

No. 24-1284

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**United States Court of Appeals  
For the Federal Circuit**

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MATTHEW CHRISTENSEN, KATHERINE KAESS CHRISTENSEN,

*Plaintiffs–Appellees,*

v.

UNITED STATES,

*Defendant–Appellant.*

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On Appeal from the Judgment of the  
United States Court of Federal Claims, No. 20-935  
Senior Judge Marian Blank Horn

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**BRIEF OF *AMICI CURIAE*  
H. DAVID ROSENBLOOM AND FADI SHAHEEN  
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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ELIZABETH J. STEVENS  
CAPLIN & DRYSDALE, CHARTERED  
One Thomas Circle, NW  
Suite 1100  
Washington, DC 20005  
(202) 862-5000  
estevens@capdale.com

*Attorney for Amici Curiae*

July 1, 2024

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## CERTIFICATE OF INTEREST

(1) Provide the full names of all entities represented by undersigned counsel in this case.

H. David Rosenbloom

Fadi Shaheen

(2) Provide the full names of all real parties in interest for the entities.

N/A

(3) Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

N/A

(4) List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities.

None.

(5) Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

N/A

(6) Provide any information required under Fed. R. App. P. 26.1(b) and 26.1(c).

N/A

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## INTEREST OF THE AMICI CURIAE

H. David Rosenbloom and Fadi Shaheen (“Amici”) are law professors who share an interest in the consistent, fair, and efficient administration of U.S. tax laws. Their scholarship focuses on U.S. international tax law and includes articles on the questions before the Court in this case.<sup>1</sup> Amicus H. David Rosenbloom is a former International Tax Counsel of the U.S. Treasury Department and Director of its Office of International Tax Affairs. He has negotiated numerous tax conventions (commonly referred to as “tax treaties”) on behalf of the United States and has regularly taught courses on international tax subjects, including tax treaties, at U.S. law schools and at academic institutions abroad. He is a practicing attorney and the James S. Eustice Visiting Professor of Law and Director of the International Tax Program, a master-of-laws program, at New York University School of Law (“NYU”). Amicus Fadi Shaheen is a Professor of Law and Professor Charles Davenport Scholar at Rutgers University Law School (“Rutgers”). He teaches

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<sup>1</sup> H. David Rosenbloom & Fadi Shaheen, *Toulouse: No Treaty-Based Credit?*, 104 TAX NOTES INT’L 417-422 (2021) [hereinafter Rosenbloom & Shaheen, *Toulouse*]; H. David Rosenbloom & Fadi Shaheen, *The TCJA and the Treaties*, 95 TAX NOTES INT’L 1057-1070 (2019); H. David Rosenbloom & Fadi Shaheen, *The BEAT and the Treaties*, 92 TAX NOTES INT’L 53-63 (2018). *See also*, H. David Rosenbloom & Fadi Shaheen, *Treaty Override: The False Conflict Between Whitney and Cook*, 24 FLA. TAX REV. 375 (2021); Fadi Shaheen, *How Reform-Friendly Are U.S. Tax Treaties?*, 41 BROOKLYN J. INT’L L. 1243 (2016).

courses on U.S. international tax law and tax treaties (and other tax subjects) at Rutgers, at NYU, and abroad.

Amici support the position of Appellees. They file this brief to provide the Court with additional perspective on the role of tax treaties in the U.S. income tax system and the implications of the issues presented. Amici believe this perspective will aid the Court in reaching an informed decision.<sup>2</sup>

## INTRODUCTION

This case concerns the proper interpretation of the income tax convention between the United States and France (“the treaty with France”),<sup>3</sup> and in particular article 24 (Relief From Double Taxation) of that treaty. The specific point at issue is whether article 24(2) provides for a U.S. foreign tax credit against the liability of an individual U.S. citizen resident in France for the U.S. Net Investment Income Tax (“NIIT”) imposed by section 1411 of the Internal Revenue Code (“the Code”).

That seemingly narrow issue has a broad reach. Many U.S. income tax treaties contain provisions similar to article 24 of the treaty with France, as do the U.S.

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<sup>2</sup> No counsel for a party authored this brief in whole or in part and, apart from Amici, no person (including the parties and their counsel) funded the brief’s preparation or submission. All parties have consented to its timely filing.

