

Announcer ([00:00](#)):

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Joe Bishop-Henchman ([00:15](#)):

A problem here is that you and I are tax experts. I'm sure a lot of the people listening spend a lot of time thinking about tax. The Supreme Court is not.

Nikki Dobay ([00:24](#)):

Yeah.

Joe Bishop-Henchman ([00:27](#)):

Don't get me wrong, they're all very smart people.

Nikki Dobay ([00:30](#)):

Hello and welcome to GeTtin' SALTy, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in Sacramento, California and Portland, Oregon offices. Today I'm very pleased to be joined by a very good friend, Joe Bishop-Henchman. Joe is the executive vice president at the National Taxpayers Union. Joe, thank you so much for joining me for the podcast. Can you let our listeners know what the National Taxpayers Union Foundation does, otherwise known as NTUF?

Joe Bishop-Henchman ([01:06](#)):

Sure. Thank you, Nikki. National Taxpayers Union has been around for over 50 years, and our mission's a simple one. We want to make sure the taxpayers are represented at all levels of government, so in Congress when they're debating stuff behind closed doors, in state legislatures, in regulatory agencies, and in the judiciary through amicus briefs and direct litigation we want to make sure that the taxpayers are being heard and the long-term fiscal future is not neglected. That's what we do.

Nikki Dobay ([01:41](#)):

Well, and you all on the direct litigation engagement front, that's just been a really great thing to see. I know you're often working pro bono with taxpayers and really pushing cases that may not get pushed because there's not enough money at issue or taxpayers don't have the resources to push those issues, so I just think it's really great work you're doing and happy to see that space getting filled.

Joe Bishop-Henchman ([02:12](#)):

Yeah, and happy that we get to work together on some of those. There are so many cases that could make good law, but for whatever reason the company doesn't want to go all the way on it, and that's understandable given all the competing pressures there are. We go out there and we try to find clients that are willing to go the distance and result in better law for all taxpayers.

Nikki Dobay ([02:41](#)):

Well, keep up the good work on that front. Today, you and I are going to be really focusing on a specific issue, the Moore v. United States case, which is currently up at the Supreme Court. We're going to talk

about that, but as a new guest to the show I have to ask you the big question. How did you get into state and local tax, Joe?

Joe Bishop-Henchman ([03:04](#)):

By accident. No, I didn't grow up wanting to be a tax attorney. I've always been interested in policy and fiscal issues, so when I first came to Washington actually did some policy analysis of the transportation bill. This was in 2004. I think it's the last time we passed a transportation bill. When I was in law school, I went to law school at GW. I was looking for a job for the fall and a think tank called the Tax Foundation was looking for a law clerk to help with amicus filings. I ended up getting hired in that role, and the fall clerkship got extended to a spring clerkship and got extended to a third year clerkship in a summer and then they ended up bringing me on. That's a place where you learn all about tax, and so that's how I ended up in it and get to continue following it. What I tell people is I get to pretend to be a constitutional lawyer because so many of our issues deal with the Due Process Clause and the Commerce Clause and other federal and state constitutional provisions. It's almost a misnomer to say a tax lawyer, but I get to tell people that.

Nikki Dobay ([04:31](#)):

Well, you're in very good company because I think so far there's only two guests who have said they've wanted to be a tax lawyer since they were a very young child, so most of us stumbled into this. I would not say that you're pretending to be a constitutional lawyer. I think what we do often is actually do constitutional law, which is a great segue into our discussion of Moore because this is a constitutional case but comes at it from a very different angle, I would say, since we're not dealing with our general provisions that we so often get into due process and commerce.

([05:17](#)):

Just start to set the stage and please jump in with additional facts or background on this, but so Moore is not a state tax case. This is a case that really involves whether or not IRC 965 or the transition tax that was put in place by the TCJA violates the apportionment clause of the US Constitution. We've got two constitutional provisions here, the 16th Amendment, which is the amendment that authorized the federal government to impose income taxes, and here what the taxpayers are saying or Moore is saying is that the 16th Amendment does not cover this tax, thus it is required to comply with the apportionment clause of the Constitution which is in Article One. Joe, why does NTUF care about this case? Why do we care about this case as state tax lawyers? Thoughts on that?

Joe Bishop-Henchman ([06:22](#)):

Yeah. Well, you can come at it in a lot of different ways. I mean, you frame the case well. That's literally what the case is about, but of course it affects more than just the issue in front of the court and that's why everybody's kind of interested in this case. There've been already I think something like 30 briefs filed by outside groups in the case. I imagine there'll be more being filed, and there's already a lot of ink being spilled not just in the trade press, but it's starting to leak out into kind of the regular world press that this case may be a big deal. You framed it as one angle.

