

The Corporate AMT's Crypto Problem Has Constitutional Hazards

by Andrew Strelka and Angelina Richards

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In this article, Strelka and Richards examine the constitutional problems facing the corporate alternative minimum tax because of Treasury's failure to include an adjustment for cryptoassets in the recently released proposed corporate AMT regulations.

More than a century has passed since the 16th Amendment firmly established the assessment and collection of federal income taxes from sea to shining sea.¹ One might forget that the amendment was ratified in response to an 1895 Supreme Court ruling, which determined that an income tax was a direct tax necessitating apportionment among states based on population data.² Apportionment is an anachronistic function requiring that each state pay the implicated tax based on the state's proportionate population.³ The ruling effectively rendered a federal income tax unworkable until the 16th Amendment was enacted, removing the apportionment requirement for federal income taxes.

Fast-forward to the Supreme Court's summer ruling in *Moore*, in which two concurring opinions and a dissent round out a journey through Civil War-era taxation on the road to determining whether the mandatory repatriation tax can be

salvaged despite its imposition of an unapportioned tax on shareholders for undistributed income.⁴ The majority ultimately concluded that the mandatory repatriation tax passed muster through the introduction of an attribution doctrine.⁵ This doctrine allowed the Court to sidestep the question of whether income can exist absent a realization event. While the majority does not base its opinion on the question of realization, *Moore* sets the stage for how the corporate alternative minimum tax may be tested on constitutional grounds.

A problem concerning the corporate AMT's taxation of unrealized cryptoasset gains calls the new tax's constitutionality into question, as first discussed in *Tax Notes* in March.⁶ A recent accounting rule change requiring corporations to report unrealized crypto gains as financial statement income places cryptoassets in the direct path of the corporate AMT. Yet the recently released proposed corporate AMT regulations (REG-112129-23) are silent on the specific treatment of cryptoassets under the new tax.⁷ The failure to include an adjustment in the proposed regulations to remove unrealized crypto gains

¹U.S. Const. Amend. XVI.

²See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on rehearing*, 158 U.S. 601, 627-628 (1895). See also *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012) (discussing direct tax apportionment based on state population).

³See *National Federation of Independent Business*, 567 U.S. at 570 (describing apportionment requirement).

⁴*Moore v. United States*, 144 S. Ct. 1680 (2024). In 2017, as part of a complex transition to a more territorial system, the Tax Cuts and Jobs Act imposed a one-time, backward-looking tax that targeted undistributed income of foreign corporations. The mandatory repatriation tax was codified under section 965. See IRC section 965; reg. section 1.965-0 through reg. section 1.965-9. In *Moore*, the Supreme Court found the tax to be consistent with income tax principles and held that it did not constitute a direct tax requiring apportionment because the tax base consisted of realized but undistributed income that was attributed to U.S. shareholders. *Moore*, 144 S. Ct. 1680.

⁵*Id.* at 1688-1689 (attributing the realized and undistributed income of an American-controlled foreign corporation to the entity's American shareholders).

⁶Andrew Strelka, "Corporate AMT's Shadow Grows as FASB Goes Mark-to-Market," *Tax Notes Federal*, Mar. 18, 2024, p. 2231.

⁷See REG-112129-23.

from adjusted financial statement income places the entire regime in constitutional jeopardy.

What Does *Moore* Say?

Moore summarizes three fundamental constitutional taxation principles:

- Direct taxes are taxes imposed on persons or property and must be apportioned among the states by population. It appears that Congress has not enacted an apportioned direct tax since the Civil War.
- Indirect taxes are imposed on activities or transactions and must be uniform throughout the country.
- Income taxes are indirect taxes, and the 16th Amendment confirms that they need not be apportioned among the states by population.⁸

The Crypto Problem

The corporate AMT's issue with cryptoassets stems from the fact that Congress writes the tax code but not the accounting rules on which the corporate AMT finds its tax base. In the United States, the Financial Accounting Standards Board, a private organization that sets financial accounting and reporting standards under generally accepted accounting principles drafts those rules.⁹ GAAP accounting is widely adopted in the United States and is required to be used by public companies listed with the SEC.

