Moore: Due Diligence Would Not Have Helped

To the Editor:

Mindy Herzfeld's article, "*Moore*, Part 3: Should the Supreme Court Help Taxpayers Who Don't Help Themselves?"[1] raised my hackles. She faults the Moores for making an investment in an Indian company without doing due diligence of any kind on the tax consequences. But let's pause for a moment to see what the Moores might have found to be the consequences in 2006 had they done some diligence.

A U.S. shareholder of a controlled foreign corporation that was engaged in an active business that generally did not have subpart F income could reasonably expect to pay no tax until and unless the CFC paid a dividend, which, in light of the Indian treaty, would have been a qualified dividend taxed at 15 percent (the 20 percent rate only came about in 2013), exactly the same as if the investment had been made in a domestic corporation. Similarly, if the shares were sold, the capital gain would have been taxed at 15 percent, again, just as if the corporation were a domestic corporation. (Section 1248 inclusions are entitled to be treated as qualified dividends.)

There would have been some reporting on Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," but otherwise the substantive tax consequences would have been more or less identical to an investment in a domestic C corporation.

India's tax rules may be diabolically complicated, but the taxes Herzfeld alludes to are corporate-level taxes, no different in devilry than the corporate taxes payable by a U.S. C corporation. How closely, I wonder, do U.S. investors look at the nuts and bolts and other inner workings of C corporations in which they invest?

So if the Moores had done some due diligence — not much of which they could reasonably have afforded for a modest $40,000 investment that was not expected to yield much in the way of a return — these are the consequences they would have encountered at the first go-round. How much more did they need to do?

Of course, where the Moores were really at fault was not purchasing a crystal ball or a genie in a bottle that could have predicted the enactment of section 965 and the global intangible low-taxed income regime a decade later, including Congress's cruel and mischievous decision to have these apply untrammeled to individual investors. Meantime, investors in U.S. C corporations have trillions of dollars tied up, untaxed at the shareholder level and regulated only by the toothless accumulated earnings tax. Somehow, however, those trillions have remained unscathed.

Congress, Treasury, and the IRS repeatedly give short shrift to the position of individual taxpayers caught up in the mind-numbing and counterintuitive complexities of U.S. taxation of cross-border activities. Please, professor Herzfeld, don't fall in with this crowd, especially not in this case. ■

Sincerely,

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