Are you paying Mandatory Repatriation Tax and GILTI Tax?

The 2017 Tax Cuts and Jobs Act ("TCJA") redefined the U.S. Tax Code as regards U.S. shareholders owning greater than 9% of foreign corporations by requiring them to pay a Mandatory Repatriation Tax on post 1986 accumulated undistributed income, that was previously deferred until those earnings were distributed (or deemed distributed) to the U.S. shareholders. The tax is often referred to as a Transitional Tax and the foreign corporations as Specified Foreign Corporations ("SPFC").

In addition, the TCJA created a new concept in response to claims that American shareholders of foreign corporations located in No or Low Tax jurisdictions that they must currently pay tax on non asset generated income that escaped taxation by foreign countries. This is known as the Globally Intangible Low Taxed Income (GILTI) tax. Under GILTI, the earnings of certain foreign corporations that is "deemed" distributed is included in the U.S. shareholder's taxable income as well.

On the Supreme Court of the United States ("SCOTUS") calendar this year is a case commonly referred to as "Moore" which challenges the constitutionality of the MRT. Should the SCOTUS rule in favor of Moore (and not the U.S. Government), not only the MRT be ruled as a violation of the 16th Amendment, but also the GILTI tax as well as possibly the deemed distribution provisions that concern Subpart F.

Although some believe it unlikely that SCOTUS will rule against the government, given the irrevocable impact that such a ruling would have, should the SCOTUS rule in favor of Moore, refunds may be available to taxpayers who made payments during "open" years. By statute, with certain exceptions, most income tax years are closed to IRS assessments and taxpayer refund claims based on the later of three years of the due date of the tax return or two years after a tax is paid.

In this regards, as taxpayers had the option of paying the MRT over 8 years, some of those years may remain open (as well as years for which the GILTI tax applied should that be deemed unconstitutional as well). However, as a ruling is not anticipated until August, 2024, affected taxpayers may wish to consider possibly filing what is known as a "protective refund claim" for those years that remain open at this time. Accordingly, should you fall into this scenario, you may wish to discuss this with your tax advisor.