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Doing the Math (and the English) in the Windfall Tax Cases

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INTRODUCTION: THE *PPL* AND *ENTERGY* CASES

In September 2012, the Supreme Court granted certiorari in *PPL Industries v. Comr.*[1] The case involves the qualification of a so-called "windfall tax" imposed by the United Kingdom in 1997 and 1998 for the foreign tax credit allowed by §901(a) of the Code.[2] The Tax Court held that the tax qualifies for the credit,[3] but the decision was reversed by the Court of Appeals for the Third Circuit.[4] In a companion case, the Tax Court followed its *PPL* decision.[5] In that case, the Court of Appeals for the Fifth Circuit affirmed the decision of the Tax Court,[6] creating a split in the circuits. The Supreme Court granted certiorari to resolve the split. The case presents the first time the Court will have addressed the question of the foreign tax credit since its 1938 decision in *Biddle v. Comr.*[7]

The windfall tax (WFT) was imposed by the Labour government of Tony Blair, immediately after it assumed office in 1997, following 18 years of Conservative rule under Margaret Thatcher and John Major. The Conservative government had undertaken a program of selling to private parties businesses that had been owned and operated by the government ("privatization"), beginning with non-monopolies (in the period prior to 1984) and subsequently monopolies such as public utilities (after 1983). The privatized industries proved to be highly profitable in the early years following privatization, leading to public outcry that they had been sold by the government at prices that were too low.

The WFT was designed as a charge that would, effectively and retroactively, increase the price charged for the assets transferred to the private parties, to reduce or eliminate the bargain or windfall element of the original price. The charge was determined by capitalizing the actual profits earned over the first four years following privatization at a rate of 11.1%, to determine the "profit-making value" of the enterprise — i.e., essentially the fair market value or price that "should have been charged" for the company at the time of flotation of the shares of the company. This "profit-making value" was reduced by the price actually charged (flotation value) to determine, essentially, what was deemed the "bargain" element of the transaction. This bargain element was then subjected to a 23% tax.

If the WFT is characterized in this way — and admittedly there is an argumentative element in the characterization — the idea of granting a foreign tax credit for it is, by assumption, both anomalous and to some extent offensive, and may even present constitutional questions of the scope of congressional authority. The grant of a credit essentially says to a U.S.-owned entity that acquired operations in a "privatization" transaction, at a windfall, that if a government assumes power, subsequent to the government that authorized the privatization transaction, and that government retrospectively but lawfully increases the price charged in the privatization transaction, the U.S. Treasury will bear the cost of the increase, thus rendering the U.S. Treasury a guarantor to the taxpayer of the benefit of the earlier windfall accorded by the earlier government. This implicates the U.S. Treasury in the internal politics and fiscal affairs of a foreign government, constitutes an arbitrary and uncompensated service (the guarantee) provided by the Treasury to a private party, and, to an extent, commits the U.S. government to the support of an economic policy (privatization) that has not been approved through any kind of democratic process in the United States.

The Tax Court decision rested upon a rejection of the characterization of the windfall tax in the manner described above. In the view of the Tax Court, and also the Fifth Circuit, the taxpayers, and amici who have appeared in the Supreme Court proceeding, the WFT was nothing more than a retroactive excess profits tax, imposed on the profits in the first four years. The cornerstone of their argument was that with respect to no affected taxpayer did the tax exceed the profits with respect to which the tax was computed, and thus the tax liability can be expressed as a percentage (less than 100%) of the profits involved, which furthermore was, more or less, constant over the numerable taxpayers subject to the tax. The taxpayer, amici, and the decisions argue that the fact that this tax rate is different from the nominal (statutory) tax rate should not matter, so long as the "constructed" tax rate does not exceed 100%.

On this view, a credit for the tax is concededly less offensive. It simply appears as an application of what foreign tax credits ordinarily do, i.e., mitigate taxation when two jurisdictions impose comparable taxes on the same tax base. But even given this characterization, the granting of the credit still has a troubling as-

[1] 133 S. Ct. 571 (2012).

[2] All references to the Code are to the U.S. Internal Revenue Code of 1986 unless otherwise indicated.

[3] *PPL Industries v. Comr.*, 135 T.C. 304 (2010), *rev'd*, 665 F.3d 60, *cert. granted*, 133 S. Ct. 571 (2012).

[4] *PPL Industries v. Comr.*, 665 F.3d 60, *cert. granted*, 133 S. Ct. 571 (2012).

[5] *Entergy Corp. v. Comr.*, T.C. Memo 2010-197, *rev'd*, 683 F.3d 233 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 571 (2012).

[6] *Entergy Corp. v. Comr.*, 683 F.3d 233 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 571 (2012).

[7] 302 U.S. 573 (1938).

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pect. The windfall tax is widely viewed, in the United Kingdom and in international circles, as a ''partial'' or ''creeping'' renationalization of the previously privatized enterprises. International law and norms and the constitutional norms of many countries, including probably the U.S., require compensation when an industry is nationalized, partially or otherwise. It is a pointed question why that compensation should be paid by a home government of the investor whose interests are ''partially'' nationalized, particularly when the act of nationalization is one quite antagonistic to the practices of the home government, which in this case is the United States.

The Third Circuit rejected the view of the foreign tax credit regulations implicit in the taxpayer's position and the decisions of the other courts. Under its view, the governing regulations do not permit a taxpayer to ''reconstruct'' the foreign rate to determine whether the foreign tax liability falls only on profits subject to U.S. tax. The determination should be made strictly upon the manner in which the foreign state defines its tax base: the question should be whether and the extent to which the two countries define the base, to determine whether both are imposing tax upon the same amounts.

The objective in this article is to raise two difficulties with the decisions of the lower courts that the aim of the WFT was to reach net gain in normal circumstances, as required by existing U.S. regulations. Two arguments of the Tax Court and Fifth Circuit are addressed. The first is that the windfall tax as constructed is the ''equivalent'' of a garden-variety excess profits tax. This is done by the use of simple algebra, set forth below.

The second is to address an argument, stressed by the taxpayers' briefs in the Supreme Court, that the fact that the tax was imposed retroactively, and that its incidence could be determined absolutely, militates in favor of a finding that the tax was ''likely to reach net gain in the normal circumstances'' to which it applies. Rather, I argue below that, that circumstance weakens the case for fitting the WFT into the regulatory definition of a tax ''in the U.S. sense.'' Dictionary definitions of ''likely'' define the word as a synonym for ''probable,'' and dictionary definitions of ''probable'' define that term as excluding what is absolutely ''certain.''