([07:03](#)):

Another angle is this lawsuit is attempting to declare the Tax Cuts and Jobs Act unconstitutional. Now they just want to declare one piece of it unconstitutional for this one taxpayer, but anybody who's ever dealt with courts knows that you can't make judges do what they don't want to do and just because the plaintiff only wants to have it declared unconstitutional in this one instance for this one provision, doesn't necessarily mean that's what the final outcome will be when the Supreme Court hands down its

decision. So this is a big deal because the TCJA does not have a severability clause so unless you convince the Supreme Court to create one, which I guess they've done in some cases, but they're not very happy when they have to do that, this could potentially unravel the tax code that we know and love since 2017 and all the provisions associated with it. That's one angle. Another angle is... I think it's a big reason why a lot of people have filed briefs in this case is they think this is going to be the wealth tax case.

Nikki Dobay ([08:11](#)):

Yes.

Joe Bishop-Henchman ([08:11](#)):

Now, why is this the wealth tax case? This doesn't actually involve a wealth tax. This involves the transition tax. The Ninth Circuit in ruling for the government and against the Moores, they didn't just say, "Oh, this tax is constitutional." They basically said, "Well, any kind of tax would be constitutional as the federal government wanted to enact it." There's a big worry from people that unless this is reversed, a wealth tax is on the table. So you see in a lot of the briefs, including in our brief I'll add.

([08:42](#)):

Then a third angle, why does it matter for the states? Well, revenue just doesn't go to the federal government. There are a couple states piggyback completely on 965. There wasn't a lot of them, but a couple of them did, but certainly a lot of them have benefited from the increased revenue that has happened that has flowed through to the state level in the last couple of years after the passage of TCJA. I would imagine a unraveling of the entire Tax Cuts and Jobs Act would be noticed at the state level and certainly at the company level too.

Nikki Dobay ([09:18](#)):

Well, and to your point about the TCJA having no severability clause, this even goes further than that. If the court were to rule completely in favor of the taxpayers in this situation, it would have far broader reach than just those provisions because... And really maybe we get into a little bit about the realization piece of this or unrealized income. 965 was the mechanism that was used to move our system from a at the federal level worldwide system to a territorial system. To kind of make that transition, we had to figure out what to do with all this deferred income. So that's 965, and there was this deemed repatriation that tax was applied to, they provided a favorable rate to kind of make that pill a little easier to swallow since it was going back 30 years. Really the crux of this is that that was a deemed income event, so there was no realization of actual income. Now, sometimes there were for certain taxpayers, but under these facts as I understand them-

Joe Bishop-Henchman ([10:39](#)):

Yeah. You could if you wanted to have liquidated your overseas assets-

Nikki Dobay ([10:42](#)):

Correct. Yeah.

Joe Bishop-Henchman ([10:42](#)):

... but you did not have to under the way they did it.

Nikki Dobay ([10:47](#)):

Right. Right. So there's no actual realized income. This is all unrealized income. The Moore's argument is that that violates the 16th Amendment, is thus subject to the apportionment clause, and fails in its current state on that side. If the court were to say the Moores are right and you have to have an actual realization event, which seems to be... There's some cash that's changing hands, somebody's actually getting dollars in their hands. It's a lot of sections of the code. I mean, the song that's running through my mind currently is It's the End of the IRC as We Know It, which would be done by the very cool state and local cover band covering the R.E.M. songs, but a very, very drastic impact if-

Joe Bishop-Henchman ([11:44](#)):

Yeah, and you see this in some of the briefs, especially by some of the academics. They just kind of go through all the provisions where we don't have as strict realization as you might think of it, so mark-to-market provisions, 401 (k), in some instances you end up deferring tax or paying tax early when there's not a realization happening. You talk about going back in time and unraveling big pieces. Subpart F itself might fall under this. I think the taxpayers got the message because in their latest brief, they tried to talk about how what they want will not unravel all of that other stuff. It'll just be limited to what they want to unravel, but that's kind of the door that's been opened here.

Nikki Dobay ([12:39](#)):

Yeah. I would just add on all sorts of provisions in the subchapter K and the pass-through regimes. All right, so I think we've set the stage, we've really given the listeners what's at stake here. You mentioned multiple amicus briefs have been filed. My last count was 28, but it sounded like a few more came in and more to come.

Joe Bishop-Henchman ([13:10](#)):

[inaudible 00:13:11].

Nikki Dobay ([13:12](#)):

Yeah. Yeah. NTUF submitted a brief, and really we want to get into your brief because I think you all do a really nice job of laying out a path that maybe is less scary and it isn't going to be the end of the tax code as we know it. Tell us about that, and wherever you'd like to begin with that discussion.

