No. 12-43

IN THE

Supreme Court of the United States

PPL CORPORATION AND SUBSIDIARIES,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* N. JEROLD COHEN, CAROL P. TELLO, AND SHANE A. LORD IN SUPPORT OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

N. JEROLD COHEN
Counsel of Record
SHANE A. LORD
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree St., N.E.
Atlanta, GA 30309
(404) 853-8000
Jerry.Cohen@sutherland.com

CAROL P. TELLO
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

August 7, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether, in determining the creditability of a foreign tax, courts should employ an approach that relies on the form of a foreign tax statute or an approach that looks to the operational substance of the foreign tax statute.

INTEREST OF *AMICUS CURIAE*

We practice in the tax law area and are frequently confronted with questions concerning foreign tax credit matters.[1] One of *Amicus Curiae*, N. Jerold Cohen, was a former Chief Counsel of the Internal Revenue Service and, as such, participated in the formulation of the foreign tax credit regulations at issue in this case. Another, Carol P. Tello, is a well-known international tax lawyer and Chair of the Committee of the Tax Section of the American Bar Association concerned with foreign tax credits. The third, Shane A. Lord, works closely with Mr. Cohen, Ms. Tello, and other tax attorneys. As tax practitioners, we have an obligation to properly advise and protect both our clients and the tax system. When a key element of the tax law becomes clouded by contradictory holdings of two different circuits of the U.S. Court of Appeals, our ability to properly advise our clients and balance our obligation to them and the tax system becomes difficult. Determining the proper credibility of foreign taxes is just such a key element.

The two circuit court cases at issue here are diametrically opposed as to the applicability of the doctrine of form versus substance in resolving the determination of foreign tax creditability. Form versus substance is a key doctrine of tax law that permeates the tax law, affecting almost all tax determinations.

The question raised by the conflicting decisions in the two circuits is whether the taxpayer is required

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus curiae's* intent to file this brief. Petitioner and respondent have consented to the filing of this brief. Petitioner's consent letter has been filed with the Clerk of this Court. A copy of respondent's consent letter is being submitted with this brief.

to look to the substance of the foreign tax statute in determining whether the tax is a creditable foreign tax or is bound by its form. This split in the approach to foreign tax credits by the two circuits does not merely affect the particular foreign tax at issue in this matter. It affects, and will affect, many determinations as to the credibility of foreign taxes in general. Furthermore, the applicability of a form versus substance analysis in other areas of the tax law could be affected by a determination as to which of the two circuit courts applied the correct approach.

The Fifth Circuit and U.S. Tax Court have determined that the substance of a foreign tax is the determinative factor in deciding the credibility for U.S. tax purposes of the foreign tax. The Third Circuit has determined that the form of the foreign tax provision actually governs. This dichotomy between the Fifth Circuit and Third Circuit holdings regarding the application of the substance over form doctrine in the foreign tax credit area threatens to disrupt the ability of tax practitioners to properly advise their clients. The contradictory holdings in the circuits raise questions for tax practitioners that must be answered for them to uphold their obligation to the U.S. tax system and their clients.

Thus, it is paramount for tax practitioners and taxpayers that this circuit conflict be resolved. As tax practitioners, the split between the circuits regarding the doctrine of form versus substance has large tax policy ramifications that affect both the advice provided to our clients and our ability to protect the integrity of the tax system.

STATEMENT OF THE CASE

To avoid double taxation, section 901 of the Internal Revenue Code allows U.S. taxpayers a tax credit

for income, war profits, or excess profit taxes paid to another country. In defining such taxes, Treasury Regulation § 1.901-2(a)(1) provides that a foreign tax is a creditable tax "if and only if—(i) It is a tax; and (ii) The predominant character of that tax is that of an income tax in the U.S. sense."

While this case involves application of section 901 to a "windfall tax" imposed by the United Kingdom, the broader implication of this case involves the general test of foreign tax creditability for all U.S. taxpayers. The key to that test is whether the "predominant character" of a foreign tax is "an income tax in the U.S. sense."