<sup>3</sup> Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Fr.-U.S., Aug. 31, 1994, 1963 U.N.T.S. 67, as amended, Protocol, Dec. 8, 2004, 2478 U.N.T.S. 175, as amended, Protocol, Jan. 13, 2009, 2659 U.N.T.S. 82.

Model Income Tax Conventions used as a starting point for treaty negotiations with other countries.<sup>4</sup> The proper interpretation of article 24 has relevance for cases involving taxpayers other than individuals, for treaties with countries other than France, and for contexts beyond the NIIT.

Amici think this case is of major significance for the U.S. tax treaty program. They believe the court below reached the correct result in finding that a foreign tax credit is available against the NIIT by reason of the treaty with France, independently of the Code. They also believe the court below erred in concluding that only article 24(2)(b) of the treaty with France, not article 24(2)(a), provides for that independent treaty-based foreign tax credit. They urge this court to affirm the result reached by the court below on the basis of article 24(2)(a).

### **BACKGROUND**

It is generally accepted among nations that jurisdiction to impose income tax can properly be based on the source of income or the residence of the taxpayer. To these jurisdictional bases for taxation the United States adds citizenship. It is virtually alone in the world in doing so.

The basic agreement in an income tax treaty is that the country where income has its source will reduce or eliminate its tax on some of that income, and the country

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<sup>4</sup> The 2016 version of the U.S. Model Income Tax Convention is the most recent in a series of U.S. Models first published in 1976.

of the taxpayer's residence will undertake to exempt income from the source country or provide a foreign tax credit for what remains of tax of the source country, so that international double taxation can be eliminated or, at least, mitigated. Every country is both a country of source (of income) and a country of residence (of taxpayers). Normally, agreements reached in a tax treaty are reciprocal.

In its modern tax treaties, the United States takes the position that the tax of the country where income has its source takes precedence over the tax of the country of the taxpayer's residence, and the tax of the country of residence takes precedence over any residual U.S. tax based on citizenship. The country of residence is obliged to relieve double taxation by according exemption of income from, or a credit for the tax of, the country of source. The United States provides relief from double taxation by allowing a credit for the source country tax against the U.S. residence-based tax, and by allowing a credit for the net tax of the country of residence against the U.S. citizenship-based tax.<sup>5</sup> In its tax treaties, the United States has historically used only the foreign tax credit, not exemption of income, as its means of providing relief from international double taxation.

In the present case, Appellees have no U.S.-source income that is subject to the NIIT. The NIIT was imposed by the United States on the basis of Appellees'

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<sup>5</sup> See U.S. Model Income Tax Convention, art. 23, ¶¶ 2, 4, [https://home.treasury.gov/system/files/131/Treaty-US-Model-2016\\_1.pdf](https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf).

citizenship on their income having a source in France. France imposed its tax on the same income, on the basis of Appellees' residence. That tax is high enough that there should be no residual U.S. tax on the basis of citizenship after the allowance of a foreign tax credit as provided in article 24. The Government refuses to allow such a credit, however, and insists on applying the NIIT to Appellees on the basis of their citizenship. This is a position in favor of international double taxation.

### **ARGUMENT**

Tax treaties are the supreme law of the land.<sup>6</sup> They are equal in legal status to U.S. tax statutes. Neither statute nor treaty takes precedence simply by reason of being a treaty or a statute.<sup>7</sup> Under the Constitution a treaty can override a conflicting statutory rule, and a statute can override a conflicting treaty. There is no inherent preference for statute or treaty.<sup>8</sup>

Nevertheless, the very purpose of a tax treaty is to establish legal rules that do not appear in a tax statute—in other words, to supplement, qualify, or override the statute. Treaties are in the nature of contracts between sovereign nations. U.S. tax treaties are invariably bilateral agreements, with a single counterparty. They are negotiated in order to adjust the prevailing tax rules to the circumstances of

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<sup>6</sup> U.S. Const. art. VI.

<sup>7</sup> I.R.C. § 7852(d)(1) (restating the Constitutional rule).

<sup>8</sup> There is no override issue in this case because the Code and the treaty with France are not in conflict.

individual foreign countries so as to promote cross-border trade and investment. For example, U.S. tax treaties relinquish or subordinate taxing rights that the United States would have under the Code in exchange for comparable concessions by the treaty counterparty, in order to limit instances of international double taxation. Thus, tax treaties invariably change or supplement statutory tax rules that would apply in the absence of a treaty.