Joe Bishop-Henchman ([13:43](#)):

Well, I can begin with that it was a hard brief for us to do because I like writing briefs that say the taxpayer is 100% right, and we just couldn't say that in this case. I mean, we still say the taxpayer ultimately should prevail but in a way that doesn't go beyond what really needs to be done to provide justice in this one case. We actually filed the brief in support of neither party. Normally briefs are in support of one side or the other so it's not often used at the Supreme Court, but it is a procedure that they have. They really discourage it through the rules because they basically... You get the worst deadline out of anybody filing a brief.

([14:31](#)):

I had to file our brief almost among the very first of the briefs that were filed, but that's what we did. It ended up being in support of neither party. The reason we did it is because we think the Ninth Circuit certainly got it wrong when they said that the federal government can basically do whatever it wants without any constitutional restrictions. We explain why that's wrong, hopefully that doesn't need much

explanation about why that's wrong, and then walking through why this tax is constitutional, maybe there's an issue as applied to these particular taxpayers as individuals with very odd circumstances, and that if you're going to rule, make sure you do it this way. We kind of lay out some options for the justices, which we really drew from a lot of very thoughtful pieces that have been written on this and other cases in recent years. The broad strokes that we give in the brief is reverse the Ninth Circuit, vacate that case, don't uphold a wealth tax, don't do that, but also don't... If you're going to rule for the Moores, do it in a narrow way that doesn't have unintended consequences.

Nikki Dobay ([15:58](#)):

Is there a way that you address the realization issue that will help the court down that path?

Joe Bishop-Henchman ([16:09](#)):

Yeah. I mean, we give a bit of the history on it. Somebody mentioned recently that this particular Supreme Court really likes being historians, and so the big question will be what did these terms mean when they were first enacted? What did the drafters of the 16th Amendment when they were writing it in 1909, 1910, 1913, what did they mean by the word income? A lot of the briefs are quoting very old Webster's dictionaries and contemporary newspaper articles and speeches by politicians because they're trying to understand what did they mean by income. I didn't do any of that research, I'm not a historian, but I did read it all and apparently the word income comes from the phrase to come in. It's not a very elaborate definition, so this idea that it's not just a paper change in wealth, it's actually something that you receive.

([17:11](#)):

That has translated over into this concept of realization, which for good or for bad, and people argue both ways, the Supreme Court decided was a constitutional requirement in a 1920 case called Eisner v. Macomber. There's a lot of people who are arguing, "Oh, that case was a bad one or a good one." So maybe that'll come up of like, "Well, this a hundred-year-old case, are we going to keep it or are we going to reverse it?" But they said for it to be income, there has to be realization, so do they find a way to square what happened here with that or do they overrule that or do they go in a different direction? A problem here is that you and I are tax experts. I'm sure a lot of the people listening spend a lot of time thinking about tax. The Supreme Court is not.

Nikki Dobay ([18:06](#)):

Yeah.

Joe Bishop-Henchman ([18:08](#)):

Don't get me wrong, they're all very smart people and they all have very smart clerks and they're very thoughtful and they're going to read everything and do their best to understand it, but they do not live it and breathe it the way we do. Justice Ginsburg, when she was alive her husband was a practitioner, maybe a professor. I forget what precisely his job was, but she always ended up writing the tax cases, which was interesting because she herself was not a tax expert, although I imagine being married to one, probably you pick up a few things.

Nikki Dobay ([18:43](#)):

Right. Rubs off.

Joe Bishop-Henchman ([18:45](#)):

Yeah. But since she's no longer on the court, we don't really have that type of person on the court. I mean, I honestly sent our brief to a family member who doesn't follow any of this stuff and I was like, "Mark the places where I lose you." Because I really wanted it to be understandable by a lay person, which I hope it is.

Nikki Dobay ([19:13](#)):

Yeah. Well, this is definitely one that a lot of folks are watching. I know we're both at the COST annual meeting this week and there was a discussion on this case and just general chitchat about it. Joe, one last question on the case. Oral arguments will be on the 5th of December, maybe a Wayfair 2.0 party at the steps of the Supreme Court, so we'll see. I know that was also part of the chatter is are people going to go to the argument?

([19:47](#)):

Do you think that the court really knew what it was doing or getting itself into when it took this case? My... I kind of feel like... I don't think this is a secret. The court is fairly political at this point and we're in a bit of an interesting time, but I can't imagine they really knew what they were potentially getting themselves into when they took the case. It's one of... I mean, let's think about going back to Wayfair. We all kind of thought, "Well, they took the case because they wanted to do something about Quill." I can't imagine they want to blow up the whole tax code. That's their point. I could see a version of if they're not super fond of the Ninth Circuit and this was kind of a out there decision by the Ninth Circuit so maybe they wanted to ring them in, but this could have some real broad implications.

Joe Bishop-Henchman ([20:47](#)):

Yeah. I've been asking a lot of people on their insights because this... I'm guessing the plaintiffs, the firm representing the taxpayers, maybe they expected the court to take the case or at least hoped that they would take the case, but everybody else seemed surprised, myself included, because the Supreme Court takes... Or the Supreme Court is asked to hear something like six or seven or eight thousand cases a year and they take about 60 or 70 or 80, which is... Sorry, I'm not a lawyer, and I can't even do that math in my head. That's either 1% [inaudible 00:21:25].

