EB-2007-0606/EB-2007-0615

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. O.15, Sch. B;

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing rates for the sale, distribution, transmission and storage of gas commenting January 1, 2008.

AND IN THE MATTER OF an Application by Union Gas Ltd. ("Union Gas") for an Order or Orders approving or fixing rates for the sale, distribution, transmission and storage of gas commenting January 1, 2008.

AND IN THE MATTER OF a combined proceeding of the Board pursuant to section 21(1) of the Ontario Energy Board Act, 1998.

RESPONSES TO THE WRITTEN INTERROGATORIES OF THE LONDON PROPERTY MANAGEMENT ASSOCIATION, THE WHOLESALE GAS SERVICE PURCHASERS GROUP AND THE BUILDING OWNERS AND MANAGERS ASSOCIATION OF THE GREATER TORONTO AREA ON THE EVIDENCE OF DR. ROBERT LOUBE ON THE TAX CHANGE ISSUE

SUBMITTED ON BEHALF OF THE CONSUMERS COUNCIL OF CANADA THE VULNERABLE ENERGY CONSUMERS COALITION AND AND THE CITY OF KITCHENER

Interrogatory 1

Please provide a copy of the Jack M. Mintz article "Corporate Tax Adjustements and the Determination of Electricity Rates in Ontario" that is referred to in footnote 7 of the evidence.

Answer:

Please see the attachment.

CORPORATE TAX ADJUSTMENTS AND THE DETERMINATION OF ELECTRICITY RATES IN ONTARIO

By

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And

President and CEO, C. D. Howe Institute

I have been asked to consider how corporate tax adjustments should be reflected in rates charged by local distribution companies to ratepayers. These questions have been discussed as part of a draft being prepared for the tax section (Section 3.5) of the Ontario Energy Board Distribution Rate Handbook.

Specifically, three issues are being reviewed:

- *Disallowed Expenses that are Tax-Deductible*: Some expenses (e.g. political or charitable donations, certain types of employee compensation, etc.) are not deductible from profits in determining rate charges of the local distribution companies. However, for corporate income tax purposes such expenses are deducted and therefore reduce the payments-in-lieu of taxes ("PILs") paid to the Ontario government by the distribution company. The question is whether the lower income tax payments should be reflected in a) lower rates charged to consumers, or b) increased profits received by the owners of the distribution companies.

- *Eligible Capital Expenditures*: A deduction is provided in the Income Tax Act for cumulative eligible capital expenditures in determining income for tax purposes. Cumulative eligible capital is the tax system's equivalent of the concept of goodwill in accounting rules. Goodwill is deducted by way of amortization charges annually, but it not recoverable from ratepayers in rates. The question is whether ratepayers or the local distribution corporation benefit from the tax reductions associated with goodwill, because although it is not an allowable recovery for determination of rates, it increases the cumulative eligible capital deduction for tax purposes.

- *Capital Gains and Losses on the Disposition of Distribution Assets*: When assets are disposed, the sale of depreciable assets may be used to reduce the undepreciated capital cost of a class of assets, resulting in a reduction in capital cost allowance deductions for tax purposes. However if the undepreciated capital cost is reduced to zero, or if the asset is a non-depreciable asset, the corporation must report income reflecting capital gains (losses) if the sale price is above (below) the (original) cost basis of the asset. The question raised is whether the tax adjustment should be shared between the ratepayers and the shareholder, and whether the treatment of the gain or loss itself (who receives or pays the net gain or loss) should impact on the treatment of the tax increase or decrease resulting from the gain or loss.

In evaluating these issues, the critical issue that I shall address is whether corporate taxes are recovered

a) by companies charging higher prices to consumers;

b) by reducing payments as profits to shareholders; or

c) by reducing salaries and wages paid to employees.

To provide an answer, the next section provides some background material on regulatory, tax and other issues that related to the setting of rates. In the following section, I review the heart of the issue, which is the "economic incidence" of corporate income and capital taxes, which is defined more exactly below. The final section applies the theoretical and empirical understanding of corporate tax issues to the specific issues outlined above.

Some Background

Under the current regulatory regime in Ontario, the local electricity distribution companies, most of which are owned by provincial or municipal governments, are able to recover from ratepayers operating expenses, interest expense, depreciation, taxes and formula-based profit. Amounts are to be established for 2006 based on 2004 information with adjustments.

Tax payments would include any fixed charges such as payroll taxes. They would also include an amount that is estimated for corporate income and capital tax payments that are payable. The distribution companies owned by provincial or municipal governments, being non-taxable, are now required by Ontario legislation to make payments in lieu of taxes (PILs), using the same rules as are followed by any taxable Canadian corporation according to the federal and Ontario Income Tax Acts.

