12-43 PPL CORPORATION V. COMMISSIONER OF INTERNAL REVENUE

DECISION BELOW: 665 F.3d 60

LOWER COURT CASE NUMBER: 11-1069

QUESTION PRESENTED:

To avoid double taxation, section 901 of the Internal Revenue Code allows U.S. corporations a tax credit for income, war profits, or excess profits taxes paid to another country. This case involves application of section 901 to a "windfall tax" imposed by the United Kingdom. Although it is undisputed that the tax's practical effect is to impose a 51.75% tax on the "excess profits" certain companies earned in the four years after they were privatized, the Third Circuit-at the Commissioner's urging-deemed the tax non--creditable because the U.K. statute nominally taxes the difference between two numbers, one of which is driven exclusively by profitability during the four-year period, rather than nominally taxing the profits themselves. 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 considered view. Recognizing that it was creating a clear circuit split, the Fifth Circuit affirmed that courts must look beyond the form and labels of a foreign tax statute and consider the tax's practical operation and intended effect when determining whether it is creditable for U.S. tax purposes.

The question presented is:

Whether, in determining the creditability of a foreign tax, courts should employ a formalistic approach that looks solely at the form of the foreign tax statute and ignores how the tax actually operates, or should employ a substance-based approach that considers factors such as the practical operation and intended effect of the foreign tax.

CERT. GRANTED 10/29/2012