Volume 12 | Number 2 Article 6

6-1-1980

The Windfall Profit Tax - An Overview.

Barry R. Miller

Dan G. Easley

ARTICLES

THE WINDFALL PROFIT TAX—AN OVERVIEW

BARRY R. MILLER*
DAN G. EASLEY**

* Andrews, Kurth, Campbell & Jones, Houston, Texas. B.S., University of Illinois (1967); J.D., University of Illinois (1970).
** Andrews, Kurth, Campbell & Jones, Houston, Texas. B.B.A., Texas Tech University (1976); J.D., Univeristy of Texas (1979).

I. INTRODUCTION

On April 2, 1980, President Carter signed into law the Crude Oil Windfall Profit Tax Act of 1980 (the Act).[1] The Act, first proposed by Representative Ullman on May 3, 1979, was debated by Congress for over ten months. Debate on the Act was primarily along regional lines with legislators from oil producing states opposing the Act and those from non-producing states supporting it. After all the debate on and controversy surrounding the Act, it is nevertheless misnamed. The tax imposed by the Act is not a tax on profits. Rather, it is an excise or severance tax applied to certain revenues from the sale of crude oil which were believed by some to be a "windfall."[2]

The social and economic environment permitting imposition of the windfall profit tax began developing over ten years ago. In the late 1960's and early 1970's the supply of petrochemical energy available in the United States began to noticeably dwindle.[3] The Arab embargo of the winter of 1972-1973 merely emphasized that point. During that period of time, the Organization of Petroleum Exporting Countries, better known as OPEC, also began to strongly influence the availability and supply of crude oil, resulting in the United States initiating price controls on crude oil.[4] When the decision was made to lift those controls over a period of time,

1. *See* Pub. L. No. 96-223, 94 Stat. 229 (1980). Prior to enactment the bill containing the Crude Oil Windfall Profit Tax Act of 1980 (Act) was designated H.R. 3919, 96th Cong., 1st Sess. (1979). Since the pertinent provisions of the Act were made a part of the Internal Revenue Code of 1954, as amended, further references will be to sections of the Code.

2. *See* H.R. REP. No. 96-304, 96th Cong., 1st Sess. 4, 7, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1185, 1189, 1192. The Act states that the tax is an excise tax and the provisions of the Act were placed in the excise tax subtitle of the Code. *See* I.R.C. § 4986(a). The temporary regulations similarly characterize the tax. *See* Temp. Treas. Reg. § 150.4986-1 (1980). Yet, Congress characterized the tax as a "temporary excise, *or severance*, tax." *See* H.R. REP. No. 96-817, 96th Cong., 2d Sess. 92, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1240, 1243 (emphasis added). The distinction could prove important when, for example, an agreement, such as a lease, provides for the payment by one party of all severance taxes.

3. Studies conducted by many petrochemical industry groups in this period showed the amount of proven reserves falling. *See generally* American Gas Association, Inc., American Petroleum Institute & Canadian Petroleum Institute, *Reserves of Crude Oil Natural Gas Liquids, and Natural Gas in the United States and Canada* (1972).

4. *See* 6 C.F.R. Part 150, Subpart L (1973). For a detailed discussion of crude oil producer price regulations, see Carroll, *Department of Energy Crude Oil Producer Price Regulations: An Overview and an Update*, XII NAT. RESOURCES LAWYER 327 (1979).

many believed that significant, "unearned" revenues would accrue to the oil industry solely because OPEC had been successful in artificially establishing the world price for crude oil.[5] The Act, therefore, was intended to deprive the oil industry of a portion of this alleged artificial increase in revenues.[6] Additionally, the Act was intended to increase government revenues to fund various energy

5. *See* S. REP. No. 96-394, 96th Cong., 1st Sess. 132, 146, 160, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1008, 1135-36, 1148, 1161-62. In April 1979, the President announced a program designed to gradually phase out all price controls on domestically produced crude oil which will result in the complete decontrol of such prices on October 1, 1981. *See* Fact Sheet on the President's Program, Office of the White House Press Secretary (April 5, 1979). Until then, the maximum selling price will depend on the nature of the oil being sold. For purposes of the DOE Price regulations, newly discovered oil is, in general, oil produced from properties from which there was no commercial production during 1978. *See* 10 C.F.R. § 212.79 (1980). Stripper well oil is oil produced from a property whose average daily production is ten barrels or less, per well. *See id.* § 212.54. Heavy oil is oil with a weighted average gravity of 20 degrees API or less. *See* Exec. Order No. 12,153, 44 Fed. Reg. 48,949 (1979), *amended by*, Exec. Order No. 12,186, 44 Fed. Reg. 76,477 (1979). Newly discovered oil, stripper well oil, heavy crude oil, and certain types of oil attributable to tertiary recovery methods are currently free from price controls. Oil not within one of the above categories remains subject to price controls. The maximum selling price for oil still subject to price controls is determined by classifying the oil into two tiers. Lower tier oil includes oil produced and sold from a property on which production began before 1973. *See* 10 C.F.R. § 212.73 (1980). Upper tier oil includes oil produced and sold from a property on which production began after 1972 and before 1979. *See id.* § 212.74. During May 1979 the average ceiling price of lower tier oil was approximately $5.80 and the average ceiling price of upper tier oil was approximately $13.00. Under the President's program of phased decontrol, the maximum selling prices for lower and upper tier oil will be continued at the May 1979 levels, adjusted for inflation, until October 1, 1981, at which time price controls will cease. If the monthly production of lower tier oil during the decontrol period exceeds a certain base level, however, a portion of the lower tier production will be released to upper tier pricing. In addition, specified percentages of upper tier oil from a property will be released from all price controls during each month between January of 1980 and September of 1981. For a more detailed discussion of price controls, see Carroll, *Department of Energy Crude Oil Producer Price Regulations: An Overview and an Update*, XII NAT. RESOURCES LAWYER 327 (1979).