THE U.K. PRIVATIZATION AND THE WINDFALL TAX

Between 1979 and 1983, the Conservatives privatized mostly companies that were not monopolies and did not require specific economic regulation. Between 1984 and 1996 the U.K. government privatized more than 50 government-owned companies, many of which were monopolies.

The Tax Court says that ''the U.K. Government privatized those companies'' — it is unclear whether ''those'' refers to all the companies, or only the 50 ''privatized'' in 1984–96 — ''largely'' through ''public flotations (share offerings) at fixed price offers, which involved the transfer of those government-owned enterprises to new public limited companies (plcs), followed by what was essentially a sale of all or some of the shares in the new plcs to the public.''[8] The enterprises became publicly traded companies listed on the London Stock Exchange, and the Tax Court opinion says that in most cases, ''the floated shares opened for trading at a substantial premium over the price the flotation investors paid for the shares.''[9]

Apparently, there were 32 U.K. government-owned companies that were privatized and became liable for the WFT; again, the Tax Court opinion is not clear whether these include all private companies, but it seems it is referring only to those that were regulated after privatization. The *PPL* decision involved a Pennsylvania corporation, and South Western Electricity plc (SWEB), which the Tax Court characterizes as an ''indirect subsidiary'' of the Pennsylvania corporation. SWEB was one of 12 ''regional electric companies'' (RECs) privatized in 1990.

The opinion details that these utilities were regulated in a manner that regulated prices, rather than profits, and details the public perception that the profits proved to be excessive under this regulatory regime. It details that the Labour Party planned to capitalize on the unpopularity of the results of privatization, and that in May 1996 the party's ''shadow treasury'' hired Arthur Andersen, described by the Tax Court opinion as a ''tax consulting firm,'' to help develop a proposal, which was finalized and presented to the future Chancellor of the Exchequer in November 1996. Labour regained power in 1997, and the WFT was adopted in July 1997.

The WFT had a rate of 23%. It was imposed on companies ''whose privatisation involved the imposition of economic regulation,'' the 32 privatized after 1983.[10] Its base was the excess of:

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[8] *PPL Industries v. Comr.*, 135 T.C. 304, 306 (2010). By saying that the ''flotations . . . involved the transfer of those Government-owned enterprises to new public limited companies,'' it is not altogether clear what the Tax Court means, and it may matter, if not in terms of the doctrinal issues argued by the parties and considered by the courts, in terms of other rules which would appear to be applicable, although they are not mentioned in the three decisions. The term ''enterprises'' does not describe anything that, in legal parlance, can be said to be, again in legal parlance, ''transferred.'' Presumably, the U.K. government ''transferred'' the *assets comprising the enterprise* to the new public entity. What happened to certain intangible assets ordinarily critical to the operation of privately owned and operated quasi-monopolies in advanced free enterprise economies, e.g., licenses, is not clear: the creation of the plcs may have entailed the transfer of existing licenses or the creation of new ones for the newly created business entities.

[9] *Id.*, at 304, 307.

[10] *Id.*, at 313, quoting Finance (No. 2) Act, 1997, ch. 58, part I,

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(a) the value in profit-making terms of the disposal made on the occasion of the company's flotation [over]

(b) the value which for privatisation purposes was put on that disposal.[11]

In other words, the excess of the fair market value of the company at the time of privatization over the price charged for the shares. The ''value of a disposal in profit-making terms of the disposal'' on the ''occasion of flotation'' was defined as the amount produced by multiplying:

the average *annual profit* for the company's *initial period* by

the *applicable price-to-earnings ratio*.[12]

The *initial period* was the period encompassing the company's first four financial years after flotation or the lesser period of existence for companies operating for less than four financial years after privatization and before April 1, 1997. The average annual profit for the company was determined by dividing 365 by the number of days in the period and multiplying by the amount of the *total* profits for the company's initial period. The total profits were the company's *after-tax profits* for *financial reporting purposes* as determined under relevant provisions of the U.K. Companies Act 1985, or its '' 'profit on ordinary activities after tax' as determined under U.K. financial accounting principles and standards and as shown in the company's profit and loss accounts prepared in accordance with the U.K. Companies Act of 1985, as amended.''[13]

The applicable price-to-earnings ratio was nine.

DOING THE MATH: THE ALGEBRAIC CONTROVERSY

An Example

To take an example, suppose the company had been ''floated'' at a price of 500*x* originally. Suppose the company earned 75*x* for each of the first four years — a profit rate of 15% annually. The windfall tax statute would impute a ''fair'' price for the shares to be such that the profit rate would be 11.1% — meaning the price would be nine times the annual earnings, or 675*x*. The excess of this amount over the original issue price ($175x = 675x - 500x$) would be the base of the tax. The tax would be 23% of that amount, or 40.25*x*. I am here ignoring the ''number of days'' feature of the tax provisions, and computing amounts solely on the basis of years; I shall continue to do this, except at the limited points in the discussion where it makes a difference to talk of days.

The stated objective of this scheme is to bring the original investment up to a point where the ongoing operations of the privatized businesses are not so profitable. But it does this quite irregularly, because it does not require a payment of the *full* amount of the excess of the imputed value over the amount charged, but rather requires only 23%. This makes a considerable difference, after the payment of the WFT, in both the profit rate of the enterprise (retrospectively viewed), and the percentage of the original share price that the tax constitutes. For instance, if in our example the profit rate were 12% (60*x* profit per year), the WFT would be 9.2, raising the total investment to 509.2. This reduces the profit rate experienced in the initial public offering to 11.78%, not a huge reduction, and constitutes only 1.84% of the initial price. On our example using a 15% profit rate, the corresponding figures are 13.88% and 8.25%. The reduction in the profit rate is about five times the reduction when the profit rate was 12%; and the WFT as a percentage of the original price is almost five times what it is when the profit was 12%. If the profit rate is 20% (100*x* per year) — a limiting case, for reasons to be addressed presently — the WFT would be 92*x*, the after-WFT profit rate would be 16.89%, and the WFT as a percentage of the initial investment would be 18.4%. Thus, it is clear that the greater the profit rate (before the WFT), the greater the percentage reduction in the after-WFT profit rate, and the greater the WFT as a percentage of the original investment. However, the WFT, despite its outwardly equalizing objectives, still left disparities in the after-WFT profit rate.

The Taxpayer's Algebra

The taxpayers' arguments in *PPL* and *Entergy* had an algebraic underpinning. Begin with an algebraic expression for the computation of the tax:

$$(1) \qquad T = .23 \times \left[(365 \times \left(\frac{P}{D} \times 9\right) - FV\right]$$

where T represents the tax liability; 23% is the tax rate, P is the company's aggregate initial-period profit, D is the length of the initial period in days, and FV is the company's flotation value.