One such statutory tax rule specifies U.S. taxes that can be reduced by statutory foreign tax credits. The NIIT is not among those taxes. Thus, the Code does not provide for a foreign tax credit against the NIIT. However, the Code neither says nor implies that there cannot be a foreign tax credit against the NIIT under a treaty. The NIIT legislation and its legislative history are silent on that subject.

Yet, the Code clearly envisions independent treaty-based foreign tax credits.<sup>9</sup> Such treaty-based foreign tax credits supplement the Code without contradicting it.

The NIIT had not been enacted when the treaty with France was negotiated or when it was last amended by protocol. Article 2 of the treaty provides, however, that taxes enacted after the date of signature of the treaty and that are substantially similar to taxes specified as the subject of the treaty are covered by the treaty. Article

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<sup>9</sup> Internal Revenue Code § 6511(d)(3) deals with overpayments attributable to foreign taxes “for which credit is allowed against the tax imposed by subtitle A in accordance with the provisions of section 901 or the provisions of any treaty to which the United States is a party.”

2 explicitly covers the U.S. federal income tax. The NIIT, a tax on income, is substantially similar to the U.S. federal income tax and is therefore covered by the treaty with France. This point is not in dispute. This means the NIIT, as a subject of the treaty, is a “United States income tax” referenced in article 24 of the treaty, with respect to which both France and the United States are obligated to provide relief from double taxation in appropriate circumstances—France under article 24(1) and the United States under article 24(2).<sup>10</sup>

Tax treaties are properly interpreted to reflect the shared expectations of the treaty counterparties. A leading decision on that point, *National Westminster Bank, PLC v. United States*,<sup>11</sup> states that “effect must be given to the intent of both signatories.”<sup>12</sup> The views of the United States, though relevant, are not controlling.<sup>13</sup> The United States is one party to a contract, and the shared expectations of both parties are the proper guide to its interpretation.<sup>14</sup>

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<sup>10</sup> There is no hint in article 24 that the United States (or France) is obligated to provide relief for some, but not all, covered taxes, as the court below and the Government seem to suggest.

<sup>11</sup> 512 F.3d 1347 (Fed. Cir. 2008).

<sup>12</sup> *Id.* at 1353 (citing *Xerox Corp. v. United States*, 41 F.3d 647, 656 (Fed. Cir. 1994)).

<sup>13</sup> *N. W. Life Assurance Co. of Canada v. Comm’r*, 107 T.C. 363 (1996).

<sup>14</sup> *United States v. Stuart*, 489 U.S. 353, 374 (1989) (Scalia, J., concurring) (“The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to.”).

In appropriate circumstances France is required by article 24 to relieve double taxation with respect to U.S. tax levied on the basis of source, by granting exemption of income or a foreign tax credit. An appropriate circumstance would be when a U.S. citizen resident in France earns income from real property located in the United States. The source of the income would be the United States, and tax treaties normally allow the source country to retain the full right to impose tax on income from real property. The U.S. citizen resident in France would be subject to both French tax on the basis of residence and U.S. tax, including the NIIT, on the basis of both source and citizenship. France is obligated to provide relief from double taxation with respect to income that the treaty allows the United States to tax on the basis of source.

The position of the Government in this matter is that, in the converse case, the treaty with France affords no U.S. foreign tax credit against the NIIT. Referring to the decision of the Tax Court in *Toulouse v. Commissioner*,<sup>15</sup> the Government maintains that there is no U.S. treaty-based foreign tax credit because there is no foreign tax credit against the NIIT in the Code.

It is hard to reconcile this position with the decision of the Supreme Court in *O'Connor v. United States*,<sup>16</sup> a case cited by the Government in the apparent belief

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<sup>15</sup> 157 T.C. 49 (2021).

<sup>16</sup> 479 U.S. 27 (1986).

that it favors the Government’s position. *O’Connor* is, in fact, strongly supportive of the Appellees. Taxpayers argued that a provision in the Panama Canal Treaty to the effect that U.S. citizen employees of the Panama Canal Commission “shall be exempt from any . . . taxes . . . on income”<sup>17</sup> meant they were not only exempt from income taxes in Panama but also excused from paying U.S. income tax. The Supreme Court referred to this reading of the text as “utterly implausible” and without “foundation in the negotiations” of the treaty.<sup>18</sup>

The same can be said in the present case. It is implausible that the shared expectations of the United States and France would have consisted of, on the one hand, a French undertaking to relieve double taxation when a U.S. tax (such as the NIIT) is properly imposed on income that the United States has a first right to tax on a source basis and, on the other hand, a U.S. refusal to allow a credit for French income tax against that U.S. tax when France has the first right to tax. Such a nonreciprocal assignment of rights to the advantage of the United States is not consistent with the general practice of reciprocity that is followed, with almost no exceptions, in income tax treaties. Accepting the Government’s position would create an implausible imbalance between the treaty counterparties.