6. *See* H.R. REP. No. 96-304, 96th Cong., 1st Sess. 4, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1185, 1187. In fact, not only does the Act contain provisions related to the windfall profit tax, it also contains provisions regarding (i) the deductibility of the cost of tertiary injectants, (ii) residential energy credits for renewable energy source expenditures, (iii) tax credits for certain energy related expenses, (iv) tax credits for alternative fuels, (v) an alcohol fuel tax exemption and credit, (vi) industrial development bonds issued for certain energy related puposes, (vii) low income energy assistance, (viii) procedures with respect to certain petrochemical imports, (ix) repeal of carryover basis, (x) an increase in the dividend exclusion, and (xi) certain LIFO inventory matters arising out of corporate liquidations. This article is limited to a discussion of only the windfall profit tax provisions of the Act.

programs.[7]

In brief, the Act establishes a tax in the difference between the sales price of taxable crude oil and a base price, tied to the controlled price of the oil. The rate of tax varies from thirty to seventy percent, depending upon the category of crude oil being taxed. The tax is imposed on producers of taxable crude oil removed from a property on or after March 1, 1980.

II. TAXABLE CRUDE OIL

A. *Definitions*

Under the Act, a producer is any owner of an economic interest in the property from which the crude oil is produced. The term "economic interest," first set forth in *Palmer v. Bender,*[8] is defined in the regulations promulgated under section 611 of the Internal Revenue Code of 1954, as amended (the Code).[9] The term includes a working interest, a royalty or overriding royalty interest, certain production payments, and other types of interest.[10]

Under the Act, any owner of an economic interest in taxable crude oil is subject to the tax. Taxable crude oil is, in turn, defined to include all domestic crude oil other than exempt oil. Interestingly, the Act defines domestic crude oil to be crude oil "from an *oil well*" located in the United States or a possession of the United States.[11] On the face of the Act, therefore, crude oil from a gas well, condensate, is not taxable crude oil. Whether this was the result intended by Congress is unclear.[12] The Treasury Department,

---

7. *See* S. REP. No. 96-394, 96th Cong., 1st Sess. 8, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1008, 1017. Much of the delay in passage of the Act was occasioned by the disagreements over the use of tax revenues to be generated by the Act. The Act, as passed, simply does not earmark tax revenues. The Conference Report does purport to allocate revenues but the binding effect of that effort is questionable. *See* H.R. REP. No. 96-817, 96th Cong., 2d Sess. 117, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1240, 1268.

8. 287 U.S. 551, 558 (1933).

9. *See* Treas. Reg. § 1.611-1(b) (1973).

10. *See id.* Under section 636 of the Code, certain production payments are treated other than as an economic interest. *See I.R.C.* § 636. A special provision in the Act relating to production payments deals only with the net income limitation. *See id.* § 4988(b)(5). For a detailed discussion of the concept of an economic interest, see Burke & Bowhay, *Income Taxation of Natural Resources*, ¶¶ 2.09-.13 (1980 ed.).

11. I.R.C. § 4996(b)(3) (emphasis added).

12. The legislative history seems to suggest that condensate is crude oil whether or not from a gas well. *See* H.R. REP. No. 96-817, 96th Cong., 2d Sess. 114, *reprinted in* [1980]

however, in temporary regulations issued immediately after the tax became law, has taken the position that condensate is taxable crude oil.[13]

B. *Categories of Taxable Crude Oil*

Under the Act, taxable crude oil is categorized into three tiers with a different rate of tax applicable to each tier.[14] The rates are:

tier 1	70%
tier 2	60%
tier 3	30%

The Act provides that tier 1 oil is all taxable crude oil that does not fall in either tier 2 or tier 3.[15] Tier 1 oil, however, will generally include any taxable crude oil removed from a property that first began production before 1979, other than stripper, heavy, or incremental tertiary oil. Tier 2 oil includes any oil from a National Petroleum Reserve held by the United States, and stripper oil that is not tier 3 oil.[16] Tier 3 oil includes newly discovered oil, heavy oil, and incremental tertiary oil.[17] Newly discovered oil, for purposes of the Act, is defined in the same way as for price control purposes.[18]

U.S. CODE CONG. & AD. NEWS 1240, 1265. Revenue projections used by Congress in enacting the Act, however, did not include revenue from the taxation of condensate.

13. *See* Temp. Treas. Reg. § 150.4991-1(a) (1980).

14. *See* I.R.C. § 4991. The Act tiers should not be confused with the tiers applied for Department of Energy (DOE) price regulations. *See* note 5, *supra*.

15. *See* I.R.C. § 4991(c).

16. *Id.* § 4991(d). A stripper well property is defined in the Act by reference to the DOE price control regulations. Under those regulations, a stripper well property is property whose average daily production of crude oil per well does not exceed ten barrels per day during any consecutive twelve month period after December 31, 1972, provided each well is operated at its maximum feasible rate of production. 10 C.F.R. § 212.54 (1980). Apparently, once a property qualifies as a stripper well property subsequent increases in production will not change that status. *See* S. REP. No. 96-394, 96th Cong., 1st Sess. 38, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1008, 1045.

17. I.R.C. § 4991(e). If a portion of a property is transferred after 1978, the production from the property thereafter will be classified as newly discovered, stripper well, or heavy oil only if it would be so classified if there had been no transfer. The purpose of this provision is to preclude taxpayers from qualifying production from a property for a more favorable windfall profit tax rate by dividing a single property into two or more properties by way of transfer. *See* H.R. REP. No. 96-304, 96th Cong., 1st Sess. 32, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1185, 1212.

18. *See* I.R.C. § 4991(e)(2). Generally, newly discovered oil, for price control purposes, has been defined as oil produced from properties from which there was no commercial production during 1978. *See* 10 C.F.R. § 212.79 (1980).

Consequently, newly discovered oil is oil produced from a property which did not produce oil in commericial quantities during 1978. Heavy oil, for purposes of the Act, is all oil produced from a property if the oil produced and sold from the property during the taxable quarter, or during the last month before July 1979 in which oil was produced and sold from the property, had a weighted average gravity of 16 degrees API or less, corrected to 60 degrees Fahrenheit.[19] Finally, incremental tertiary oil is the increased volume of oil produced and sold from a property after the introduction of a new or significantly expanded qualified tertiary recovery project.[20] The Act specifies certain procedures which must be followed to certify a tertiary recovery project as qualified.[21]

C. *Independent Producer Oil*

In addition to categorizing oil into three tiers, the Act classifies certain oil as independent producer oil.[22] The tax rate applicable to tier 1 and tier 2 oil that is also independent producer oil is reduced from seventy percent to fifty percent and sixty percent to thirty percent, respectively.[23] Tier 3 oil, however, cannot qualify as independent producer oil. Accordingly, the rate applicable to tier 3 oil is a constant thirty percent.

