No. 12-43

In The
Supreme Court of the United States

PPL CORPORATION AND SUBSIDIARIES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR SOUTHEASTERN LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CATO INSTITUTE, AND GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, contrary to decades of case law, courts should look only at the technical nomenclature used in a foreign tax statute and not consider the practical operation and economic substance of the foreign government's tax assessment when determining whether, under U.S. law, an American taxpayer who pays the foreign tax may claim the traditional statutory right against double taxation found in section 901 of the Internal Revenue Code.

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation, Inc. ("SLF") is a nonprofit national constitutional public interest law firm and policy center that promotes the public interest in the proper construction and enforcement of the laws and Constitution of the United States in the courts of law and through public discourse. SLF advocates constitutional individual liberties, limited government, and the free enterprise system in its litigation cases and *amicus* participation in state and federal courts.

Many of the litigation matters and policy debates in which SLF has participated since its founding in 1976 have involved the vindication of private property rights. SLF has represented parties and submitted *amicus* briefs before this Court in numerous cases presenting governmental threats to the property rights of individuals and businesses, including through overreaching use of eminent domain powers and excessive and imbalanced regulation. SLF prides itself on defending ordinary citizens and small business owners in local communities throughout America who find their freedom and their property under

[1] All parties have consented to the filing of this brief in letters on file with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

challenge from arbitrary and unreasonable bureaucratic power.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the constitutional limits on government that are the foundation of freedom. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. Cato participates from time to time as an *amicus* in important cases implicating fundamental liberties, structural protections for individual rights, and judicial checks on arbitrary government action.

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Through litigation, research papers, editorials, policy briefings, and forums, Goldwater advances nonpartisan public policies founded upon the principles of limited government, economic freedom, and individual responsibility. Goldwater participates in court cases and frequently files *amicus* briefs through its Scharf-Norton Center for Constitutional Litigation.

Amici file this brief because the legal position taken below by the Commissioner of Internal Revenue raises basic issues of agency power that transcend the interests of any particular taxpayer or class of taxpayers. This case concerns the limits of the power of a federal agency to apply a statute originally focused on economic substance in a manner that utterly ignores the true nature of the underlying transaction. *Amici* urge the Court to rein in the Commissioner's discretion to act against the property interests of individuals and businesses through an overly formalistic reading of the law that only serves the convenience and institutional self-interests of the tax collector.

SUMMARY OF ARGUMENT

The Court should reverse the judgment of the court of appeals and reject the Commissioner's hyperformalistic application of the credit for foreign "excess profits taxes" allowed in section 901(b)(1) of the Internal Revenue Code, 26 U.S.C. § 901(b)(1).

The Commissioner's opposition to the allowance of a tax credit for payment of the British Windfall Tax contravenes the traditional understanding of section 901 long held by the courts, including this Court, and is inconsistent with the Commissioner's own previous focus on substance and economic reality in judging the availability of the foreign tax credit under the relevant Treasury regulation. The application of section 901 espoused by the Commissioner and approved by the Third Circuit takes a venerable principle of the tax code that has long been held to require an examination of the true underlying substance and operation of a foreign tax and improperly converts it into a mechanical review that refuses to look beyond the superficial language of the foreign law.

It is revealing that the Commissioner has invoked this myopic approach to section 901 to deny the taxpayer a foreign tax credit and coincidentally to advance the revenue-raising objectives of the Internal Revenue Service. Not surprisingly, in cases where the IRS believes the literal terms of a foreign tax provision tend to disguise its true character, the Commissioner has not hesitated to present extensive evidence of the tax's underlying purpose and economic substance as a basis to deny the taxpayer a credit under section 901. And in numerous cases before this Court, the federal government has consistently emphasized a substance-over-form approach to questions of taxation.

The self-serving nature of the Commissioner's current position is a ringing alarm that betrays the

arbitrariness of the government's shifting approach to section 901 and the danger that it poses for taxpayers who rely upon a consistent and predictable application of the tax code in structuring their transactions. Fundamentally, section 901 is a statutory grant of protection from double taxation, and taxpayers have a right to be free from government action that manipulates the code to take away that protection in favor of maximizing tax collections.

ARGUMENT

THE COMMISSIONER'S RIGIDLY FORMALISTIC POSITION SHOULD BE REJECTED AS AN ADMINISTRATIVE OVERREACH THAT BREAKS FAITH WITH THE HISTORICAL UNDERSTANDING OF SECTION 901.