Let us take a moment and define what is in brackets in equation (1) as the tax base (TB), that is, the quantity identified by the statute that is multiplied by the tax rate to get the tax:

$$(2) \qquad TB = (365 \times \left(\frac{P}{D} \times 9\right) - FV$$

Now in the ordinary case D is going to be 1,461, i.e., four times 365 plus one day for a leap year. We can ignore the one day, and safely treat 365/1,461 as rounded to ¼.

schedule 1, 1(1).

[11] *Id.*, at schedule 1, 1(2)(b).

[12] *Id.*, at schedule 1, 2(1) (emphases supplied).

[13] *Id.*, at 304, 313–14 & n. 8 (2011).

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So we can simplify equation (1) as follows:

$$(3) \qquad T = .23 \times \left[\left(\frac{P}{4} \times 9\right) - FV\right]$$

and equation (2) as follows:

$$(4) \qquad TB = \left(\frac{P}{4} \times 9\right) - FV$$

The taxpayer then resolves equation (3), treating 9⁄4 as 2.25, and assuming FV is zero. Because FV will always be greater than zero, and .23 × 2.25 equals .5175, the taxpayer expresses the maximum amount of windfall tax liability as follows:

$$(5) \qquad T \le .5175\ P$$

Thus, the taxpayer argues that this *looks like* an excess profits tax, at a 51.75% rate, on the aggregate four-year profits of the company. The offset attributable to the flotation value is irrelevant; such an offset is allowed by an ordinary excess profits tax in any event, and the point is that the tax is computed with reference to aggregate profit, which it does not confiscate in full.

There is a concession made, however, which can be expressed mathematically by the following relation, letting TR be a variable (statutory) tax rate:

$$(6) \qquad TR \ge .444 \xrightarrow{\text{yields}} T \ge P$$

In other words, if the tax rate is greater than 44.44%, the tax liability exceeds profits, the tax is confiscatory, and, by hypothesis, the tax would not qualify (in full) for a foreign tax credit. Neither the taxpayers, amici, nor the Tax Court or Fifth Circuit explain how it can be that a tax at 44% would be fully creditable but one at 45% would be in full only deductible. This would create what is called a ''notch effect'': the taxpayer's liability would spike as the rate crossed 44.44%.

Actual Profits: An Alternative Algebra

The contrary reading of the regulations, suggested at the outset, may also be given an algebraic underpinning, although the Internal Revenue Service did not do so in its argument, or even its Supreme Court brief. Let us introduce another variable, which we will call r, as the *average annual profit rate* during the four-year testing period, i.e., the percentage which the average profit earned (P/4) during the four years is of the original flotation value (FV). We now focus on the base of the windfall tax as actually constructed under the U.K. law and not as reconstructed by the taxpayers (i.e., by applying a coefficient in the tax base (2.25) to the tax rate (23%) instead of leaving it as part of the tax base). Getting rid of the ''dailiness'' computation, we wish to determine the threshold at which the *base* of the windfall tax (as actually constructed under the U.K. law) is less than or equal to the four-year profit. Let P be the four-year profit; PMV, the profit-making value; FV, the flotation value; and r the annual profit rate. Thus, the tax base as actually constructed under the U.K. law is PMV − FV, and the equation we wish to solve is as follows:

$$(7) \qquad PMV - FV \le P$$

Representing that the aggregate profit for the four-year period is four times the average annual profit:

$$(8) \qquad P = 4 \times (r \times FV)$$

and the ''profit-making'' value is nine times the average annual profit during the four-year period, or:

$$(9) \qquad PMV = 9 \times (r \times FV)$$

So, plugging equations (8) and (9) into equation (7), we get:

$$(10) \qquad 9rFV - FV \le 4rFV$$

which resolves to:

$$(11) \qquad 5r \le 1$$

This means that r is less than or equal to 1⁄5, or 20%. Thus, if r is greater than 20%, the base of the windfall tax (excess of ''profit-making'' value over flotation value) will be *greater than* the aggregate profits for the four-year period. This consideration may be decisive of the entire case, notwithstanding the welter of other considerations the controversy properly implicates. In fact, the method of the tax — capitalizing profits over a period of years at a fixed rate, and deducting invested capital — will generate a ''break-even'' point with respect to *any* capitalization rate, and *any* period over which profits were calculated. The break-even point will simply be the reciprocal (1 divided by the number) of the difference between the capitalization multiplier and the number of years in the period. Thus, suppose you wanted the rate of return to be 5% (a capitalization rate of 20), and you used only one year in the period. The profit rate at which you taxed an amount in excess of profits would be 1⁄19, or 5.263%. In other words, if we suppose the FV were 100, and the profits in the one year were 10, then the tax base (100, i.e., 20 times 10 (200) minus 100) would greatly exceed actual profits (10). If the profits were 5.263, the tax base would be 20 times 5.263 (105.26) less 100, or 5.26, exactly equal to profits for the year (or close enough for government work).

One can express this mathematically, for any tax structured along the lines of the windfall tax, where K is the capitalization multiple, N is the number of years in the period, R is the break-even profit rate, and, as above, TB is the tax base and P the aggregate profit:

$$(12) \qquad R \ge \frac{1}{K - N} \xrightarrow{\text{yields}} TB \ge P$$

To repeat what this expression means: for *any* capitalization multiple, and any number of years in the testing period, the tax base will exceed aggregate profit in the testing period whenever for any affected company the average annual profit rate exceeds the number one divided by the *excess* of the capitalization multiple over the number of years in the period. This means that compliance with the ''gross receipts'' condition of the regulations is a function of the magnitude of the difference between the capitalization multiple and the length of the period. If the difference is small,

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say one or two, then the profit rate at which a company's tax base will exceed aggregate profits is very high. In such cases, a tax structured along the lines of the WFT may well meet the criteria for being treated as ''likely'' to reach net gain.

But as the difference gets larger, the ''tipping'' profit rate gets smaller, and the more frequent will be the cases where the tax base will exceed aggregate profits, sometimes by considerable amounts. With a difference of five, as specified under the windfall tax, and a ''tipping point'' at 20%, the tax would not appear to meet the gross receipts criterion.

If it will help, a table (Table 1) is attached showing, for all capitalization rates from 1 to 10, and for all testing periods from 1 to 10 years, the profit rate at which corresponding to the pair of numbers chosen above which the tax base, computed using the corresponding capitalization rate and test period, will exceed aggregate profits for the period. This is Table 1.