Specifically, the Act provides that independent producer oil is that portion of an independent producer's qualified production which does not exceed such producer's independent producer amount for the applicable calendar quarter.[24] Classification as independent producer oil, therefore, depends on the applicability of three terms: (i) independent producer; (ii) qualified productions; and (iii) independent producer amount.

An independent producer, in general, is any producer, owner of

---

19. I.R.C. § 4991(e)(3).

20. *Id.* §§ 4991(e)(4), 4993. Tertiary recovery methods are more involved than, and do not include, secondary recovery processes such as water flooding and gas injection. *See* H.R. REP. No. 96-817, 96th Cong., 2d Sess. 98, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1240, 1249. For a more detailed discussion of incremental tertiary oil, see Shattuck, *Planning for the Crude Oil Windfall Profit Tax*, 28 OIL & GAS TAX Q. 387, 397 (1980).

21. *See* I.R.C. § 4993. The temporary regulations provide more detail. *See* Temp. Treas. Reg. § 150.4993-1(b) (1980).

22. I.R.C. § 4992.

23. *See id.* § 4987.

24. *Id.* § 4992.

an economic interest, other than a retailer or refiner within the meaning of sections 613A(d)(2) and 613A(d)(4) of the Code,[25] The term "retailer" includes persons who sell oil, natural gas, or products derived therefrom, directly or through a related person, through retail outlets operated, licensed or leased by such persons, if the retail sales of such products during the applicable quarter exceed $1,250,000.[26] The term "refiner" denotes a person, or a related person, engaged in refining with refinery runs on any one day during the taxable quarter in excess of 50,000 barrels.[27]

To be qualified production, the oil must be tier 1 or tier 2 oil and must be attributable to a *working interest* in the property in existence on January 1, 1980.[28]

Production attributable to a royalty interest, or an overriding royalty interest, therefore, does not qualify as independent producer oil. Production attributable to an interest that was converted from an overriding royalty interest to a working interest after January 1, 1980, however, will still qualify if the interest was subject to a binding contract to convert which was in existence on February 20, 1980.[29]

---

25. *See id.* § 4492(b); Temp. Treas. Reg. § 150.4992-1(b) (1980).

26. *See* Temp. Treas. Reg. § 150.4996-1(g)(1) (1980). The Act has sought to borrow the definition of retailer from the provisions relating to percentage depletion for independent producers and royalty owners set forth in section 613A of the Code. Unfortunately, many issues regarding the definition, as used therein, have not yet been resolved. Some have been dealt with by the regulations proposed under section 613A but such regulations have not been finalized. *See* Prop. Treas. Reg. § 1.613A (1979). Others were not treated in the proposed regulations and, indeed, some new issues were raised by the proposed regulations. Although a discussion of these issues is beyond the scope of the article, others have discussed them in some detail. *See* Robertson, *Concept of "Retail Outlet,"* 25 OIL & GAS TAX Q. 22, 22-25 (1976); *cf.* Dougherty, *Percentage Depletion Allowance: An Update*, 26 OIL & GAS TAX Q. 436, 438 (1978) (discussing retailers, refiners, and related parties).

27. *See* Temp. Treas. Reg. § 150.4996-1(g)(2) (1980). This definiton is, again, that contained in the depletion area. Reliance on this definition is also unfortunate since it too raises several unresolved issues. For example, the term refining is not defined by statute nor is it clear what constitutes being *engaged* in refining. Further, there still remains the question of whether one can be a refiner for less than a calendar quarter and be an independent producer for the rest of such quarter.

28. *See* I.R.C. § 4992(d). A working interest is defined as an operating mineral interest within the meaning of section 614(d) of the Code which was in existence on January 1, 1980. *Id.* § 4992(d)(2)(A). Presumably, the term would not include a net profits interest or a production payment which is an economic interest. *Cf.* Treas. Reg. § 1.614-2(b) (1965) (operating mineral interest does not include royalty interests, production payments, or net profits interest).

29. *See* I.R.C. § 4992(d)(2)(B). The language of the Act suggests that this rule does not

A special rule is provided by the Act with respect to a property interest transferred after December 31, 1979.[30] Under the rule, production from such an interest does not constitute qualified production unless an exception to the rule applies. The exceptions include transfers at death, certain changes in trust beneficiaries, and certain transfers between related parties.[31] The principal exception is that production from such a transferred interest nevertheless constitutes qualified production if the person to whom the property was transferred can prove, in accordance with regulations to be issued by the Treasury Department, that at no time after December 31, 1979, was the property held by a disqualified transferor.[32] A disqualified transferor is one who had qualified production in excess of his independent producer amount or was not an independent producer.[33] Accordingly, a producer cannot transfer an interest in production that did not constitute independent producer oil in his hands in order to have such production qualify as independent producer oil in another's hands.[34]

The amount of an independent producer's qualified production eligible for the reduced rates, the independent producer amount, is limited to an average daily production of 1,000 barrels per day multiplied by the number of days in the quarter.[35] If an indepen-

apply to an optional conversion. The legislative history, however, can be read to conclude that the rule applies to any conversion, whether mandatory or optional. H.R. REP. No. 96-817, 96th Cong., 2d Sess. 110, *reprinted* in [1980] U.S. CODE CONG. & AD. NEWS 1240, 1261.

30. *See* I.R.C. § 4992(d)(3). Both a sublease and a transfer of a partnership interest are transfers for this purpose. *See id.* § 4992(d)(3)(D).

31. *Id.* § 4992(d)(3)(C).

32. *Id.* § 4992(d)(3)(B). The temporary regulations specify that the transferee must establish "to the satisfaction of the district director for the district in which the property is situated" that such was the case. Temp. Treas. Reg. § 150.4992-1(d)(3)(ii)(A). It is not known, as yet, how heavy this burden will be on transferees. It is clear, however, that an even greater importance has been attached to detailed record keeping.

33. I.R.C. § 4992(d)(3)(B)(ii).

34. It should be noted that one is a disqualified transferor only if the disqualification existed prior to the beginning of the quarter in which the transfer occurred. Apparently, if one transfers a property interest before the end of the quarter in which he first becomes disqualified he can have such production qualify as independent producer oil in another's hands even though it would not have been independent producer oil in his hands. *Cf.* I.R.C. § 4992(d)(3)(B)(ii) ("disqualified transferor" person whose qualified production at end of quarter exceeded independent producer amount); Temp. Treas. Reg. § 150.4992-1(d)(3)(ii)(B) (1980) ("disqualified transferor" defined).