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<sup>17</sup> *Id.* at 29 (alteration in original).

<sup>18</sup> *Id.* at 31.

Moreover, there is copious evidence, marshalled in the Brief of the Appellees, to the effect that the positions of the Government and the court below based on *Toulouse* cannot be correct. U.S. tax treaties have provided foreign tax credits independent of the Code on a number of occasions. Those independent treaty-based foreign tax credits would not stand if the Government's position in this case were correct.<sup>19</sup>

The Model Technical Explanation issued by the Treasury Department to interpret the U.S. Model Income Tax Convention of 2006 states clearly that model article 23, titled Relief from Double Taxation, guarantees a credit.<sup>20</sup> The relevant provision appears in the discussion of article 23(2):

*The credits allowed under paragraph 2 are allowed in accordance with the provisions and subject to the limitations of U.S. law, as that law may be amended over time, so long as the general principle of the Article, that is, the allowance of a credit, is retained. Thus, although the Convention provides for a foreign tax credit, the terms of the credit are determined by the provisions, at the time a credit is given, of the U.S. statutory credit.*

Therefore, *the U.S. credit under the Convention* is subject to the various limitations of U.S. law (see, e.g., Code sections 901-908). For example, the credit against U.S. tax generally is limited to the amount of U.S. tax due with respect to net foreign source income within the relevant foreign tax credit limitation category (see Code section 904(a) and (d)), and the dollar amount of the credit is determined in accordance with U.S. currency translation rules (see, e.g., Code section 986). Similarly,

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<sup>19</sup> Rosenbloom & Shaheen, *Toulouse*, *supra* note 1, at 418, 420-21 (regarding the Italian IRAP).

<sup>20</sup> No Model Technical Explanation was issued to interpret the Model Income Tax Convention of 2016.

U.S. law applies to determine carryover periods for excess credits and other inter-year adjustments.<sup>21</sup>

Thus, the Treasury Department, which develops the models on which U.S. treaty negotiations are based and which is charged with negotiating U.S. tax treaties (including, of course, the treaty with France) has clearly expressed a view of the article dealing with relief from double taxation that is contrary to the Government's position. The "subject to limitations" language of the model article and of article 24(2)(a) of the treaty with France refers to limitations on the *amount* of the credit, nothing more.<sup>22</sup>

A reading of article 24 that grants no foreign tax credit independent of what is found in the Code would be inconsistent with decades of U.S. tax treaty practice, as well as several U.S. tax treaties currently in force. It would hold implications for U.S. taxpayers of all types, who rely on U.S. tax treaties to provide relief from international double taxation.

And there is absolutely no reason for such a reading. Nothing in the Code or the legislative history of the NIIT suggests that Congress intended to prohibit a treaty-based foreign tax credit against the NIIT. Nor is there anything strange or unusual about a tax treaty affording a benefit not found in the statute. Indeed, that

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<sup>21</sup> U.S. Model Technical Explanation Accompanying the U.S. Model Income Tax Convention of November 15, 2006, at 74, <https://www.irs.gov/pub/irs-trty/temod006.pdf> (emphasis added).

<sup>22</sup> See Rosenbloom & Shaheen, *Toulouse*, *supra* note 1, at 419-21.

is precisely why treaties are negotiated—to provide benefits that do not appear in the statute.

### CONCLUSION

For the reasons set forth above, the result reached by the Court of Federal Claims should be affirmed on the basis of article 24(2)(a) of the treaty with France.

Respectfully submitted,

*s/ Elizabeth J. Stevens*

Elizabeth J. Stevens

Caplin & Drysdale, Chartered

One Thomas Circle NW, Suite 1100

Washington, DC 20005

Telephone: (202) 862-5000

Email: [estevens@capdale.com](mailto:estevens@capdale.com)