The PILs are remitted to the Ontario government in order to help reduce the stranded debt created by the government's requirement to finance Ontario Hydro, which was previously responsible for the generation, transmission and distribution of electricity in Ontario.

Energy consumers in Ontario also pay a Debt Retirement Charge for electricity use to reduce the stranded debt. It is intended that, between the PILs payments, and the Debt Retirement Charge, the stranded debt will eventually be paid in full. One unique point that is important to the analysis below regarding economic incidence is the following one. PILs used to reduce the stranded debt lower dollar for dollar the future Debt Retirement Charge levied on electricity prices. In other words, any reduction in PILs should mean higher electricity charges paid by energy consumers in the future in order to reduce the stranded debt.

It is important to note that there is a significant difference between income, as determined for tax purposes, and corporate profit, as measured for accounting (Canadian GAAP) purposes. For example, companies for tax purposes depreciate assets at a different rate (capital cost allowances) than that provided for accounting purposes, especially when governments provide accelerated depreciation for assets such as in the case of energy conservation equipment. The proposed 2006 electricity distribution rate model would recognize these differences by calculating taxes according to the capital cost allowances provided by the Income Tax Act rather than requiring distribution companies to calculate their tax liabilities based on accounting depreciation. Thus, the PILs calculations will use expected actual tax liabilities to determine rates charged to consumers, rather than adjusting the taxes to reflect accounting depreciation.

Similarly, other differences between taxable income and accounting profit are not relevant in determining PILs and therefore rates to be charged to consumers. These include, for example, dividends received from other corporations. Dividends paid from corporation to another are typically exempt from taxation, since such dividends have already borne tax paid by the company prior to distribution of the dividend. Accounting profits, however, would include such dividends in revenues. Another example is losses incurred in prior years, which are deductible in calculating taxable income but are not relevant in determining annual accounting profits. Other such differences between taxable and accounting profits are also not applied in determining PILs. The calculation of corporate income taxes in determining rates charged to consumers relies on the deductions and inclusions for tax purposes, and ignores the different deductions and inclusions used to calculate accounting income.

Further, differences between taxable capital for determining capital tax payments and the book value of assets (or liabilities and shareholders' equity) are not relevant in determining PILs associated with the capital taxes that are payable to the federal and Ontario governments. For example, accounts payable of less than a year are not included taxable capital but would be included in the book liabilities of the company. In calculating rates, the tax rule rather than the accounting rule is used. Also, for capital tax purposes, corporations can deduct an allowance for investments in other companies on the presumption that such assets would already be subject to capital tax imposed on subsidiaries. That deduction is not available for accounting purposes.

Thus, there is no prima facie reason why specific items as referenced in the introduction, such as disallowed expense deductions for regulatory purposes, goodwill for cumulative eligible capital and capital gains and losses on the disposition of distribution assets, would not be treated the same way. If the Income Tax Act allows them to be deducted in calculating tax, like other deductions the tax rules would, it appears, be the most obvious ones to use. After all, there are many differences between taxable and accounting profits and assets. Consistency suggests that all such differences be resolved using the same principle.

In order to determine whether the general rule current in place (ie. follow the tax rules) should apply, one needs to deal with the overall question of principle. Ultimately, that question is one of incidence – in other words, who actually bears the corporate tax – shareholders, employees or consumers – a point to which I now consider in the next section.

Economic Incidence of the Corporate Tax

As a start, it is important to recognize the difference between legal and economic incidence. Legally, corporations are responsible to pay corporate income and capital taxes to governments. However, in an economic sense, the true bearers of the corporate tax may be **consumers**, who pay higher prices, **employees**, who receive less compensation, and **shareholders,** who receive lower profits.

Often we think of the corporate income tax as a payment made on income earned by shareholders of the company. While this is not strictly true, since it is actually paid by the company, not the shareholder, it theoretically reduces the amount of profits available to be distributed to shareholders. Thus, it is reasonable to think of corporate taxes as reducing income earned by shareholders. This approach assumes that prices and employee compensation are fixed, and any changes in revenues must be borne by the shareholder.

Alternatively, one might think of corporate taxes as if they are no different from other costs that must be passed on by a business in order to remain profitable. Following this paradigm, without higher prices charged to consumers or lower employee compensation, the corporate tax would reduce income paid to investors, who would no longer wish to invest their funds since they could derive better risk-adjusted returns on investments in other assets like foreign corporate shares, real estate or government treasury bills. This approach assumes that investment returns are fixed in the market, and any change in revenues must be adjusted either in prices or in labour costs.

The economic literature on "who pays the corporate tax" does not provide a demonstrably clear theoretical argument (Whalley [1987]). One view is that the corporate tax is shifted forward to consumers through higher prices to recover all costs. An alternative view is that corporate tax falls on owners of the business who are unable to shift their capital investments to other assets with more favourable returns. Economists are not agreed on the correct answer to be applied in all cases, or even whether there is such a universally applicable answer.