35. I.R.C. § 4992(c). For the first quarter of 1980, the period is thirty-one days, which is the number of days from the effective date of the Act, March 1, 1980, to the end of that quarter. *Id.* § 4992(c)(1)(B).

dent producer's qualified production during a quarter exceeds the 1,000 barrel amount, the 1,000 barrel amount is allocated between tiers 1 and 2 in accordance with the production from each tier.[36] Within tiers the independent producer amount is then allocated on the basis of removal prices[37] of the oil in the tier, beginning with the highest removal price.[38]

For purposes of the independent producer oil provisions of the Act, certain related independent producers are treated as one independent producer and are required to share a single 1,000 barrel allotment.[39] For example, spouses and their minor children must share one 1,000 barrel amount. In addition, controlled groups of corporations and owners of beneficial interests in other related entities, including trusts and estates, may be required to share one 1,000 barrel amount. The Act treats a partner, however, as a separate producer of his allocable share of partnership production.[40] Thus, each partner who otherwise qualifies as an independent producer will qualify for a separate 1,000 barrel amount.

D. *Exempt Crude Oil*

The Act exempts from taxation any crude oil produced from a qualified governmental interest or from a qualified charitable interest as well as any exempt Alaskan oil, Indian oil, or front-end oil.[41] For this purpose, a qualified governmental interest is an economic interest in crude oil held by a state or a political subdivision thereof, or by an agency or instrumentality of a state or its politi-

---

36. *Id.* § 4992(c)(2). Although the Act specifies the allocation is to be in proportion to production, it is presumed that the allocation between tiers was to be in accordance with qualified, rather than total production. An allocation in accordance with total production could lead to an allocation of a part of the independent producer amount to non-qualified production. Notably, the allocation between related persons *is* in accordance with qualified production. *See id.* § 4992(e)(1).

37. *See* Temp. Treas. Reg. § 150.4992-1(c) (1980). The term removal price is discussed in the text accompanying note 49 *infra*.

38. I.R.C. § 4992(c)(2)(B). Presumably, the allocation between tiers and within a tier is based on barrels, not value. Both the statute and the temporary regulations fail to address this issue. *Cf. id.* § 4992(c)(2) (referring to allocation between tiers based on proportion to production in each tier); Temp. Treas. Reg. § 150.4992-1(c) (1980) (implies allocation to be based on barrels but refers only to proportion of production between tiers).

39. *See* I.R.C. § 4992(e).

40. *Id.* §§ 4992(d)(3)(B)(iii)(1), 4996(a)(1)(B); *see* H.R. REP. No. 96-817, 96th Cong., 2d Sess. 109, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1240, 1260.

41. *See* I.R.C. § 4991(b).

cal subdivision, but only if, by law, all income from such interest is dedicated to a public purpose.[42] In contrast to this rather broad exemption provided governmental interests, the term "qualified charitable interest" is limited to economic interests held by certain charitable institutions described in section 170 of the Code.[43] For example, an interest held by a church would rarely constitute a qualified charitiable interest.[44]

The term "exempt Alaskan oil" is carefully defined in the Act to cover certain Alaskan production which Congress believed should be exempt in order to encourage further exploration and development.[45] The provision regarding "exempt Indian oil" reflects special treatment given certain production held by or for the benefit of American Indians.[46] Finally, the "front-end oil exemption" applies to oil removed from a property prior to October 1, 1981, the sales proceeds from which are used to pay for certain tertiary recovery projects.[47]

42. *Id.* § 4994(a). The legislative history of the Act makes it plain that Congress did not intend to have this exemption apply to the extent a non-governmental person has an interest in such production. *See* H.R. Rep. No. 96-817, 96th Cong., 2d Sess. 107, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1240, 1258.

43. *See* I.R.C. § 4994(b). The qualified charitable interest must have been held by the institution on January 21, 1980, and at all times thereafter until the end of the calendar quarter during which the oil is removed.

44. *See id.* An interest held by a church is a qualified charitable interest only if prior to January 22, 1980, the net proceeds from sale of the production from such interest were dedicated to the support of a medical facility or educational institution. H.R. Rep. No. 96-817, 96th Cong., 2d Sess. 108, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1240, 1259.

45. *See* H.R. Rep. No. 96-817, 96th Cong., 2d Sess. 103, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1240, 1254.

46. *See* I.R.C. § 4994(d); H.R. Rep. No. 96-817, 96th Cong., 2d Sess. 108, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1240, 1259.

47. *See* I.R.C. § 4994(c). Under the DOE rules, producers who expend funds engaging in certain tertiary enhanced recovery projects before October 1, 1981, are allowed to sell specified volumes of unrelated price controlled oil at deregulated prices to provide such funds. *See* 10 C.F.R. § 212.78 (1980). The oil released from the controlled prices is front-end tertiary incentive oil which is exempt from the windfall profit tax if the project is controlled by an independent producer. Front-end tertiary incentive oil should not be confused with incremental tertiary oil. The latter refers to the increased production resulting from a successful qualified tertiary recovery project and is taxed in tier 3. *Cf.* I.R.C. § 4993 (incremental tertiary oil is oil removed from property after qualified tertiary enhanced recovery project begun).

III. Computation of the Tax

A. *General*

The windfall profit tax is imposed only on the "windfall profit" resulting from the removal of taxable crude oil from the property from which it was produced during each calendar quarter.[48] The windfall profit is equal to the removal (sales) price of a barrel of oil reduced by the applicable adjusted base price and a severance tax adjustment.[49] The windfall profit on each barrel of oil is, however, subject to a net income limitation.[50]

The removal price with respect to any crude oil is most often the amount for which the barrel is sold, but in certain cases it is the constructive sales price used for percentage depletion purposes.[51] On the whole, the adjusted base price is the average price for which the category or tier of oil would have sold in 1979 prior to the removal of price controls and adjusted for inflation.[52] Therefore, the base price for tier 1 is the ceiling price that would have applied to the oil under the Department of Energy (DOE) price regulations if it had been sold in May 1979 as upper tier oil,[53] reduced by 21 cents.[54] The national average base price for tier 1 oil should be around \$12.80 per barrel. The base prices for tier 2 and tier 3 oil are currently determined under formulas set forth in the temporary regulations pursuant to which the base prices for tier 2 and tier 3 oil will be approximately \$15.20 and \$16.55, respectively.[55] The base price is adjusted quarterly for inflation to arrive

48. *See* I.R.C. § 4986(a).