Nikki Dobay ([21:24](#)):

I would say it's one or... Yeah, yeah. It's like 1%. Yeah.

Joe Bishop-Henchman ([21:28](#)):

Yeah. So already the odds are against you just by appealing at all, but they agreed to hear it. The best explanation, the best guess because we're all guessing, we don't know why the Supreme Court took the... The only people who know are the justices themselves, but our best guess that I've heard is Ninth Circuit ruled against the taxpayer, strike one. Supreme Court doesn't really like the Ninth Circuit, thinks it gets it wrong a lot, and they're not wrong about that assessment, I must add. Then... Sorry, I know you live in the Ninth Circuit, Nikki. Then there was a very vociferous dissent in the Ninth Circuit opinion by all of the conservative justices on that panel. These are their buddies, these are their simpaticos, and so it gets to them and maybe that's all they know about it, and the facts as presented in the petition didn't exactly... I'm going to put it this way. They did not exactly tell the whole story, which is true of any appeal. You're not...

Nikki Dobay ([22:40](#)):

Right.

Joe Bishop-Henchman ([22:41](#)):

Any appeal, you're going to frame the case in the way that you think wins the case for you.

Nikki Dobay ([22:48](#)):

Right. Right.

Joe Bishop-Henchman ([22:48](#)):

There have been some articles recently about like, "Well, there's this fact that wasn't brought up until now or there's this other interesting tidbit that wasn't brought up until now that maybe or maybe not is relevant to what the court should decide in this case." Maybe the plaintiffs are the dogs that caught the car here, I don't know, but they're going to the Supreme Court so what do I know? We'll see what the justices do on it. They know they have the case. Some senators wrote to Justice Alito and told him he should recuse himself, this is just kind of an interesting side note in the case, and Justice Alito wrote a four-page public memo, published it to the Supreme Court website saying he's not going to recuse himself in the case. It's not like it's escaped their attention that they've accepted this case, so we'll see what happens with it.

Nikki Dobay ([23:49](#)):

Yeah. I'm sure as the amicus briefs come in they must realize more and more how many people are really watching this case, so we will wait and see. Well, Joe, thank you so much for this discussion. I think this is really helpful for the listeners and to kind of set the stage with this case. It's going to be fascinating to see what happens next year when they rule in the case. But I can't let you go without a surprise non-tax question. As I mentioned, Joe and I are both in sunny Las Vegas. It's very warm here and we're-

Joe Bishop-Henchman ([24:32](#)):

Cold in the rooms, I have to say, in the conference.

Nikki Dobay ([24:35](#)):

Yes. Yes. Hard dressing.

Joe Bishop-Henchman ([24:37](#)):

They've got it about Antarctica temperatures in the air conditioning here.

Nikki Dobay ([24:40](#)):

Yes. We're in Las Vegas for the COST conference. I'm going to ask you a Vegas question for this one. To the extent you can talk about it on a public podcast, what is your favorite thing to do in Vegas? I'll go first because that's how this works. My favorite thing to do in Vegas is we often come here to eat, and so we just try to get to as many of the good restaurants as we can. One of our favorites is Best Friend, which is in the Park MGM. Unfortunately, we could not get in this trip. I would highly recommend it to anybody, but there's a ton of good food here so you don't have to come to Vegas to gamble if you don't want to. You can just come and eat. What's your favorite thing?

Joe Bishop-Henchman ([25:29](#)):

Well, I'm going to do food too. I do like blackjack, but I've promised my husband not to do it this trip. But I do love food too, and especially Italian food. Giada's restaurant is over in The Cromwell, just actually across the street from us tempting me, and actually I'm not exaggerating when I say I think that's the best Italian food on the planet [inaudible 00:25:56].

Nikki Dobay ([25:56](#)):

Oh, okay. All right. Well, you've given me another one to add to the list. Are you going anywhere good tonight? We're going to Spago.

Joe Bishop-Henchman ([26:05](#)):

Spago's pretty good. I don't think so tonight. I think I've got a night of calls. It's not very exciting, so probably room service for me.

Nikki Dobay ([26:14](#)):

All right. All right. Well, maybe you can jump across the street if possible.

Joe Bishop-Henchman ([26:17](#)):

Right.

Nikki Dobay ([26:18](#)):

Well, thank you again, Joe. Super great brief. Congratulations on all the great, amazing work you all do, and we will definitely be catching up again soon. Thank you to our listeners for tuning into this episode. Information for Joe and I will be in the show notes. If you have any questions or comments, please leave us feedback. I will be with you again on the next episode of GeTtin' SALTy.