In December 2023 the FASB published an update to its GAAP rules to improve the accounting and disclosure of cryptoassets. Under Accounting Standards Codification 2023-08, "Accounting for and Disclosure of Crypto Assets (ASU 2023-08)," corporations must generally recognize changes in the fair value of cryptoassets on their income statements.¹⁰ For corporations subject to corporate AMT taxation, this accounting rule change results in a direct tax imposed on cryptoassets.

⁸ *Moore*, 144 S. Ct. at 1687 (referencing Article I).

⁹ The FASB is overseen and administered by the Financial Accounting Foundation, a nonprofit established in 1972. See FASB, "About the FASB" (2024).

¹⁰ See generally FASB, "Accounting Standards Update No. 2023-08, Intangibles — Goodwill and Other Crypto Assets (Subtopic 350-60)" (Dec. 2023).

In *Moore*, the Supreme Court saved the mandatory repatriation tax by labeling it an income tax — jumping through the intellectual hoop of attributing realized income from one entity to another. No such scenario exists that would attribute realized income to crypto, an asset that the IRS treats as property.¹¹ And while the Supreme Court remains divided over whether federal income taxation requires realization,¹² its views on direct taxes are clear. Direct taxes include taxes on personal property and must be apportioned among the states under Article I.¹³

Thus, unless unrealized crypto gains are removed from adjusted financial statement income in the final regulations, Treasury will force its new tax into Civil War-era constitutional scrutiny.

Restoring Congressional Intent

Notably, the legislative discussions and documents concerning the enactment of the corporate AMT and the Inflation Reduction Act do not focus on the realization principle as a central theme or on the taxation of unrealized property gains generally. From the outset, the corporate AMT's design has focused on ensuring that the largest corporations face tax obligations that are not excessively reduced by tax deductions disproportionate to their financial accounting income. The treatment of realized-vs.-unrealized income under the U.S. federal income tax system was never contemplated as a goal of the corporate AMT, and it was not a topic of discussion during the drafting or enactment of the bill.¹⁴

¹¹ See Notice 2014-21, 2014-16 IRB 938.

¹² Justice Ketanji Brown Jackson's concurrence in *Moore* states that the issue is undecided, while Justices Amy Coney Barrett, Samuel Alito, Clarence Thomas, and Neil Gorsuch argue in the concurrence and dissent that federal income taxation may not tax unrealized sums. *Moore*, 144 S. Ct. at 1699-1700, 1709.

¹³ *National Federation of Independent Business*, 567 U.S. at 571 (citing *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. at 618).

¹⁴ The corporate AMT was originally proposed as a primary revenue raiser in the Biden White House's Build Back Better proposal, which was publicly released October 28, 2021. See White House release (Oct. 28, 2021) ("In 2019, the largest corporations in the United States paid just 8 percent in taxes, and many paid nothing at all. President Biden believes this is fundamentally unfair. The Build Back Better framework will impose a 15 percent minimum tax on the corporate profits that large corporations — those with over \$1 billion in profits — report to shareholders. This means that if a large corporation says it is earning a billion dollars, then it can't avoid paying taxes.").

Indeed, the Joint Committee on Taxation's early analysis of the new tax estimated that the corporate AMT would tax approximately 150 corporate taxpayers — nearly half in the manufacturing industry.¹⁵ This focus on 150 corporate AMT taxpayers was repeated several times during the legislative process without any mention of taxing unrealized income or an intended distinction between domestic and international accounting standards.¹⁶

For accounting standards, the corporate AMT finds its tax base in both GAAP-generated financial statements and statements prepared in accordance with international financial reporting standards.¹⁷ When Congress enacted the Inflation Reduction Act, neither accounting framework recognized unrealized gains on cryptoassets as part of income:

- Under IFRS, entities that do not trade cryptocurrency as part of their normal business operations must use International Accounting Standard 38 to report cryptoassets in their financial statements.¹⁸ This standard dictates that any increase in the fair value of the asset beyond its historical cost counts as other comprehensive income.¹⁹ During the legislative process for the Inflation Reduction Act, Senate Finance Committee Chair Ron Wyden, D-Ore., explicitly stated

that other comprehensive income does not count as financial statement income for corporate AMT purposes.²⁰

- As for GAAP, at the time of the corporate AMT's enactment, the FASB had not yet published ASU 2023-08, the rule requiring unrealized crypto gains to be reported in income. Under the former accounting treatment, companies recorded cryptoassets at cost and then tested those assets for impairment.²¹ In other words, a company could realize a loss on the value of a cryptoasset on its financial statement, but any increase in the value of a cryptoasset would not be reported as income on financial statements.