49. *Id.* § 4988(a); *see* Temp. Treas. Reg. § 150.4988-1(a) (1980).

50. *See* I.R.C. § 4988(b). See text accompanying note 56 *infra*.

51. I.R.C. § 4988(c); *see* Temp. Treas. Reg. § 150.4988-1(b) (1980). Treas. Reg. § 1.613-3 (1968) provides, basically, for a constructive sales price equal to the representative market or field price of crude oil before conversion or transportation. Temp. Treas. Reg. § 150.4988-1(b)(3) (1980) gives the Internal Revenue Service the authority to "adjust the removal price to reflect clearly the fair market value of oil removed."

52. *See* I.R.C. § 4989(a); Temp. Treas. Reg. § 150.4989-1(a) (1980).

53. For a discussion of DOE price regulations, see note 5 *supra*.

54. *See* I.R.C. § 4989(c); Temp. Treas. Reg. § 150.4989-1(b) (1980).

55. *See* I.R.C. § 4989(d)(1)(B); Temp. Treas. Reg. § 150.4989-1(c) (1980), *as amended by*, T.D. 7720, 45 Fed. Reg. 63,263 (1980) & T.D. 7721, 45 Fed. Reg. 64,574 (1980). These base prices are only averages. The actual base price of a barrel of oil will have to be determined by each producer, taking into account the actual selling price of the oil and, in some cases, differences in the grade, quality, and location of the oil.

at the adjusted base price.[56] Additionally, the base price of tier 3 oil is to be adjusted upward by approximately one-half percent per quarter.[57] The severance tax adjustment is basically the difference between the state severance tax actually imposed and the state severance tax which would have been imposed had the barrel been sold at its adjusted base price.[58] The tax payable with respect to a barrel of oil is determined by multiplying the windfall profit by the tax rate applicable to the tier of oil being taxed.[59]

B. *Example of Computation*

An example of how the windfall profit tax is computed may be helpful in understanding some of the Act's provisions. Assume that (i) a single barrel of newly discovered oil (tier 3) is removed from a property during the calendar quarter, (ii) the barrel of oil is sold for $35.00, (iii) its adjusted base price is $17.89 (base price of $16.55 multiplied by inflation adjustment of 1.0810), and (iv) the barrel is subject to a state severance tax equal to 7½%. The windfall profit tax on such barrel of oil (without considering the net income limitation) is $4.75, computed as follows:

---

56. *See* I.R.C. § 4989(b).

57. *See id.* § 4989(b)(2). For the quarter ending September 30, 1980, the inflation adjustment was .0649 for tier 1 and tier 2 oil and .0810 for tier 3 oil. *See* Notice 80-6, 1980-24 I.R.B. 21.

58. *See* I.R.C. § 4996(c); Temp. Treas. Reg. § 150.4996-2(a) (1980). The total rate of severance taxes imposed by a state which may be considered for purposes of the severance tax adjustment cannot exceed 15%. A severance tax is defined as a tax on the removal of crude oil from the ground levied by a state, and not a political subdivision of a state, that is determined on the basis of the gross value of the oil removed. *See* I.R.C. § 4996(c)(3); H.R. REP. No. 96-817, 96th Cong., 2d Sess. 104, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1240, 1255. To discourage states from adopting their own windfall profit tax the Act also provides that if a severance tax is enacted or increased after March 31, 1979, the tax must apply equally to all portions of the removal price. *See* I.R.C. § 4996(c)(3)(B). In a recent revenue ruling the Internal Revenue Service ruled that a state tax, designated as a privilege tax, was not a severance tax within the meaning of the Act. Rev. Rul. 80-217, 1980-32 I.R.B. 11.

59. *See* I.R.C. § 4987; Temp. Treas. Reg. § 150.4987-1 (1980). As noted earlier in the text, except for independent producer oil, the tax rate is 70% for tier 1, 60% for tier 2, and 30% for tier 3. Independent producer oil in tier 1 is subject to a 50% rate of tax and in tier 2 a 30% rate.

Removal price		$ 35.00
Less: Adjusted base price:	$ 17.89	
Severance tax adjustment: The difference between the severance tax actually imposed ($35.00 x 7½%) and the amount that would have been imposed if the oil sold at its adjusted base price ($17.89 x 7½%)	1.29	
Total		(19.18)
Windfall Profit		15.82
Multiplied by: Tax Rate		x 30%
Windfall Profit Tax		$ 4.75

C. *Net Income Limitation*

If the amount of the windfall profit, not the windfall profit tax, on a barrel of oil exceeds ninety percent of the net income attributable to that barrel, the tax is to be computed by multiplying the applicable rate of tax by a "profit" equal to ninety percent of the net income.[60] Net income for purposes of this limitation is the producer's taxable income from the property involved, determined under section 613(a) of the Code, with certain adjustments, divided by the number of barrels produced from the property during the year.[61] In computing taxable income from the property, however, no deduction is allowed for depletion, the windfall profit tax

60. *See* I.R.C. § 4988(b); S. REP. No. 96-394, 96th Cong., 1st Sess. 58-59, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1008, 1066.

61. *See* I.R.C. § 4988(b)(2). The definition of a property, for purposes of the net income limitation is that contained in section 614 of the Code. S. REP. No. 96-394, 96th Cong., 1st Sess. 52, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1008, 1059. For other purposes of the Act, the term property has the meaning given it by the DOE price control regulations. Those regulations define a property as the right to produce domestic crude oil which arises from a lease or fee interest. A producer may treat each separate and distinct producing reservoir subject to the same right to produce crude oil as a separate property, provided the reservoir is recognized by the appropriate regulatory authority as a distinct producing formation not in communication with any other producing formation. *See* 10 C.F.R. 212.72 (1980).

itself, intangible drilling and development costs incurred on productive wells, or the cost of certain tertiary injectants.[62]

IV. Administration of the Tax

A. *Withholding*

Although each producer of taxable crude oil removed is ultimately liable for the windfall profit tax, the Act generally requires the first purchaser of the oil to withhold the tax from the purchase price, deposit the tax, and file quarterly tax returns.[63] Purchasers required to withhold the tax are liable for payment of the tax regardless of whether they actually collect it from the producer.[64]

The amount of tax to be withheld is to be determined on the basis of information received by the purchaser regarding the oil and the producer of the oil.[65] Under certain circumstances, however, the amount of tax withheld will be more, or less, than the amount of tax actually imposed by the Act. For instance, special rules to be followed in the absence of the necessary information may result in the withholding of tax in excess of the amount that should have been withheld. Similarly, computational errors by one of the parties to a transaction may cause under or over-withholding. Under or over-withholding is generally to be corrected by ad-