A. The Hyper-Formalism Advocated by the Commissioner Departs Starkly from the Traditional Interpretation of Section 901.

The Commissioner's argument for denying taxpayers a section 901 credit for payment of the United Kingdom's Windfall Tax cannot be squared with the established substantive approach to the foreign tax credit originally intended by Congress and long approved by the courts, including this Court.

1. Historically, the Availability of the Section 901 Credit Has Turned on the Economic Substance of the Foreign Tax Assessment.

First enacted in 1918 and substantially unchanged in 94 years, section 901 grants U.S. citizens and businesses a credit for "the amount of any income, war profits, and excess profits taxes paid" to a foreign country. 26 U.S.C. § 901(b)(1). The credit allowance was designed "to mitigate the evil of double taxation." *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 7 (1932).

Until the decision below, the courts interpreting section 901 have consistently held that "[t]he label and form of the foreign tax is not determinative" of the availability of the tax credit. *Inland Steel Co. v. United States*, 677 F.2d 72, 80 (Ct. Cl. 1982). Whether or not the foreign levy "is labeled a gross income or a net income tax" or uses some other "form" or "name," "[t]he important thing is whether the other country is attempting to reach *some net gain*," *Bank of Am. Nat. Trust & Sav. Ass'n v. United States*, 459 F.2d 513, 519 (Ct. Cl. 1972) (emphasis added).

This Court's longstanding interpretation of section 901 reflects the same understanding. In *Biddle v. Comm'r*, 302 U.S. 573 (1938), the Court held that a taxpayer who was a shareholder in a British corporation was not entitled to a credit for a British income tax assessed on the taxpayer's proportionate share of the taxes paid by the corporation on its own profits.

Id. at 575, 580-82. These amounts, although denominated "income" in the U.K., were not actually received by the shareholder as dividends and would not be considered taxable income under the U.S. tax code, and thus the taxpayer would not face double taxation in the absence of a credit. *See id.* at 581-82. Importantly, the Court reasoned that the availability of a credit under section 901 is not determined "by reference to foreign characterizations and classifications of tax legislation." *Id.* at 579.

In accordance with this emphasis on substance, courts addressing the availability of the tax credit have not hesitated to look beyond the terminology of the foreign statute to examine the assessment's purpose and substantive effect. *See Inland Steel*, 677 F.2d at 82 (exploring "History and Purpose" of foreign tax); *see also Texasgulf, Inc. v. Comm'r*, 172 F.3d 209, 211-14 (2d Cir. 1999) ("Essential to the resolution of this appeal is an understanding of the nature and operation of the [foreign tax] during the relevant taxable years.") (discussing trial evidence, including expert testimony, on "the industry-wide operation" of the tax).[2]

Treasury Regulation 1.901-2, promulgated by the IRS in 1983 to implement section 901, reflects the

[2] The rules of procedure for both the Tax Court and the district courts make it clear that in determining a foreign law, the court "may consider any relevant material or source, including testimony, whether or not submitted by a party or otherwise admissible." Tax Ct. R. 146; *see* Fed. R. Civ. P. 44.1 (same).

case law that grew up under the statute. Regulation 1.901-2 groups together the three types of taxes listed in section 901 ("income, war profits, and excess profits taxes") into a single concept of "income tax," which the rule then defines as a foreign tax "[t]he predominant character of" which "is that of an income tax in the U.S. sense." Treas. Reg. § 1.901-2(a)(1)(ii); Pet. App. 109. The regulation further specifies that the "predominant character" test is satisfied only if the foreign tax "is likely to reach net gain in the normal circumstances," and only if, "judged on the basis of its predominant character," the tax meets three technical requirements: (1) It is imposed upon or after the "realization" of income; (2) it is imposed on the basis of "gross receipts," and (3) the base of the tax constitutes "net income"—"gross receipts" less "significant costs and expenses." Treas. Reg. 1.901-2(b)(2), (3), (4); Pet. App. 114, 120, 122.

Until the present case, the Commissioner has applied Regulation 1.901-2 consistently with the substance-over-form reasoning traditionally followed in the courts.

2. The Approach Advocated by the Commissioner and Adopted by the Third Circuit Improperly Ignores the Substance of the British Windfall Tax.

