

In the

ORIGINAL

Supreme Court of the United States

F. W. WOOLWORTH CO.,

Appellant,

v.

TAXATION AND REVENUE DEPARTMENT

OF THE STATE OF NEW MEXICO

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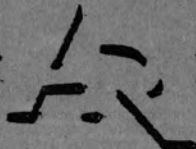
No. 80-1745

Washington, D. C.

Monday, April 19, 1982

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F. W. WOOLWORTH CO., :

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TAXATION AND REVENUE DEPARTMENT :

OF THE STATE OF NEW MEXICO :

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Monday, April 19, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:13 o'clock p.m.

APPEARANCES:

WILLIAM L. GOLDMAN, ESQ., Washington, D. C.; on behalf of the Appellant.

SARAH E. BENNETT, ESQ., Santa Fe, New Mexico; on behalf of the Appellee.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in F. W. Woolworth against the State of New Mexico.

Mr. Goldman, I think you may proceed.

ORAL ARGUMENT OF WILLIAM L. GOLDMAN, ESQ.,
ON BEHALF OF THE APPELLANT

MR. GOLDMAN: Mr. Chief Justice, and may it please the Court, this state income tax case involves the same basic constitutional issues that you discussed this morning and this afternoon in the ASARCO case.

Woolworth, the Appellant in this case, is a New York corporation engaged in the retail business throughout the United States, Puerto Rico, and the Virgin Islands. It purchases consumer items that it sells at retail through its Woolworth and Woolco stores. Woolworth also owns four major foreign subsidiaries that are engaged in the same general type of business in Germany, the United Kingdom, Canada, and Mexico.

The dispositive issue here is whether the retail businesses of the foreign subsidiaries are functionally integrated with Woolworth's domestic retail business in the United States. If the foreign operations are functionally integrated, then we agree that the dividends paid by the foreign subsidiaries are

1 properly includable in apportionable income. That was
2 the question decided by this Court in Mobil, and the
3 reason would be that where you have an admittedly
4 unitary business, as this Court recognized in Underwood
5 Typewriter, it is impossible to allocate specifically
6 the portion of the profits of that business that were
7 earned in any particular jurisdiction where the business
8 was conducted.

9 And so formulary apportionment is appropriate,
10 and for that purpose, where the unitary business
11 includes the operations of the subsidiaries, the
12 dividends can be treated as part of the apportionable
13 income. Of course, if the business were defined as
14 including the operations of the subsidiaries, so the
15 dividends are included in the apportionable base, then
16 that would necessitate the payroll, property, and sales
17 of the subsidiaries be correlatively reflected in the
18 apportionment --

19 QUESTION: Well, in that case it wouldn't be
20 just the dividends. It would be the income of the subs.

21 MR. GOLDMAN: Your Honor, if the state were
22 seeking to have combined reporting, we might be
23 concerned about the treatment of the underlying
24 operating income.

25 QUESTION: Well, is your position then, if

1 they are going to take the dividends into account, they
2 must take into account all of the property and payroll?

3 MR. GOLDMAN: No, Your Honor. The answer is
4 essentially the same as was made this morning.

5 QUESTION: All right. Thank you.

6 MR. GOLDMAN: Where the dividends paid reflect
7 a percentage of the profits earned by the subsidiary,
8 then you should reflect a commensurate percentage of the
9 underlying payroll, property, and sales that are fairly
10 related to the portion of the profits being distributed.

11 On the other hand, where the operations of the
12 subsidiary are not functionally related to the business
13 being conducted in the United States, the dividends
14 should not be included in apportionable income. The
15 dividends have no role to play in the state tax
16 calculation, because they represent income earned in the
17 course of totally unrelated activities.

18 QUESTION: I get a feeling you are using the
19 term "functionally related" in not quite the same way as
20 your friends on the preceding case.

21 MR. GOLDMAN: By functionally related, I am
22 referring to the operational activities conducted by the
23 subsidiaries in their respective countries. If --

24 QUESTION: All of your business is retail
25 sales, is it not, domestic and foreign?

1 MR. GOLDMAN: That's correct.

2 QUESTION: And that distinguishes it in some
3 respects from the prior case, does it not?

4 MR. GOLDMAN: Well, it distinguishes this case
5 from some of the subsidiaries that pay dividends to
6 ASARCO. There was discussion this morning of MIM, which
7 is engaged in a comparable line of business as the
8 parent corporation.

9 QUESTION: And with asbestos, which they said
10 was a different --

11 MR. GOLDMAN: That's correct. The state made
12 a distinction between the cases where the subsidiary was
13 engaged in the same or similar line of business and an
14 unrelated line of business. Our point is that it should
15 make absolutely no difference at all where the
16 operations of the businesses are functionally separate
17 and unrelated. The question here is to determine how
18 much of Woolworth's income is fairly attributable to its
19 operations in New Mexico. That is all New Mexico can
20 tax, and if income is earned in the course of separate
21 activities, albeit the same type of business, but
22 functionally separate, so that income is earned by a
23 self-contained, free-standing business operating in
24 Europe, then New Mexico has no claim to tax any part of
25 that income. It can only claim a share of the income

1 earned from the business a portion of which is conducted
2 in New Mexico.