62. *See* I.R.C. § 4998(b)(3)(B). The Act added section 193 to the Code which requires the deduction, for income tax purposes, of the costs of certain tertiary injectants. A producer, though, may elect to capitalize and amortize these costs for purposes of the windfall profit tax net income limitation. *See id.* § 4988(b)(3)(E). In determining the taxable income from the property, an imputed cost depletion deduction is allowed based on the cost depletion which would have been allowable for the taxable year if all intangible drilling and development costs incurred on productive wells had been capitalized and only cost depletion with respect to production from the property had been taken in prior years. *See id.* § 4988(b)(3)(C). In certain cases the consideration paid upon the transfer of a proven property after 1978 cannot be considered in computing the imputed cost depletion deduction. *See id.* § 4988(b)(4). Because the net income limitation can result in a significant reduction in tax liability, it should not be overlooked. For a more detailed explanation of the net income limitation, see Main, Hurdman & Cranstoun, *Analysis of the Crude Oil Windfall Profit Tax: With an Emphasis on the Independent Producer*, 28 Oil & Gas Tax Q. 418, 429 (1980).

63. *See* I.R.C. § 4995(a). Form 720, Quarterly Federal Excise Tax Return, with form 6047 attached, is used to report the windfall profit tax. *See* Temp. Treas. Reg. § 150.4997-1(a)(1) (1980).

64. *See* Temp. Treas. Reg. § 150.4995-1(e) (1980).

65. *See* I.R.C. § 4995(a)(2)(A); Temp. Treas. Reg. § 150.4995-1(b)(1) (1980).

justing the amounts withheld on subsequent purchases.[66]

Even though the information might be available, the net income limitation, presumably because of administrative difficulties, is not to be taken into account by the purchaser in computing the amount of tax required to be withheld from each payment.[67] Instead, the producer must determine whether the limitation applies to any oil sold during the year and, if applicable, file a claim for a credit or refund after year-end.[68]

The purchaser is required to withhold the tax unless the oil is removed from the premises before sale, refined on the premises, or purchased from an integrated oil company.[69] When the oil sold is not subject to withholding, the operator is to supply each producer with the information required to enable the producer to compute the amount of the windfall profit tax on the producer's share of production.[70]

B. *Certificates*

As observed earlier, the amount of tax to be withheld is based on information regarding the oil and the producer of the oil. Typically, however, only the operator of a well is in a position to know the type of the oil sold. As a result, the Act requires the operator to provide the purchaser with the information necessary for a correct computation of the tax.[71] In that regard, the temporary regulations provide that the operator must certify detailed information regarding the type of oil purchased, the volume in each tax tier,

---

66. *See* I.R.C. § 4995(a)(3); Temp. Treas. Reg. § 150.4995-1(c)(1)(i) (1980).

67. *See* I.R.C. § 4995(a)(2)(B).

68. *See* Temp. Treas. Reg. § 150.6402-1(b)(2) (1980). The claim for refund can be made on form 843 or it can be made in connection with the producer's income tax return for the year of over-withholding. Alternatively, a claim for credit for such over-withholding apparently can be made on form 720 in that income tax return. *See id.* § 150.6402-1(b). An exception to this annual refund rule, providing for an accelerated procedure, is available for producers of exempt oil or independent producer oil. *See id.* § 150.6402-1(d).

69. *See id.* § 150.4995-1(d)(2). The temporary regulations have been amended to provide that the first purchaser is to withhold the tax with respect to oil produced by an integrated oil company unless the purchaser has been furnished a certificate stating that the purchaser is an integrated oil company which will deposit its own tax. *See id.* § 150.4995-1(a); T.D. 7694, 1980-23 I.R.B. 19. If the integrated oil company is the operator, it is required to furnish such certificate to the purchaser. Temp. Treas. Reg. § 150.4995-2(c)(2)(i) (1980).

70. *See* Temp. Treas. Reg. § 150.6050C-1(a)(2) (1980).

71. *See* I.R.C. § 4995(a)(2).

and other data necessary for a correct computation of the tax.[72]

Those who produce independent producer oil qualifying for the lower rates of tax and producers of exempt oil can furnish a certificate to the operator or the purchaser certifying their status and setting forth the facts that establish entitlement to the lower rate or the exemption.[73] An operator who receives a producer's certificate is required to furnish the information to any purchaser of oil to which the certificate applies.[74] Since each partner in a partnership is treated as a separate producer, if payment for oil is made by the purchaser to a partnership, the amount to be withheld from the payment is ordinarily based on information received from the operator or partnership that summarizes the status of the partner-producers.[75]

C. *Deposit Requirements*

Purchasers that are not integrated oil companies[76] ordinarily must deposit the amounts required to be withheld not later than forty-five days after the end of the calendar month in which the oil was removed.[77] Independent refiners, those refiners who are dependent on unrelated persons for their supply of crude oil,[78] purchasing oil under a contract in which no payment is required to be made before the forty-sixth day after the end of the month in which the oil is purchased, must deposit the amounts withheld before the first day of the third month which begins after the end of the month in which the oil was removed.[79] Integrated oil compa-

72. *See* Temp. Treas. Reg. § 150.6050C-1 (1980). By agreement, the operator may be relieved of the obligation to provide information if the purchaser does not need it to properly compute the tax. *See id.* § 150.6050C-1(d).

73. *See id.* § 150.4995-2(a). The regulations provide rules applicable in those circumstances when the purchaser has reason to believe the information contained in a certificate is not correct or when information regarding the oil is insufficient. *See id.* § 150.4995-1(b)(2).

74. *Id.* § 150.6050C-1(f).

75. *See id.* § 150.6050C-1(f). Form 6458, Certification and Election Form, is to be used to make the certifications, elections, and revocations thereof required by the Act, and to transmit certain information.

76. An integrated oil company is a taxpayer that produces oil and is either a retailer or refiner. *Id.* § 150.4996-1(g); *see* I.R.C. § 4995(b)(3).

77. *See* I.R.C. § 4995(b)(2). *But see id.* § 4995(b)(2)(A)(ii) (extension for oil purchases made by independent refiner under delayed payment contract).

78. *See* I.R.C. § 4995(b)(4); Temp. Treas. Reg. § 150.4996-1(h) (1980).