Stated plainly, when Congress designed the corporate AMT, a tax on income reported on financial statements,²² those financial statements did not include unrealized increases in the value of cryptocurrencies. But unless an adjustment is made to remove unrealized crypto gains from adjusted financial statement income, the corporate AMT will deviate significantly from the accounting rules it was built on.²³

Treasury Can Fix This

Taxing unrealized crypto gains was never the intent of the corporate AMT. And to do so would seemingly risk categorization of the corporate AMT as a direct tax on property under Article I, requiring the tax to be apportioned among the states. The apportionment requirement, though not implicated for quite some time, is a

¹⁵ See letter from Joint Committee on Taxation chief of staff Thomas A. Barthold to Senate Finance Committee Chair Ron Wyden, D-Ore. (Aug. 1, 2022).

¹⁶ See letter from Congressional Budget Office Director Phillip L. Swagel to Sen. Lindsey Graham, R-S.C. (Aug. 4, 2022); 117 Cong. Rec. H7653-H765 (daily ed. Aug. 12, 2022) (Statement from Rep. Sheila Jackson Lee, D-Texas: "This would apply to about 150 corporations that average nearly \$9 billion in profit, but which paid effective tax rates of just 1.1 percent."); (Statement from Rep. Troy A. Carter, D-La.: "We can achieve this goal by strengthening IRS enforcement against wealthy tax cheats and closing tax loopholes exploited by the wealthiest few 150 massive corporations.").

¹⁷ Section 55(b)(2)(A)(i) (adjusted financial statement income is determined under section 56A); section 56A(b) (applicable financial statement is defined by section 451(b)(3)); section 451(b)(3) (applicable financial statement includes both statements prepared in accordance with GAAP and IFRS).

¹⁸ International Accounting Standards Board, "Request for Information Third Agenda Consultation," 34-35 (Mar. 2021); IASB, "Holdings of Cryptocurrencies" (June 2019).

¹⁹ IASB, "Request for Information Third Agenda Consultation," *supra* note 18; IASB, "Holdings of Cryptocurrencies" *supra* note 18.

²⁰ 117 Cong. Rec. S4166 (daily ed. Aug. 6, 2022) (statement from Wyden: "For purposes of the corporate minimum tax, Other Comprehensive Income is not included in financial statement income.").

²¹ FASB board meeting handout, "Accounting for Exchange-Traded Digital Assets and Commodities" (May 11, 2022).

²² See 117 Cong. Rec. S4166 (daily ed. Aug. 6, 2022) (statement from Sen. Benjamin L. Cardin, D-Md., clarifying whether the corporate AMT is based only on financial statement income).

²³ Accounting rules are not static, and there is no statutory or proposed regulatory limitation that would prevent the corporate AMT from pivoting wildly on the adoption of new or modified accounting rules by the FASB. We note that this arrangement, which seems to effectively place the FASB in control of the corporate AMT, may implicate the nondelegation doctrine, which has its roots in the separation-of-powers principles, and it is implied in Article I. By failing to make an adjustment for unrealized crypto gains, Treasury would effectively let the tax base for the corporate AMT be determined by a postenactment accounting rule designed by a private party, presenting significant separation-of-powers considerations.

fundamental principle of U.S. taxation. As stated by Justice Samuel Chase, a Founding Father:

The great object of the constitution was, to give congress a power to lay taxes adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts or excises; and the rule of apportionment, according to the CENSUS, when they laid any direct tax.²⁴

Because GAAP now requires corporate taxpayers to account for unrealized crypto gains in income statements, taxpayers subject to the corporate AMT will generally be subject to a direct tax on property. Fortunately, the seemingly anachronistic requirement of allocating the corporate AMT state by state can be avoided by simply removing unrealized crypto gains from adjusted financial statement income in the final regulations. ■

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²⁴ *Hylton v. United States*, 3 U.S. 171, 173 (1796).