A second table (Table 2) is attached, which shows for all conceivable profit rates from 12 to 60, the *ratio of the tax base under the windfall tax* (PMV – FV) to aggregate profits for the four-year period. This table shows, for instance, that if the average annual profits during the four-year period were 25% of the flotation value, the tax base of the windfall tax would be 25% greater than the aggregate profits; at a 35% profit rate, the excess is 53.57%; if the profit rate is as high as 50%, the base is a full 75% greater than aggregate profits.

Table 2 also shows, for each profit rate, the effective tax rate, shown as a percentage of profits, which the windfall tax would constitute. As the table shows, on account of the offset for the profits attributable to flotation value, that rate never even really approaches 51.75% — varying from just under 4% at a 12% profit rate, to 42.17% even if profits averaged 60% of flotation value over the four-year period. Note that *all* calculations in Table 2 are in percentage terms and assume a flotation value of 100; the resulting percentages are independent of the amount of the flotation value.

This calls greatly into question the Tax Court's argument as to the ''equivalence'' of conceiving the windfall tax as a tax on the flotation ''undervaluation,'' or conceiving of it as a tax on ''excess profits.''

THE REGULATIONS

The governing regulations were finalized in 1983, and have been uniformly recognized by courts applying them, including all three courts that decided the *PPL/Entergy* cases, as having the ''force of law.''[14]

Section 901(a) allows a credit for foreign ''income, excess profits, and war profits taxes.'' Case law predating the regulations held uniformly that the determination of whether a tax qualified as an income tax for purposes of this statute was based on whether the tax constituted an income tax by reference to the criteria of U.S. law.[15] The regulations define their mission as determining ''[w]hether a foreign levy is an income tax.''[16] They provide that a levy is an income tax if the levy meets two requirements:

- It is a tax; and
- Its ''predominant character'' is ''that of an income tax in the U.S. sense.''

They provide that a levy is a tax if ''it requires a compulsory payment pursuant to the authority of a foreign country to levy taxes.''[17] As to the second criterion, the regulations provide that ''[t]he predominant character of a foreign tax is that of an income tax in the U.S. sense'' if two conditions are met:

> [T]he foreign tax is likely to reach net gain in the normal circumstances in which it applies [and]
>
> [O]nly to the extent that liability for the tax is not dependent, within the meaning of paragraph (c) of this section, by its terms or otherwise, on the availability of a credit for the tax against income tax liability to another country.[18]

The regulations then provide that a foreign tax is ''likely to reach net gain in the normal circumstances in which it applies if and only if the tax, judged on the basis of its predominant character, satisfies each of the realization, gross receipts, and net income requirements'' detailed, at great length that will not be repeated here, in the regulations.[19] The requirement placed at issue by the decisions in the windfall tax matter is the following:

> (3) Gross receipts. — (i) In general. A foreign tax satisfies the gross receipts requirement if, judged on the basis of its predominant character, it is imposed on the basis of —
>
> (A) Gross receipts; or
>
> (B) Gross receipts computed under a method that is likely to produce an amount that is not greater than fair market value.

[14] *PPL Industries, Inc. v. Comr.*, 665 F.3d 60, 63 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 571 (2012), citing *Texasgulf, Inc. v. Comr.*, 172 F.3d 209 (2d Cir. 1999); *Amoco Corp. v. Comr.*, 138 F.3d 1139, T.C. Memo 1996-159 (7th Cir. 1998).

[15] *Biddle v. Comr.*, 302 U.S. 573, 578, 581–82 (1938); *Keasbey & Mattison Co. v. Rothensies*, 133 F.2d 894 (3d Cir. 1943); *New York & Honduras Rosario Min. Co. v. Comr.*, 168 F.2d 745 (2d Cir. 1948); *Comr. v. American Metal Co.*, 221 F.2d 134 (2d Cir. 1955); *Lanman & Kemp-Barclay & Co. v. Comr.*, 26 T.C. 582 (1956); *Bank of America v. U.S.*, 459 F.2d 513 (1972).

[16] Regs. §1.901-2(a)(1).

[17] Regs. §1.901-2(a)(2)(i).

[18] Regs. §1.901-2(a)(3)(i)–(ii).

[19] Regs. §1.901-2(b)(1).

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> A foreign tax that, judged on the basis of its predominant character, is imposed on the basis of amounts described in this paragraph (b)(3)(i) satisfies the gross receipts requirement even if it is also imposed on the basis of some amounts not described in this paragraph (b)(3)(i).[20]

An example in the regulations recites that a petroleum tax deems gross receipts to be 105% of the fair market value of petroleum extracted. It says that the ''computation is designed to produce an amount that is greater than the fair market value of actual gross receipts,'' and that ''therefore, the tax on extraction income is not likely to produce an amount that is not greater than fair market value.''

THE TAX COURT AND COURT OF APPEALS DECISIONS

In its decision, the Tax Court stressed, as an initial matter, the importance to its decision of the fact that, for each company subject to the windfall tax, its windfall tax liability appeared to have been less than its aggregate profits in the four-year test period:

> [H]owever we describe the form of the windfall tax base, our inquiry as to the design and incidence of the tax convinces us that its predominant character is that of a tax on excess profits. As an initial matter, we note that *the parties have stipulated that none of the 31 companies that paid windfall tax had a windfall tax liability in excess of its total profits over its initial period*.[21]

The court, with respect to design, said of the IRS position:

> With respect to design, respondent reorders the usual notion (at least in architecture) that form follows function to argue, in essence, that form determines function; i.e., that the design of the tax base (the excess of one value over another) demonstrates Parliament's decision to enact a tax based on value (i.e., ''to tax undervaluation on flotation of the Windfall Tax Companies'') ''rather than a tax based on income or excess profits.''[22]

The court rejected that position on grounds that the stated reasons for the tax — to adjust the flotation price so that it was fair, and to drive down the ''excessive'' profits enjoyed by the companies — were essentially equivalent, and that Parliament understood this to be so:

> [P]rofits were considered excessive in relation to the prices at which the windfall tax companies were sold to the public, which, in turn, were deemed to be too low. One explanation implies the other. It follows, then, that both parties may be said to be correct in their assessment of the political motivation for the windfall tax.
>
> * * * *
>
> The architects and drafters of the tax knew (1) exactly which companies the tax would target, (2) the publicly reported after-tax financial profits of those companies, which were a crucial component of the tax base, and (3) the target amount of revenue the tax would raise. Therefore, it cannot have been an unintentional or fortuitous result that, (1) for 29 of the 31 windfall tax companies that paid tax, the effective rate of tax on deemed annual excess profits was at or near 51.7 percent, and (2) for *none of the 31 companies did the tax exceed total initial period profits*. What respondent refers to as ''petitioner's algebraic reformulations of the Windfall Tax statute'' do not, as respondent argues, constitute an impermissible ''hypothetical rewrite of the Windfall Tax statute''. Rather they represent a legitimate means of demonstrating that Parliament did, in fact, enact a tax that operated as an excess profits tax for the vast majority of the windfall tax companies. The design of the windfall tax formula made certain that the tax would, in fact, operate as an excess profits tax for the vast majority of the companies subject to it.[23]

But in contrast to the Tax Court, the Third Circuit found the taxpayer's reformulation of the tax as ''a bridge too far.'' Referring to the argument flowing from what are set forth above as equations (4) and (5), the Third Circuit said:

> [T]he income portion of this tax base—2.25 times gross receipts—violates the gross receipts requirement, which limits the basis of a tax to gross receipts or an approximation thereof ''likely to produce an amount that is

[20] Regs. §1.901-2(b)(3).