79. *See* I.R.C. § 4995(b)(2)(A)(ii); Temp. Treas. Reg. § 150.4995-3(b) (1980).

nies must deposit the amounts required to be withheld and the tax attributable to their own production twice monthly.[80]

D. *Reports and Returns*

All purchasers subject to the withholding rules must provide each producer from whom they have purchased crude oil a monthly statement of the amount of tax withheld.[81] An annual statement of the producer's tax liability and other pertinent information is to be sent both to the producer and to the Internal Revenue Service.[82] If the purchaser withheld tax from payments made to an operator or partnership rather than directly to the producer of the oil, the purchaser is to furnish the statement to the person who received the payment.[83] That person is then required to promptly relay the information and to file information returns with the Internal Revenue Service.[84]

Usually the purchaser, rather than the producer, is to file a quarterly return under the Act.[85] The producer must file the return, however, if the oil removed during the taxable period was not subject to withholding.[86] Furthermore, the producer must file an annual return if the producer's liability for the tax exceeds the amount of tax withheld.[87] The quarterly return is to be filed no later than the last day of the second month following the close of the taxable period, while the annual return is due not later than the last day of February.[88]

E. *Penalties and Responsibility for Administration*

Producers, purchasers, and operators are subject to civil and criminal penalties and tax deficiencies for failure to file returns,

80. *See* I.R.C. § 4995(b)(1). All deposits are to be accompanied by a form 504, Federal Tax Deposit, Excise Taxes, and are to be made at a Federal Reserve Bank or a financial institution authorized by Treasury Department Circular No. 1079, 31 C.F.R. Part 214 to accept such deposits. *See* Temp. Treas. Reg. § 150.4995-3 (1980) for the rules applicable to deposits of the windfall profit tax.

81. Temp. Treas. Reg. § 150.4997-2(a), (b) (1980).

82. *Id.* § 150.4997-2(c)(1).

83. *Id.* § 150.4997-2(a).

84. *Id.* § 150.4997-2(a).

85. *Id.* § 150.4997-1(a)(1)(i).

86. *Id.* § 150.4997-1(a)(1)(iii).

87. *Id.* § 150.4997-1(a)(2).

88. *Id.* § 150.6076-1.

furnish information, pay or collect the tax, deposit the tax, or for misrepresentations regarding oil sold to the first purchaser.[89] First purchasers may rely on certification furnished to them unless they have reason to believe the information certified is incorrect.[90] Primary responsibility for administraton of the Act is imposed on the Internal Revenue Service.[91]

V. Relationship to Other Code Provisions

A. *Percentage Depletion*

Under sections 611 and 613A of the Code, independent producers and royalty owners are entitled to a percentage depletion deduction with respect to the amount of their average daily production that does not exceed 1,000 barrels of oil per day. The percentage depletion deduction allowable with respect to a property is equal to the lesser of (i) the amount determined by multiplying the gross income from the property by the applicable percentage,[92] or (ii) five percent of the taxable income from the property.[93] Gross income from a property is usually the amount for which production from the property is sold during the taxable year.[94] Taxable income from a property, however, is the gross income from the property less all allowable expenses attributable to sales of production from the property.[95]

As originally proposed, the Act provided that the full amount of the windfall profit, without the severance tax adjustment, was to reduce gross income from a property, thereby directly reducing the

89. *See, e.g.*, I.R.C. § 4998; *id.* § 6050C(d); Temp. Treas. Reg. § 150.6050C-1(g) (1980).

90. *See* I.R.C. § 4995(a)(2)(A).

91. *See id.* §§ 4997(b), 7805(a).

92. The rate of percentage depletion for oil and gas is being reduced over time. The rates are as follows: 22% in 1980; 20% in 1981; 18% in 1982; 16% in 1983; and 15% in 1984 and thereafter. *Id.* § 613A(c)(5).

93. *See id.* § 613.

94. Treas. Reg. § 1.613-3 (1968). The term "gross income from the property", as it refers to oil and gas wells, means the amount for which the oil or gas is sold on the premises. If the oil or gas is not in the immediate vicinity but is manufactured, converted, sold, or transported prior to sale, then gross income is the representative market price before conversion or transportation. *See id.* § 1.613-3(a).

95. Treas. Reg. § 1-613(5) (1972); *see, e.g.*, I.R.C. § 611 (deduction for depletion); *id.* § 613 (allowance for percentage depletion); *id.* § 617 (deduction and recapture of certain mining exploration expenditures).

amount of percentage depletion available.[96] Under the Act, as signed into law, however, the windfall profit tax has no direct effect on percentage depletion. In fact, by virtue of the decontrol of oil prices, the dollar amount of percentage depletion should significantly increase.

The windfall profit tax is a cost that apparently must be deducted from gross income from a property in computing the taxpayer's taxable income from the property.[97] Thus, the windfall profit tax could reduce the percentage depletion deduction, especially with respect to marginal properties, due to the fifty percent of taxable income limitation.[98]

B. *Deductibility of Tax*

The windfall profit tax is an excise or severance tax[99] which is deductible for federal income tax purposes under section 164(a)(5) of the Code.[100] Consequently, the effective rate of tax on the windfall profit will often be less than the rates specified for each tier. For example, tier 1 oil attributable to the interest of a royalty owner is subject to a seventy percent rate. If the royalty owner is in the fifty percent income tax bracket, however, the effective rate of tax on the windfall profit is only thirty-five percent (70% x 50%) since the tax itself is deductible.

---

96. *See* H.R. REP. No. 96-817, 96th Cong., 2d Sess. 110, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1240, 1261.

97. *Cf.* I.R.C. § 613(c) (defining gross income from property); Treas. Reg. § 1.613-5(a) (1972) (certain expenses and taxes deductible from gross income from property).

98. A marginal property is one in which production costs are so high that the property is barely profitable. *Cf.* 10 C.F.R. § 212.72 (1980) ("marginal property" if average daily production of crude oil does not exceed specified barrels per day at certain completion depths). When this is the case, a reduction of the taxable income from the property by the tax may operate to materially lessen or eliminate depletion.