Indeed, as pointed out by the report of the Technical Committee on Business Taxation[1], the argument is quite complicated, since the corporate tax has a number of different functions in different circumstances.

One function is that the corporate tax withholds income from investors who would otherwise be able to escape payment of personal income taxes by leaving assets in a corporation that would be untaxed on its income if no corporate tax existed. Thus, the incidence of the corporate tax falls on the saver – a result that is especially consistent with small corporate businesses that are set up by investors to hold assets.

Another view is that the corporate tax withholds income payable to foreign corporate investors, such as those in the US, UK and Japan, who would be able to credit Canadian corporate income taxes against liabilities owing to their resident governments. Thus, the incidence of the Canadian corporate tax falls on foreign governments that receive less tax due to tax crediting.

A final view is that the corporate tax on large corporations falls most heavily on consumers of products and services sold by the corporations. Since large corporations must raise capital from international markets, including the listing of shares in the US and UK financial markets, the cost of finance is determined by investors in international markets. Those investors seek after-tax returns on Canadian investments that are at least as good as in other countries. If the return on Canadian investments is less than that

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[1] Report of the Technical Committee on Business Taxation, Finance Canada, Ottawa, 1998. The author of this paper chaired that committee, and was principal author of its final report.

received from other markets, Canadian companies cannot raise capital at favourable terms and must forgo investment. Thus, the true incidence of the Canadian corporate tax is to fall on consumer prices on products and services sold to Canadians or on factors like land that are internationally immobile, since the corporate tax cannot be passed on to shareholders in international markets who will shift their investment funds to alternative investments.

Overall, no clear case can be made regarding shifting. However, as the Technical Committee on Business Taxation noted in its report (p. 3.21):

"One might thus expect the corporate income and capital taxes on large corporations to be substantially shifted to immobile factors – labour and, to a lesser extent, land.... Studies have shown that there is some segmentation in equity capital markets internationally – prices of equity securities of Canadian business are somewhat sensitive to developments in both foreign and Canadian markets. The implication of these studies is that the rate of return on capital is affected to some degree by the supply of Canadian savings so that the corporate income tax can be shifted back in part to owners of capital".

Empirically, the corporate tax is far more likely to be shifted forward in higher prices charged to consumers than shifted back to owners of capital given the openness of Canada's markets to international trade and investment.

Local distribution companies are neither small nor foreign-owned companies. They are, however, owned primarily by provincial or municipal governments. Taxes paid by the distribution companies could be a) reflected in higher electricity charges or b) passed back to the owners – the government bodies. Given that governments seek to earn a risk-adjusted rate of return on their local distribution company investments commensurate with other investments, including buying back their risk-free debt, it would seem that corporate taxes in general are viewed as recoverable costs.

This latter point is also consistent with the general approach used for regulation. PILs that are paid to the Ontario government are generally treated as costs of doing electrical business. The tax payments are therefore included in determining the rates to be charged. Further, PILs paid by local distribution companies that result in higher rates charged to consumers, are used to retire Ontario Hydro's debt related to electrical generation and distribution. The consumers make up for the higher rate charges by paying lower Debt Retirement Charges that are added on to the cost of electricity bills in order to pay off the stranded debt. Thus, the PILs are ultimately borne by the consumers who are provided an offset in the Debt Retirement Charge ultimately assessed on the consumers. If consumers pay more in PILs, they will pay less in future Debt Retirement Charges, and vice versa.

Application of Economic Incidence to Tax Adjustments

Given the above discussion, it would seem that there is no need to make any adjustment to actual tax calculations in order to determine rates charged to consumers. If the economic incidence of the corporate tax falls on consumers, higher PILs payments would be expected to result in higher electricity prices. That is in fact the case. It follows that if a tax deduction results in lower taxes (PILs) paid by the local distribution company, it should result in a lower rate charged to consumers on the basis of the same principle. Given that the Ontario government then receives a smaller PILs payment, it will need to assess a higher future Debt Retirement Charge on the consumers as an offset. Application of the principle has a practical effect. Ultimately, consumers are no better or worse off, and neither are the distribution companies, who pass on taxes in rates.

However, these conclusions apply to corporate and capital taxes in general, not to specific items.

In that regard, I would conclude with respect to the contested issues that corporate income or capital tax adjustments should be consistently applied. Rates should be raised to reflect tax costs or not at all, or some combination of both to reflect economic incidence.

Given that generally corporate income and capital taxes paid by local distribution companies are treated as costs and therefore result in higher rate charges paid to consumers, I see no reason to differentiate these specific tax impacts from application of this general principle.