The "windfall tax" in this case is on the excess "value" of certain companies that were privatized in the 1980s and 1990s above their privatization price. The excess "value" was measured by the companies' profits during the four years immediately after privatization. While the form of the statute would clearly indicate intent to tax the "value" of the companies, the tax's practical effect is to impose a tax on the "excess profits" of the companies during the four year period after privatization.

Consistent with the form of the statute, the Commissioner has taken a position that the "windfall tax" is on "value," not income, and, therefore, is not a creditable foreign tax. The Tax Court held against the Commissioner, finding that the tax, in substance, is the equivalent of an income tax in the U.S. sense. The Third Circuit reversed the Tax Court. The Third Circuit deemed the tax non-creditable because the U.K. statute provides that the tax is on the difference between two values.

In a case arising out of the same U.K. tax, same tax court proceedings, and same evidentiary record, the

Fifth Circuit reached the opposite conclusion and affirmed the Tax Court's holding. Recognizing that it was creating a circuit split, the Fifth Circuit criticized the Third Circuit's analysis and held that courts must look beyond the form of a foreign tax statute and consider the tax's practical operation when determining whether it is creditable for U.S. tax purposes. The Third Circuit and Fifth Circuit holdings are in conflict as to the critical question of whether (or to what degree) the form of a foreign tax statute determines the "predominant character" of a tax. The application of this key test for creditability of foreign taxes impacts every U.S. taxpayer.

The Court should grant certiorari to resolve this circuit conflict, which is not limited to the particular tax at issue in the cases.

REASONS FOR GRANTING THE PETITION

1. The split in the decisions by the Fifth Circuit and Third Circuit results from two diametrically opposed views of the proper factors in determining the credibility of a foreign tax. While the issue of determining the credibility of this particular foreign tax may not be one that reaches a great number of U.S. companies, the interpretation of the relevant Treasury regulations is important to a great number of U.S. taxpayers and generally has widespread ramifications.

2. At the present time, there are three courts that have addressed the proper approach to the credibility of this foreign tax. The Fifth Circuit and Third Circuit Courts of Appeals have set out two entirely different approaches to making this determination. This is so even though they were considering the same tax and the same lower court determination. That lower court was the United States Tax Court.

While the U.S. Tax Court has nationwide jurisdiction, under its precedent of *Golsen v. Commissioner*, 54 T.C. 742 (1970), it is bound to follow the holding of the circuit to which a case it is considering would be appealed. Since the U.S. Tax Court hears over 90 percent of the disputed tax cases, this creates a strange result in which it might find a tax credible for taxpayers in the Fifth Circuit who bring a case to it while rejecting creditability for the same tax for taxpayers in the Third Circuit.

3. Thus this conflict between the circuits means that the approach to the determination of whether a foreign tax is or is not credible will depend upon the taxpayer's residence or principal place of business. Not only is that result unsatisfactory from the point of view of administration of the United States' income tax laws, but it puts tax advisors in a difficult position. Must they wait to see which of the two courses will be followed in other jurisdictions or make a guess as to that outcome?

4. When there is such a split between the circuits with regard to a key doctrine of tax law, taxpayers and their advisors expect the Supreme Court to resolve the matter. If there were a way to resolve the split, to reconcile the decisions, then all may be required to be patient and await further guidance as other courts wrestle with this issue. Here, however, there is absolutely no way to reconcile these decisions. Either credibility is to be determined under the approach taken by the Third Circuit or by the Fifth Circuit.

5. Under these circumstances, we believe that this is a matter to be resolved by the Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

N. JEROLD COHEN
Counsel of Record
SHANE A. LORD
SUTHERLAND ASBILL &
BRENNAN LLP
999 Peachtree St., N.E.
Atlanta, GA 30309
(404) 853-8000
Jerry.Cohen@sutherland.com

CAROL P. TELLO
SUTHERLAND ASBILL &
BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

August 7, 2012