[21] *PPL Industries, Inc. v. Comr.*, 135 T.C. 304, 338 (2010), *rev'd*, 665 F.3d 60 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 571 (2012).

[22] 135 T.C. at 304, 333–34 (2010).

[23] 135 T.C. at 304, 339–41 (emphasis added) (footnotes omitted).

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> *not greater than* [their] fair market value.'' Treas. Reg. §1.901-2(b)(3)(i)(B) (emphasis added).[24]

In other words, the Third Circuit appears to have been saying that the alleged equivalence was a function *not* of the ''character'' of the tax, but of the particularities of the rate involved:

> However, changing the tax rate in this way to avoid a problem with the tax base would read the gross receipts requirement out of the regulation. This we decline to do. An example from the Treasury regulation illustrates why our law does not tolerate such a mathematical maneuver. In the example, another country imposes a tax on the extraction of petroleum. Treas. Reg. §1.901-2(b)(3)(ii), Ex. 3. The country deems ''gross receipts'' to equal 105% of the market value of the petroleum extracted. That is, the starting point for the tax base is 105% of each affected company's gross receipts from petroleum. The regulation disallows a credit for the tax because it ''is designed to produce an amount that is greater than the fair market value of actual gross receipts.'' *Id.* As the tax would not even be creditable up to the amount imposed on 100% of gross receipts, less associated costs, the entirety of the tax fails to satisfy the requirement. This all-or-nothing result is so because the regulation mandates that ''a tax either is or is not an income tax, *in its entirety*, for all persons subject to the tax.'' *Id.* §1.901-2(a)(1)(ii) (emphasis added). If 105% of gross receipts (barely more than actual receipts) does not satisfy the requirement, then 225% is in the same boat but another ocean.[25]

In affirming the Tax Court, the Fifth Circuit, with apparent care, eschewed the language of the Tax Court about looking to extrinsic circumstances, or of language of form versus substance. Instead, it hewed close to the regulation and the three-factor test. It quoted at length the Tax Court's language concerning the asserted equivalence of the tax as nominally computed and a tax on actual profits. It characterized the IRS's ''insistence on the primacy of the Windfall Tax's text'' as an ''argument . . . easy to dispatch,'' because ''[t]he case law from which 26 C.F.R. §1.901-2 is derived refutes the Commissioner's assertion that we should rely exclusively, or even chiefly, on the text of the Windfall Tax in determining the tax's 'predominant character.' ''[26] The court said the net income and realization requirements were clearly satisfied, but then acknowledged some greater difficulty with the gross receipts requirement:

> The Commissioner's formalistic argument applies with somewhat greater force to the gross receipts requirement. A tax actually directed at corporate value would not, in the ordinary instance, be imposed on the basis of gross receipts. The Commissioner essentially urges that because Parliament computed the Windfall Tax based on ''profit-making value,'' calculated according to average profits over an initial period, the tax is not designed to reach gross receipts, even though the tax may be based on gross receipts in some indirect way. But we are persuaded by the Tax Court's astute observations as to the Windfall Tax's predominant character: the tax's history and practical operation were to ''claw back'' a substantial portion of privatized utilities' ''excess profits'' in light of their sale value. These initial profits were the difference between the utilities' income from all sources less their business expenses — in other words, gross receipts less expenses from those receipts, or net income. The tax rose in direct proportion to additional profits above a fixed (and carefully calculated) floor. That Parliament termed this aggregated but entirely profit-driven figure a ''profit-making value'' must not obscure the history and actual effect of the tax, that is, its predominant character.[27]

Judge Jones then addressed the Third Circuit's opinion in *PPL*. She characterized the opinion as having ''accepted that perhaps the Windfall Tax reached 23% of 2.25 times the companies' initial period profits,'' but as having ''viewed this as fatal to the gross receipts requirement,'' because ''a tax must be established on the basis of no more than 100% of gross receipts.'' The Fifth Circuit responded:

> This reasoning exemplifies the form-over-substance methodology that the governing regulation and case law eschew. The gross receipts requirement ensures a creditable income tax is usually computed ''begin[ning] from actual gross receipts, rather than notional amounts.'' BITTKER & LOKKEN at ¶ 72.1. This distinction between ''actual re-

[24] *PPL Industries, Inc. v. Comr.*, 665 F.3d 60, 64 n. 1 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 571 (2012).
[25] *Id.*
[26] *Entergy Corp. v. Comr.*, 683 F.3d 233, 236 (5th Cir. 2012).
[27] *Id.*, at 233, 236–37.

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> ceipts'' and ''notional amounts'' reflects a core requirement in Section 1.901-2 that creditable foreign taxes must be based on either actual income *or* an imputed value *not* intended to reach *more* than actual gross receipts.

