that were wrongfully collected should the period of limitations run before the last installment is paid" (*Flora*, 362 U.S. at 195-96 (Harlan, *J.*, dissenting)). In defense of the majority opinion, however, Chief Justice Warren responded that:

"A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent. If he permits his time for filing such an appeal to expire, he can hardly complain that he has been unjustly treated, for he is in precisely the same position as any other person who is barred by a statute of limitations" (*Id*. at 175 (majority op.)).

In essence, from the perspective of Chief Justice Warren, taxpayers should just refuse to pay taxes they disagree with and let the deficiency procedures run their course.

But for a multinational in the 2018-2021 period, simply refusing to pay hundreds of millions of dollars of transition tax over a multi-year period because the provision might be unconstitutional was not a practical option. So what should taxpayers have done? The answer can't be that taxpayers who paid their §965 liability in installments had to have filed "protective" refund claims. As explained above, the IRS often rejects them out of hand for failure to fully pay. More critically, the first time corporate taxpayers were realistically able to consider filing such claims was after the grant of certiorari, a time when the administrative period of §6511 for 2017 year, absent some sort of extension, would have naturally expired.

For these taxpayers—installment-electing taxpayers whose 2017 year was closed by the date the Supreme Court granted certiorari—the DOJ can be expected to argue that the time bars in the claims processing provisions of §6511 and §7422 block any recovery for those early installments. But the Due Process Clause of the Fifth Amendment demands more. A litigant must have an opportunity to be heard "at a meaningful time and in a meaningful manner" (*Armstrong v. Manzo*, 380 U. S. 545, 552 (1965)). As in the other "bait and switch" cases, installment taxpayers have made payments under compulsion and in reliance on the §6403 offset remedy only to have it fall short solely because the *entire tax* may be unconstitutional *ab initio* and thus there are no future installments to offset. This situation is fundamentally different from *Stone Container*. There, taxpayers had two different mechanisms to challenge the HMT, one of which provided recovery of all HMT payments they made (*See United States Shoe Corp. v. United States*, 114 F.3d 1564, 1572 (Fed. Cir. 1997) (upholding the limitations period in 28 USC §

1581(i)); *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000) (refund brought under § 1581(a) based on protest jurisdiction did not limit the refundable years and taxpayers could recover all HMT payments)). And there was no suggestion in the U.S. Code or the case law that the Tucker Act would "afford taxpayers the benefit of the longer [six-year] limitations period" (*Stone Container*, 229 F.3d at 1350). In addition, recovery of HMT payments made in one year did not depend on payments made in another year. Each year stood alone and taxpayers could freely bring suit if they acted timely enough, just like the tax at issue in *Clintwood Elkhorn*. No bait and no switch.

In contrast, here, the IRS affirmatively and expressly denied installment taxpayers any meaningful opportunity to recover payments they made in the early years until they had fully paid all years. Taxpayers were promised the opportunity to file a claim for refund in the eighth year of the installment period, after they had satisfied their purported transition tax liability in full. But if the Supreme Court reverses, the government likely will argue that the early payments are time-barred by the limit imposed by §6511(a) and amount-barred by the limitations in §6511(b)(2) (*See Brockamp*, 519 U.S. at 354 ("For these reasons, we conclude that Congress did not intend the 'equitable tolling' doctrine to apply to §6511's time limitations.")). Restricting taxpayers to a refund of only a small portion of an unconstitutional tax cannot constitute the complete, "meaningful" post-deprivation remedy "for taxes already paid" that due process demands (*McKesson*, 496 U.S. at 31 ("[I]f a [government] places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause … obligates the [government] to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.")).

Under these circumstances, if the Supreme Court concludes that the transition tax is unconstitutional, taxpayers who paid their transition tax in installments should be able to pay the rest of their installments due under §965 and sue for a full refund (yes, the government likely will argue that this rather bizarre payment requirement is mandated by *Flora*; although one could argue that, after the tax is held unconstitutional, the second sentence of §6403 would redefine the tax owed to be zero). At that point they will have a refundable "overpayment" under §6402. That tax will have been "erroneously or illegally assessed or collected" under 28 U.S.C. §1346(a)(1). And, again, they will have fully paid that tax as required by *Flora*. The administrative exhaustion requirements of §6511 and §7422—which the IRS interprets as prohibiting it from paying a refund anyway—will have been futile and must give way to due process. Just reversing *Moore* is not enough.

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