- Deductions given for tax purposes, even if disallowed for regulatory purposes, will result in lower PILs paid by the companies. These tax reductions should be passed on to the consumer as lower rates, just as in the case of other tax provisions. This would apply to political and charitable donations, executive compensation payments, and any other corporate expenditure that generates a tax deduction but are not recoverable from ratepayers in rates.

- The same principle should apply to eligible capital deductions, which should be applied to reduce rates to the ratepayers.

- In the case of capital gains or losses on the disposition of distribution assets, the general principle should be applied that would result in increases and decreases in taxes resulting from these amounts increasing or decreasing rates to ratepayers. I note that this approach is not at all considered as an alternative (pages 8 and 9 of Section 3.5 of the Handbook in the draft I saw) which only allows a 50 percent passing of the benefits to ratepayers or not at all.

In conclusion, therefore, I suggest that no adjustment to PILs are necessary and that rates should be reflect actual payments expected to be made by the local distribution companies to the Ontario government.

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Time Magazine (Canadian Edition)
Globe and Mail
Canadian Business (monthly column since 2001)
Worth Magazine

EXPERIENCE as EXPERT WITNESS:

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"An Assessment of the Transfer Price for Cimetidine Paid by SmithKline Canada" Dept. of Justice, 2003.

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Winterhaven Stables Ltd. vs. the Crown. Expert witness report on "The Relationship Between Federal Income Tax Revenues and Cash Expenditures on Post-Secondary, Health and Canada Assistance Plan Transfers to Provinces", December, 1985.

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1. 2003 – 2006, Deloitte & Touche LLP Professor of Taxation, University of Toronto.
2. Second Prize ($10,000.), Donner Prize for Best Book in Public Policy 2002 ("Most Favored Nation").
3. Winner, Purvis Prize for best writing in Economic Policy for "Most Favored Nation", 2002.
4. Who's Who of Canadian Business (2001 -)
5. National Register's Who's Who In Executives and Professionals
6. 2001, Nationwide Register's Who's Who
7. 2001, Distinguished Speaker Series, Environment Canada
8. 2000, Alumni Excellence Award, University of Alberta, Edmonton.
9. 2000, Global Who's Who of Economists.
10. 1990 – 2001, Arthur Andersen Professor of Taxation, University of Toronto.
11. Who's Who of Canada (Since 1989).
12. 1998, Visiting Scholar, International Monetary Fund.
13. 1997, Distinguished Speaker, Industry Canada.
14. 1996 and 1997, Clifford Clark Visiting Economist, Finance Canada.
15. 1994, Distinguished Visiting Professor, University of Alberta.
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David Soberman	(1996)
David Dunne	(1995)
Khai Lee	(1994)

Economics

Henry Li	(2001)
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Sanjit Dhami	(1997)
Pierre-Pascal Gendron	(1997)
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Ian Gorman	(1987)
Murray Frank	(1984)
Mike Peters	(1979)

Interrogatory 2

The evidence at page 2 states that "the specific conditions of the gas distribution industry, related to the gas industry's capital intensity, causes the corporate income tax rate to have a different impact on the gas distribution industry."

Please comment on the specific conditions of the gas distribution industry related to the gas industry's capital intensity and how this impacts on the industry with relation to the provincial capital tax and the capital cost allowance rate for distribution assets (Class I).

Answer:

Capital intensity can be measured by ratio of assets to revenue. For Canadian non-financial corporations it is necessary to have $1.06 in assets for each $1.00 in revenue. For Canadian utilities including electric, gas and water, it is necessary to have $3.16 in assets for every $1.00 in revenue. See Canada Statistics Table 179-0004 for the year 2005. Union reported $2.20 in assets for every $1.00 in revenue for 2006 (www.uniongas.com/aboutus/overview/ataglance.asp), while Enbridge reported $2.04 in assets for every $1.00 in revenue for 2005 (Enbridge 2005 Annual Report Consolidated Statements). Thus, gas utilities are more capital intensive than most non-financial corporations but less capital intensive than other utilities.

As noted in my testimony, price decreases faster in capital intensive industries following a tax decrease than in other industries.

Interrogatory 3

The evidence states at page 8 "that it is necessary, at a minimum, to pass at least seventy-five percent of the corporate tax reduction through the Z-factor."

a) If the corporate tax reduction is effective January 1 of the year amounts to a reduction in taxes of $100 for the year, please confirm that, in your opinion, at least $75 of this reduction should be accounted for through the Z factor.

b) Does this $75 Z factor continue on for the subsequent years or is the entire $100 reduction in taxes that takes place in the first year of the reduction accounted for in subsequent year through the inflation factor? Please explain.

Answer:

a) Yes

b) The impact of the Z factor change in the first year on the price continues on through the subsequent years. The inflation factor will, at a maximum, account for only 25 percent of the impact by year 5 after the corporate tax decrease.

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