The court held that the 2.25*x* computation was an acceptable ''imputed value'' because it was not likely to reach profits not actually earned by the companies:

> Nevertheless, not all methods of imputing income fail to satisfy the gross receipts requirement. Section 1.901-2(b)(3)(i) indicates that a foreign tax satisfies the gross receipts requirement if it is imposed either on *actual* gross receipts or *imputed* gross receipts ''computed under a method that is likely to produce an amount that is not greater than fair market value.'' Either of these reflects ''actual gross receipts.'' Treas. Reg. §1.901-2(b)(3)(i)(A), (B).[28]

It relied upon the fact that the tax was imposed only on known profits of the companies:

> In fact, as the record indicates, each utility could only be subject to the Windfall Tax after making a profit exceeding approximately an 11% annual return on its initial flotation value, and the Windfall Tax liability increased linearly with additional profits past that point. Moreover, the Third Circuit opinion seems to overlook that a tax based on actual financial profits in the U.K. sense necessarily begins with gross receipts, as, again, the record here indicates. London Electricity's profit for purpose of the Windfall Tax was calculated by computing gross receipts less operating expenses. The Windfall Tax was designed to reach a *subset* of this leftover amount by beginning with an amount predicated on *actual gross receipts* minus flotation value.[29]

The Fifth Circuit concluded that the 2.25 multiplier ''had nothing to do with inflating the utilities' profits into notional amounts'':

> The 2.25 multiplier resulted from dividing the number of days in a year by approximately the number of days in four years — or, simplified, one-quarter. This number was multiplied by nine — the price-to-earnings ratio — to result in 2.25 (times profits). By the Third Circuit's logic, had the Windfall Tax applied to the first *nine* years after flotation, rendering the initial period approximately 3,285 days (and the divisor one-ninth), the ''multiplier'' would have been (approximately) 1, and the Windfall Tax would suddenly qualify for dollar-for-dollar credit under Internal Revenue Code §901. But the Third Circuit illogically holds that a Windfall Tax for eight years, or four, as in this case, is in entirely ''another ocean'' and may not be credited.[30]

GROSS RECEIPTS AND NET GAIN

The algebraic derivation above raises serious questions about the Fifth Circuit's response to the Third Circuit's view of the ''gross receipts'' requirement (and the ultimate ''net gain'' conclusion). That derivation shows that, with a capitalization rate of nine, and a testing period of four years, if a company earned profits during the test period at an annual average rate in excess of 20%, the tax base as defined by the foreign statute would have exceeded actual profits. This would mean it was based on something other than ''gross receipts.'' At a rate in excess of 20% but not more than 21%, the excess would have been more than 5% of the ''actual'' gross receipts. The tax base would be larger because the United Kingdom was seeking to capture value attributable not only to the four years, but to the indefinite future.[31]

Beyond that, however, the Tax Court's emphasis on the comparison between the tax payment and aggregate profits addresses a question that the regulations simply do not ask. The question, under the ''net gain'' concept, is not whether the *tax payment* is in excess of the net profits. The question is whether the *tax base* is less than or equal to net profits. And the Tax Court makes no reference to any stipulation that in all or most cases the base to which the 23% rate was applied was less than the net profits of the company for the four-year period.

It is a mystery why this question was not asked, and why there are no findings on this question. All of the data necessary to make the computations, presumably

[28] *Id.*

[29] *Id.*

[30] *Id.*, at 233, 236, 238–39.

[31] If it be objected that the gross receipts (or net gain) in years beyond were the basis of the tax, the objection does not help because to that extent the windfall tax would not meet the realization requirement of the regulations, which requires that the tax be imposed ''[u]pon or subsequent to the occurrence of events . . . that would result in the realization of income under the income tax provisions of the Internal Revenue Code.'' Regs. §1.901-2(b)(2)(i)(A).

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for all 32 companies, was publicly available. All that was necessary were numbers for the aggregate profits for the four years, plus the flotation values. From the profits, one could compute ''profit-making value''; subtract the flotation value; and compare the resulting number to the aggregate profits. Apparently no one did this for any of the companies, even PPL and Entergy, the two companies claiming the credit.

The question is whether this lacuna in the record matters. The simple math demonstrates that the profits would equal or exceed the tax base *only in the case of companies with an average ''profit rate'' of 20% or less per year*. If the average profit rate were above that level, the tax base would be greater than the profits for the four-year period. Moreover, the simple math demonstrates that *for any tax so designed, with a specified capitalization rate and using a specified testing period*, one can identify an *annual average profit rate, expressed as a percentage of the initial flotation price*, above which *the tax base as defined by the foreign statute* would exceed *the aggregate profits in the testing period*.

This *fact* — simply demonstrable with elementary algebra — demolishes the Tax Court's finding of the ''equivalence'' of the windfall tax capital-type tax and an excess profits tax, or Judge Jones's characterization of the windfall tax base as ''entirely profit-driven.'' The simple truth is: the two tax bases are different; the conclusion that the windfall tax tax base consists solely of profit is wholly dependent upon an exogenous circumstance; and that circumstance *probably* did not obtain in many circumstances. Even without findings or an examination of the data, it is difficult to believe — given the apparent public outcry against the excessive profits of the privatized companies, and given that the Labour Party had the confidence to impose this controversial tax — that all of the companies involved had profit rates between 11% and 20%. And, in any event, the burden was on the taxpayer to demonstrate the failure of the proposed assessments. If the taxpayer could not show that the profits of the companies involved for the period in the preponderance of cases exceeded the tax base defined by the United Kingdom statute, the taxpayer did not meet its burden.

Even in the unlikely circumstance that all or most of them did, it is not clear that would be enough to save the windfall tax as a creditable tax. Depending on how one interprets the regulation, it may be that the mere *possibility* that the base would exceed net profits is sufficient to destroy its qualification as ''likely to reach net gain.'' Just as surely, however, the actual values of the two factors that determine the break-even profit rate (the capitalization rate and the period used to measure profits) matter. Judge Jones's purported *reductio ad absurdum* of the Third Circuit's gross receipts argument is relevant here. Judge Jones is correct that, as the length of the period of measurement increases, the likelihood that the tax will hit only net profits increases. In her example, if the test period were eight years, with a capitalization rate of 9, profits would have to be 100% of flotation value for the tax base to exceed them.[32] At that level, one might conclude that a profit rate at that level sustained over that period of time was so improbable that the possibility the tax base would be based on notional gross receipts was negligible. But that conclusion cannot be made with a break-even profit rate of 20%, and a testing period of four years.

Just to give an example, assume an average profit rate over the four years of 25%, and a flotation value of 500, so that annual profits are 125, and aggregate profits 500. The profit-making value is nine times 125, or 1,125. Reduced by the 500 flotation value, the 23% rate applies to a base of 625. This is in excess of the net profits for the period (500). The tax is based on ''notional'' gross receipts of the kind proscribed by the regulations and the examples in them.

The Tax Court and Fifth Circuit, as well as the taxpayers in their brief and amici in their filings in the Supreme Court, deride the IRS position as elevating the ''form'' of the windfall tax statute over the windfall tax's economic ''substance.'' The algebra above makes vividly clear what was the ''substance'' of the windfall tax. Its predominant character is not that of an income tax.