Based on the history recited above, one would think there is little room for doubt that the British Windfall Tax is an "excess profits tax" within the

meaning of section 901. The U.K. law was enacted in 1997 by the British Labour Government for the express purpose of taxing what Parliament figured were "excess" or "windfall" profits earned by businesses that had been privatized by the Conservative Government in the 1980s. For U.S. owners of the affected businesses, the U.K. assessment raises the specter of double taxation. *See* Pet. Br. 5-11.

The Windfall Tax satisfies the requirements of Treasury Regulation 1.901-2's long-established "predominant character" test because the tax assessment is based on, and increases in proportion to, a subset of the financial profits realized by the affected businesses. The British statute levies a 23-percent tax rate against the difference between the historical purchase price paid for the privatized businesses in question (called the "flotation value") and a "profit-making value," which is calculated on the basis of the profits (*i.e.*, gross receipts less operating costs—in other words, net income) *actually earned* by the businesses during the specified four-year period. The tax works out to about 52 percent of actual profits earned above a prescribed rate of return during the relevant period, and therefore the assessment could never exceed any appropriate measure of income.

Applying this substantive analysis, the Fifth Circuit had no problem concluding that a tax credit is available under section 901 for payment of the U.K. Windfall Tax. *See Entergy Corp. v. Comm'r*, 683 F.3d 233, 238 (5th Cir. 2012). Writing for the Fifth Circuit, Chief Judge Jones concluded that the Commissioner's

invitation to "rely exclusively, or even chiefly, on the text of the Windfall Tax" was incompatible with the traditional substance-based approach to the foreign tax credit. *Id.* at 236. As she stated: "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." *Id.* at 236-37.[3] The essence of the Fifth Circuit's holding is that the British Windfall Tax is creditable because (1) it reaches realized income, and (2) gross revenue was an inherent part of the calculation.

In its decision below, however, the Third Circuit accepted the Commissioner's novel argument that, to the contrary, the court must confine itself to the terminology used in the Windfall Tax statute and must not consider the substantive nature and effect of the tax in judging whether a credit is proper. The court determined that the British tax could not be treated as an assessment against net income for purposes of Treasury Regulation 1.901-2 because,

[3] The Fifth Circuit explained that the "gross receipts" requirement in Treasury Regulation 1.901-2 is designed "to prevent foreign nations from 'soaking up' American tax revenue by levying an income tax on an imputed amount deliberately calculated to reach some amount *greater than the business's actual gross receipts*." 683 F.3d at 237 (emphasis added) (citing Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates & Gifts ¶ 72.1 (2011)).

according to the U.K. statute's taxing formula, the tax is levied against an amount determined using an imputed number labeled "profit-making value," rather than against a simpler measure of net income that is expressly denominated "net income" or "gross receipts." *See* Pet. App. 8-15. The Third Circuit ignored the substantive components of the formula and erroneously concluded that the tax was not imposed on the basis of actual gross revenue—an integral part of the calculation—and was therefore not creditable.

Under the Commissioner's approach, adopted by the Third Circuit, a taxpayer claiming the section 901 credit may not inquire beyond the language of the foreign enactment, and the Tax Court may not consider evidence of the foreign tax law's practical operation and substantive effect, *see id.* at 8, even though such evidence has commonly been presented in prior cases under section 901, *see, e.g.*, *Texasgulf, Inc.*, 172 F.3d at 211-14. This position severs the last link to any meaningful examination of the foreign tax's "history and actual effect," *Entergy Corp.*, 683 F.3d at 237. It abandons the substantive "predominant character" test codified in the Treasury Regulation and supplants it with a rote, mechanical application of the rule's sub-factors to the literal language of the foreign statute.[4]

[4] *See* George Orwell, *Nineteen Eighty-Four* 255 (New American Library ed. 1981) (Appendix: "The Principles of Newspeak") ("When Oldspeak had been once and for all superseded, the last link with the past would have been severed.").

This hyper-formalistic application of section 901 threatens taxpayers with the arbitrary denial of their traditional statutory right against "the evil of double taxation," *Burnet*, 285 U.S. at 7. Unless rejected by this Court, the Commissioner's abrupt break from the historical understanding of section 901 will subvert the stability and predictability of financial transactions for U.S. individuals and companies with business interests overseas.

B. The Commissioner's Position Is Opportunistic and Inconsistent with the Government's Usual Emphasis on Substance Over Form.

The degree to which the Commissioner's current position is unfaithful to the traditional understanding of section 901 is underscored by its self-serving nature. The approach advocated by the Commissioner bears the hallmarks of a litigating position that has been adopted out of convenience and selectively applied by the IRS only where it works against the taxpayer and increases the returns to the tax collector.