99. *See* H.R. REP. No. 96-304, 96th Cong., 1st Sess. 4, 7, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1185, 1189, 1192. The Act states that the tax is an excise tax and the provisions of the Act were placed in the excise tax subtitle of the Code. The temporary regulations similarly characterize the tax. *See* Temp. Treas. Reg. § 150.4986-1 (1980). Yet, Congress characterized the tax as a "temporary excise, *or severance*, tax." *See* H.R. REP. No. 96-817, 96th Cong., 2d Sess. 92, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1240, 1243 (emphasis added). The distinction could prove important when, for example, an agreement, such as a lease, provides for the payment by one party of all severance taxes.

100. The Act amended section 164 of the Code to specifically provide for a deduction with respect to the windfall profit tax. *See* Pub. L. No. 96-223, § 101(b), 94 Stat. 229 (1980).

VI. Phase Out of Tax

The windfall profit tax is to be phased out over a thirty-three month period beginning the later of (i) January 1, 1988, or (ii) the day following the month in which it is estimated that the government has received an aggregate of 227.3 billion dollars in windfall profit tax revenues.[101] In no event, however, is the phase out period to begin later than January 1991.[102] The tax, therefore, should begin to phase out sometime between December 1987 and February 1991 and will completely expire sometime between November 1990 and November 1993.[103]

VII. Proposed Amendments

Almost immediately after the Act became law, efforts were renewed to alter its impact. Among the more notable were efforts by legislators, primarily from oil producing states, to exempt certain royalty owners from tax under the Act.[104] Most recently, emphasis is being placed on the desire of many legislators to exempt a specified dollar amount of production from tax under the Act.[105] Fi-

101. *See* I.R.C. § 4990. The tax is temporary in nature and will be phased out beginning at a date dependent upon the rate at which revenues are generated. The amount of revenue collected from the tax is calculated by estimating the gross receipts from the tax minus any revenue attributable to crude oil interests held by the United States. The figure is further reduced by the amount of windfall tax refunds and the amount producers are allowed to reduce their federal income tax due to the deductibility of the tax. *See* H.R. Rep. No. 96-304, 96th Cong., 2d Sess. 116, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1185, 1267.

102. *See* I.R.C. § 4990.

103. *See id.*

104. Even before the Act was signed by President Carter, Senator Henry Bellmon (R. Okla.) introduced a bill to exempt the first 1000 barrels of daily oil production of independent producers and royalty owners. *See* S. 2487, 96th Cong., 2d Sess. (1980). Other amendments have been proposed to benefit independent producers and royalty owners. *See, e.g.*, S. 2533, 96th Cong., 2d Sess. (1980) (introduced by Senator Lloyd Bentsen (D. Tex.)) (containing provisions similar to those proposed by Senator Bellmon in S. 2487, 96th Cong., 2d Sess. (1980)); S. 2521, 96th Cong., 2d Sess. (1980) (introduced by Senator Robert Dole (R. Kan.)) (bill would exempt up to ten barrels of oil per day produced by royalty owners); H.R. 7127, 96th Cong., 2d Sess. (1980) (introduced by Representative Keith Sebelius (R. Kan.)) (provisions identical to those of S. 2521 exempting royalty owners from tax on up to ten barrels of oil per day). Because the announced target of the Act was the "oil companies" whose profits were deemed excessive, few people realized that the Act taxed all producers regardless of size. Only when the tax is actually borne by royalty owners and other "small" producers will the reach of the Act be understood.

105. The Senate version of the revenue reconciliation measure currently under consideration by the Congress provides a credit for royalty owners who are individuals, estates, or

nally, it appears that Congress may soon face a technical amendments bill designed to correct errors and remove ambiguities in the Act.[106]

VIII. Conclusion

It appears likely that the Act will achieve the goals set forth for it by its sponsors. It will certainly reduce oil industry revenues and should provide a large fund for energy related projects.[107] Such successes, however, will be obtained with a tool that was made not only overly complex,[108] but misnamed. The tax imposed by the Act is not a tax on profit, instead it is an excise or severance tax. In short the Act taxes, at rates varying from category to category of crude oil, the difference between the control price of crude oil and the market price for such oil, with certain adjustments. Special treatment was accorded to certain independent producer oil and certain oil was exempted altogether from the tax imposed by the Act. Although the tax is imposed on each producer of oil, including royalty owners, it is paid principally through a withholdng procedure with complicated certification, deposit, and return require-

---

qualified family farms equal to the first $1000 of windfall profit tax on oil removed during 1980. S. 2939, 96th Cong., 2d Sess. (1980). In addition, an amendment to S. 2939 would exempt from the windfall profit tax the first two barrels of daily production from stripper wells. Both provisions would be financed, however, by a reduction in the adjusted base price. S. 2939 has been passed by the Senate.

106. Many of the errors and ambiguities have been noted in this article. One uncertainty is whether condensate is "crude oil" and, therefore, subject to the windfall tax. The legislative history seems to suggest that condensate is crude oil whether or not from a gas well. *See* H.R. Rep. No. 96-817, 96th Cong., 2d Sess. 114, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1240, 1265. Revenue projections used by Congress in enacting the Act, however, did not include revenue from the taxation of condensate. Another ambiguity is whether the tax imposed by the Act is an excise tax or a severance tax. *Compare* I.R.C. § 4986(a) (stating tax is excise tax) *with* H.R. Rep. No. 96-817, 96th Cong., 2d Sess. 92, *reprinted in* [1980] U.S. Code Cong. & Ad. News 1240, 1243 (Congress characterized the tax as a "temporary excise, *or severence* tax") (emphasis added). Additionally, provisions of the Act dealing with computation and administration of the tax may cause practical difficulties. *See, e.g.*, I.R.C. § 4992(c)(2) (raises question of whether allocations between tiers is to be based upon barrels of oil or value); *id.* § 4995(a)(2)(A) (practical difficulties arising from withholding and certification requirements); *id.* § 4995(a)(2)(B) (difficulty in application of net income limitation).

107. During the first four months of its existence the Act generated 448 million dollars in revenues for the federal government. The exact figure was $447,517,000 as of the end of June 1980. *See* [Sept. 30, 1980] No. 191 Daily Tax Rptr. (BNA) G-5.

108. The text of the Act related to the windfall profit tax covers approximately twenty-six printed pages.

ments. Because of its deductibility, the tax may not have the impact on producers of oil that a superficial review of the Act would reveal. In addition, the effect of the tax on percentage depletion is difficult to predict. Under the terms of the Act, the tax is supposed to be phased out in the early 1990's. Until then, however, it can only be hoped that the Internal Revenue Service and the courts will eliminate the many ambiguities contained in the Act in a cogent fashion or that technical amendments will be passed with the same effect.