DOING THE ENGLISH: 'LIKELY' AND 'CERTAIN'

Part of the offensive and somewhat dangerous aspect of the claim that the windfall tax qualifies for a foreign tax credit is the *totally* retroactive nature of the U.K. enactment, combined with the fact that it was ''one off,'' that is, imposed one time, once and for all. This seems to invite foreign governments to impose retroactive enactments on accumulated profits of foreign or foreign-owned (i.e., U.S. or U.S.-owned) companies, framing the enactments as a percentage of profits, and thereby render the companies, in Judge Jones's words in *Entergy*, ''a conduit from the tax-accrediting nation (e.g., the United States) to the nation imposing the tax,''[33] i.e., engaging in a partial or creeping nationalization, with compensation borne by the U.S. tax-paying public.

The government's brief in the Supreme Court does not stress such considerations, but a brief filed by a group of tax law professors, quite distinguished international tax law professors, stresses both — identifying the ''perverse incentives'' a ruling for the taxpayer would give foreign governments, and emphasizing the one-off and ''purely'' retroactive nature of the tax to

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[32] Using 500 as the flotation value, as in our example above, if profits were 100% (500) for eight years, aggregate profits would be 4,000, and the ''profit-making value'' would be 4,500 (9 × 500). The tax base, the excess of profit-making value over flotation value would be 4,000, exactly equal to aggregate profits. If profits were 101% (505) for eight years, the tax base would be 4,045, greater than the aggregate profits (4,040), and thus the tax would apply to ''notional'' gross receipts or ''notional'' profits.

[33] *Entergy Corp. v. Comr.*, 683 F.3d 233, 237 (5th Cir. 2012), *cert. granted*, 131 S. Ct. 571.

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argue that the tax is, in the regulations' intended sense, un-American.[34] The brief responds to this with two arguments. First, it argues that the WFT is facially a tax on ''value'' (by which the professors really mean ''capital''), and that if reconstructed as the petitioners would do, *any* tax on value, or indeed many if not most consumption taxes, could be recast as taxes on income or profits. Second, they argue that the retroactivity and non-periodic features of this tax render it, under the regulations, a tax whose predominant character is not that of an income tax in the United States sense.

These are treacherous arguments. The first is dangerous because, while the observation involved is altogether valid, it may not be something the existing regulations preclude, and indeed, as the professors' brief recognizes with respect to ''at least'' some of the amici on the other side,[35] it may be viewed by many as a desirable aspect of the existing regulations, from either a legal or policy standpoint, including possibly some of the current Justices.

The second is much more faulty, because, although the professors manfully essay to impute to the regulations requirements that a foreign tax be periodic and nonretroactive, suggesting the point is ''so clear that it was not essential for Treasury to restate it explicitly in the regulations,''[36] their argument in truth requires invalidating the regulations in part. The regulations say a tax has the requisite ''predominant character'' *if and only* if the three factors cited in the regulations obtain. The ''if'' part is an objectionable feature of the regulations: prior case law supported the ''only if'' portion, because various decisions held that absent one of the three factors, the tax failed. All three were thus *necessary*, but no authority prior to the regulations said that collectively they were *sufficient*. The regulations do say this, clear as a bell, that was sort of the whole point of their originality when they were promulgated. You cannot put in additional conditions without violating the regulations, even apparently fundamental features of the United States income tax, like nonretroactivity or the annual accounting mandated by the Supreme Court's ancient decisions in *Burnet v. Sanford & Brooks Co.*[37] or *North American Oil Consolidated v. Burnet*.[38]

For this reason, one objective here is to search for a legal theory that will in effect treat any such enactment as noncreditable. The most straightforward such rule would be to say that the combination of a one-off tax, ''pure'' retroactivity, and resort to non-tax financial accounts are sufficient in themselves to render such a tax not an income tax under the statute. At first glance, the regulations appear to stand in the way of such a straightforward rule. The question here is whether a prophylactic rule of this kind can be articulated under the regulations as written. It can be. It revolves around the meaning of the word ''likely.''

The *PPL* brief for the petitioner in the Supreme Court trumpets the pure retroactivity of the windfall tax as a virtue, helping qualify it for the foreign tax credit, because it was not only ''likely'' to reach net gain, but ''certain'' to. This is the heading of one of its arguments: ''The Windfall Tax Is Not Only Likely But Certain to Reach Net Gain in the Normal Circumstances in Which It Applies.''[39] The brief repeats the expression numerous times. To like effect is the Tax Court:

> What respondent refers to as ''petitioner's algebraic reformulations of the Windfall Tax statute'' do not, as respondent argues, constitute an impermissible ''hypothetical rewrite of the Windfall Tax statute.'' Rather they represent a legitimate means of demonstrating that Parliament did, in fact, enact a tax that operated as an excess profits tax for the vast majority of the windfall tax companies.

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[34] Brief of Anne Alstott, Marvin Chirelestein, Mihir Desai, Michael Graetz, Daniel Halperin, Mitchell Kane, Lawrence Lokken, Robert Peroni, and Alvin Warren, *PPL Corporation v. Comr.*, reproduced at 2013 *TNT* 19–23.

[35]

> Like wealth taxes, non-creditable taxes on consumption are also closely related to taxes on income. Since consumption and income are often correlated, accepting mathematical reformulations of the sort used by petitioner here might also potentially extend the foreign tax credit to a variety of consumption taxes. This is, of course, exactly what at least some amici for petitioner intend. Brief for Amici Curiae Roseanne Altshuler, et.al. at 19–20, citing McLure, Jr. and Zodrow, ''The Economic Case for Foreign Tax Credits for Cash Flow Taxes,'' 51 *Nat. Tax J.* 1 (1998). *See also* Warren, ''How Much Capital Income Taxed Under an Income Tax Is Exempt Under a Cash-Flow Tax?'' 52 *Tax L. Rev.* 1 (1996).

Id.

[36] *Id.*

[37] 282 U.S. 359 (1931).

[38] 286 U.S. 417 (1932). The Brief argues:

> Surely the requirement of 'net gain' in the 'normal circumstances of its operations in which it applies' under 26 C.F.R. section 1.901-2(a)(3)(i) of the regulations implies the crucial income tax role of an annual accounting period; otherwise, it would not be describing a tax 'with the predominant character of an income tax.' This point is so clear that it was not essential for Treasury to restate it explicitly in the regulations.

Brief of Anne Alstott, Marvin Chirelestein, Mihir Desai, Michael Graetz, Daniel Halperin, Mitchell Kane, Lawrence Lokken, Robert Peroni, and Alvin Warren, *PPL Corporation v. Comr.*, reproduced at 2013 *TNT* 19–23.

[39] The brief for petitioner is reproduced at 2012 *TNT* 242-17 (12/17/12).