Over the decades, the shoe was on the other foot, and it was the Commissioner who urged a substantive examination into the nature and effect of the foreign tax to show that the section 901 credit should be disallowed. *See, e.g.*, *Biddle v. Comm'r*, 302 U.S. at 579 (noting that the Board of Tax Appeals made findings in the Commissioner's favor "supported . . .

by much expert testimony," and mandating, at the urging of the Commissioner, "an examination of the manner in which the British tax is laid and collected . . . and whether it is the substantial equivalent of payment of the [income] tax as those terms are used in our own statute").

The Commissioner's past record of preferring a substance-based approach to the foreign tax credit is fully in line with the government's traditional position before this Court that substance must trump form in the interpretation and application of all provisions of the Internal Revenue Code. *See, e.g.*, Brief for United States 10, *United States v. Centennial Savings Bank FSB*, No. 89-1926 (U.S. filed Nov. 15, 1990) (noting "fundamental principle of federal taxation that the substance rather than the form of a transaction determines its tax consequences"); Brief for United States 22, 27-28, *Frank Lyon Co. v. United States*, No. 76-624 (U.S. filed July 28, 1977) (arguing that Commissioner correctly disregarded form in favor of economic substance); Brief for United States 34, *United States v. Consumer Life Ins. Co.*, No. 75-1221 (U.S. filed Aug. 4, 1976) (urging "the familiar axiom that economic substance rather than form is controlling for purposes of federal taxation" and approving "the substance-over-form doctrine" applied by this Court "in a number of landmark decisions that have been a major influence in shaping the development of our federal tax jurisprudence"); Brief for United States 13-14, *United States v. Byrum*, No. 71-308 (U.S. filed Dec. 1971) (noting that "this Court has

consistently held that substance and reality, rather than form, are to govern in the application of" various provisions of the Internal Revenue Code).

The Solicitor General has long taken the same approach when the issue turns on the nature or operation of a state tax (for example, in cases addressing the immunity of the federal government or an Indian tribe from state taxation). *See, e.g.*, Brief for United States as *Amicus Curiae* Supporting Respondent 13, *Wagnon v. Prairie Band Potawatomi Nation*, No. 04-631 (U.S. filed July 14, 2005) (arguing that in determining whether the legal incidence of a state tax falls on an Indian tribe, the Court should look beyond the form and labels used in the tax to its substantive effect); Brief for United States 13, *City of Detroit v. Murray Corp. of Am.*, No. 18 (U.S. filed Oct. 12, 1957) ("Neither form nor nomenclature of a tax is controlling over substance."); Brief for United States 19-20, *United States v. Evans*, No. 378 (U.S. filed Feb. 24, 1953) (arguing that in considering the relevant character of a state gasoline tax, the Court must look "to substance rather than form, to practical operation and effect rather than nomenclature, to realities and not to labels"; "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents. . . .") (internal quotation marks and citations omitted); Brief for United States 60, *Alabama v. King & Boozer*, No. 602 (U.S. filed Oct. 21, 1941) (arguing that the "validity of taxes challenged as invading the immunity of the Government should be decided . . . in terms

of the legal incidence of the tax," which is determined by looking "to substance and reality, not to form").[5]

The government's awkward turnabout when it comes to the British Windfall Tax smacks of opportunism—a short-sighted maneuver calculated to boost tax collections, but at the expense of the long-term benefits of a consistent and predictable tax policy. The contrast between the government's frequent preference for economic substance in past cases where it served the government's interests and the Commissioner's current rush to elevate superficial terminology over economic reality betrays an indefensible arbitrariness. Ultimately, federal tax authorities should not be able to use a foreign tax's form or label to mask the tax's true substantive character. Otherwise, American taxpayers who have staked their foreign investments on the predictability and economic soundness of the U.S. tax code become the victims of cynical and arbitrary government action.

In sum, the position ratified by the court of appeals below represents a dangerous and self-serving exercise of administrative power. This Court should reaffirm the substantive protection originally granted

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[5] *See also Fairbank v. United States*, 181 U.S. 283, 305 (1901) ("we must always regard things rather than names"), *quoted in* Reply Brief for United States 11, *United States v. United States Shoe Corp.*, No. 97-372 (U.S. filed Feb. 18, 1998) (addressing analysis for distinguishing a fee from a tax).

by Congress in section 901 by rejecting the arbitrary position now pushed by the Commissioner.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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