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> The design of the windfall tax formula *made certain* that the tax would, in fact, operate as an excess profits tax for the vast majority of the companies subject to it.[40]

The Fifth Circuit quotes this language and characterizes it as ''astute.''[41]

The implication is that if something is ''certain,'' it is *a fortiori* and perforce ''likely''; what is certain must be likely, it follows as the night the day.

To which one might respond: Not so fast, Lopez. Guess again. Suppose you had inside information that a takeover of Lameco was going to be announced the following morning, and that a letter of intent had been signed that afternoon, and after the signing of the letter of intent, you bought the stock, and you were subsequently asked why you bought the stock, and you said, ''I thought it was *likely* that a takeover was going to be announced.'' You would be *lying*, right? You didn't ''think'' a takeover announcement was ''likely.'' You *knew* a takeover announcement was *certain*. ''Likely'' and ''certain'' mean two different things. Right? If someone else said this, and s/he was under oath at the time, and you were a prosecutor, and you knew the underlying facts, you would have a basis for a perjury charge against him/her, wouldn't you?

Wiktionary gives a number of definitions for ''likely,'' but only the first one is germane here, and that simply defines the word as ''probable; having a greater-than-even chance of occurring.''[42] Webster's gives the first definition of ''likely'' as ''of such a nature or so circumstanced as to make something more probable.''[43] This leads to the question what does ''probable'' mean. Webster's gives the first definition (definition 1a) of ''probable'' as ''that is based on or arises from adequate or convincing *though not absolutely conclusive* intrinsic or extrinsic evidence or support.'' Definition 1b is ''that can reasonably and fairly convincingly be accepted as true, factual or possible *without being undeniably so*.'' Definition 1c is ''that reasonably and fairly convincingly establishes something as true, factual, or possible *but not with absolute conclusiveness*.'' So. ''Likely'' means ''probable,'' and ''probable'' means the chances are x, where (I feel an altogether superfluous equation coming on):

(13) $.50 < x < 1.00$

So ''likely'' means ''probable,'' they are virtual synonyms, and the domain of what is probable does *not* include what is certain. ''Certain'' and ''likely'' mean different things; ''likely'' is not inclusive, but rather exclusive, of ''certain.'' You can rev up that perjury prosecution, counselor.

A slight wrinkle in this argument is that the absolute ''if and only if'' provision of the regulations seems to set forth an exhaustive definition of when an income tax is ''likely to reach net gain.'' But a better reading of the definition, and use of the term ''likely,'' which is reinforced by the reference to the ''normal circumstances'' in which the tested tax ''applies,'' excludes an absolutely determined, completely retroactive, one-time-only imposition from the category of taxes whose ''predominant character is that of an income tax in the United States sense.''

[40] *PPL Industries v. Comr.*, 135 T.C. 304, 340–41 (2010), *rev'd*, 665 F.3d 60, *cert. granted*, 131 S. Ct. 571 (footnotes omitted).

[41] *Entergy Corp. v. Comr.*, 683 F.3d 233, 236–37 (5th Cir. 2012), *cert. granted*, 131 S. Ct. 571.

[42] http://en.wiktionary.org/wiki/likely (last visited Jan. 16, 2013).

[43] Webster's Third International Dictionary (1993) (emphasis supplied).

TABLE 1. Break-Even Annual Profit Rates for Varying Capitalization Multiples and Initial Periods

Initial Period												
	Capitalization Multiple	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**
1		100.0%	50.0%	33.3%	25.0%	20.0%	16.7%	14.3%	12.5%	11.1%	10.0%	9.1%
2			100.0%	50.0%	33.3%	25.0%	20.0%	16.7%	14.3%	12.5%	11.1%	10.0%
3				100.0%	50.0%	33.3%	25.0%	20.0%	16.7%	14.3%	12.5%	11.1%
4					100.0%	50.0%	33.3%	25.0%	**20.0%**	16.7%	14.3%	12.5%
5						100.0%	50.0%	33.3%	25.0%	20.0%	16.7%	14.3%
6							100.0%	50.0%	33.3%	25.0%	20.0%	16.7%
7								100.0%	50.0%	33.3%	25.0%	20.0%
8									**100.0%**	50.0%	33.3%	25.0%
9										100.0%	50.0%	33.3%
10											100.0%	50.0%
11												100.0%
12												

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Table 2. Ratio of Tax Base to Profits as a Function of Profit Rate (Assuming FV = 100)

Profit Rate	Profits (Four-Year)	Tax Base	Ratio of Tax Base to Profits	Tax as Percentage of Profits
12	48	8	16.67%	3.83%
13	52	17	32.69%	7.52%
14	56	26	46.43%	10.68%
15	60	35	58.33%	13.42%
16	64	44	68.75%	15.81%
17	68	53	77.94%	17.93%
18	72	62	86.11%	19.81%
19	76	71	93.42%	21.49%
20	80	80	100.00%	23.00%
21	84	89	105.95%	24.37%
22	88	98	111.36%	25.61%
23	92	107	116.30%	26.75%
24	96	116	120.83%	27.79%
25	100	125	125.00%	28.75%
26	104	134	128.85%	29.63%
27	108	143	132.41%	30.45%
28	112	152	135.71%	31.21%
29	116	161	138.79%	31.92%
30	120	170	141.67%	32.58%
31	124	179	144.35%	33.20%
32	128	188	146.88%	33.78%
33	132	197	149.24%	34.33%
34	136	206	151.47%	34.84%
35	140	215	153.57%	35.32%
36	144	224	155.56%	35.78%
37	148	233	157.43%	36.21%
38	152	242	159.21%	36.62%
39	156	251	160.90%	37.01%
40	160	260	162.50%	37.38%
41	164	269	164.02%	37.73%
42	168	278	165.48%	38.06%
43	172	287	166.86%	38.38%
44	176	296	168.18%	38.68%
45	180	305	169.44%	38.97%
46	184	314	170.65%	39.25%
47	188	323	171.81%	39.52%
48	192	332	172.92%	39.77%
49	196	341	173.98%	40.02%
50	200	350	175.00%	40.25%
51	204	359	175.98%	40.48%
52	208	368	176.92%	40.69%

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Table 2. Ratio of Tax Base to Profits as a Function of Profit Rate (Assuming FV = 100)				
Profit Rate	**Profits (Four-Year)**	**Tax Base**	**Ratio of Tax Base to Profits**	**Tax as Percentage of Profits**
53	212	377	177.83%	40.90%
54	216	386	178.70%	41.10%
55	220	395	179.55%	41.30%
56	224	404	180.36%	41.48%
57	228	413	181.14%	41.66%
58	232	422	181.90%	41.84%
59	236	431	182.63%	42.00%
60	240	440	183.33%	42.17%

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