3 The key question as to whether the income from
4 the foreign subsidiaries should be taken into account,
5 the key issue is whether the businesses are related,
6 functionally related, not whether it is the same kind of
7 business.

8 QUESTION: Do you think our cases lay down any
9 test for when a business is or is not functionally
10 related to another one?

11 MR. GOLDMAN: Oh, absolutely. I think through
12 all of the decisions of this Court, starting with Adams
13 Express, and Underwood, Bass, Ratcliff, I think in every
14 instance where this Court has found a unitary business,
15 there has been a degree of functional relationship
16 between the operations of the business that is totally
17 missing in this case. I think --

18 QUESTION: Well, it may be possible to go back
19 through the facts of each of the cases and say that all
20 of them conform to one pattern, but do you rely upon any
21 one case for a definition of your term "functionally
22 integrated"?

23 MR. GOLDMAN: Not as such, Your Honor. I
24 think what the cases say is, where the business earns
25 its profits as a whole as an economic unit, then you

1 have a unitary business. There is a phrase, "as a
2 unit", "operating as a unit", in the Adams Express case,
3 for example, and in that opinion the Court goes on to
4 say that unity of ownership is insufficient, because you
5 can have two separate businesses with the same
6 ownership, and as long as they operate separately, then
7 they have no relationship to each other, but I don't --
8 I can't point to a sentence as such which defines a
9 unitary business, but I think it is easy to read all of
10 the opinions and come away with the absolute conviction
11 that in order to have a unitary business, there must be
12 a functional relationship.

13 What this Court said -- one guide may be in
14 the Mobil opinion. The Court said that in order to show
15 that the dividends are not apportionable, you must show
16 that they were earned in the course of activities
17 unrelated to the business conducted in the taxing
18 state. The income must be earned in the course of
19 activities unrelated to the business conducted in the
20 taxing state.

21 All of the income earned by Woolworth's
22 subsidiaries is earned in the course of activities
23 unrelated to the conduct of the domestic retail business.

24 QUESTION: Are we to infer from that that the
25 source of supply for the European outlets is all in the

1 European market?

2 MR. GOLDMAN: The record is very clear. Let
3 me get to the facts, Your Honor. The record is very
4 clear that each corporation conducted its inventory
5 purchasing on a separate basis. To a large extent, each
6 subsidiary purchased its inventory in its own country,
7 but the facts show that even where they purchased in the
8 same countries, in the Orient, for example, each one
9 purchased separately from the others and on its own, and
10 indeed there is a suggestion that they may to a certain
11 extent almost have been competitive with each other, but
12 certainly there was no coordinated central purchasing
13 function at all.

14 Let's look at the facts in the case. The
15 record shows that each subsidiary independently carried
16 on all of the essential operations of a retail
17 business. These include selecting site for stores,
18 determining the type and quantity of merchandise to
19 carry, purchasing the inventory, advertising, funding of
20 operations, accounting and cash control, personnel
21 selection and training. All of the essential functions
22 were carried on separately by each subsidiary. Each
23 subsidiary was a self-contained economic unit.

24 I think the facts in this case stand in sharp
25 contrast, as I said before, to all of the prior

1 decisions of this Court in which a functionally
2 integrated unitary business has been found to be
3 present. The case that perhaps provides the clearest
4 guidance here is Butler Brothers v. McColgan, since it
5 also involved a mercantile operation. In that case, a
6 wholesale business that consisted of distributing houses
7 in seven states and a central office in Chicago.

8 The Court found that the business was an
9 integrated, unitary business because of the presence of
10 centralized management, centralized purchasing, and
11 centralized advertising, and for those reasons, the
12 operations of all of the separate distributing houses
13 were found to be integral parts of a single unitary
14 business, so that in determining how much of the income
15 was apportionable, or taxable, I should say, in
16 California, apportionment was upheld.

17 Now, how does this case compare to Butler
18 Brothers? There is absolutely no centralized management
19 in this case. The record shows that with the possible
20 exception of one officer of the Canadian subsidiary,
21 that none of the officers of the foreign subs was also
22 an officer of the parent company.

23 QUESTION: I take it then if Woolworth just
24 transformed itself into a holding company, and each of
25 its stores in each of the 50 states was owned by a

1 subsidiary, similar to those that are operating abroad,
2 those subsidiaries should be treated as non-unitary also.

3 MR. GOLDMAN: No, Your Honor. We are very
4 emphatic in saying that the form of corporation
5 organization should make no difference whatsoever. The
6 domestic retail business was conducted in an integrated
7 fashion, with centralized --

8 QUESTION: Well, I know, but suppose it was --
9 suppose the operations in each of the states was
10 actually carried on precisely like the operations of the
11 subsidiaries abroad.

12 MR. GOLDMAN: If those --

13 QUESTION: Then you would have exactly the
14 same result.

15 MR. GOLDMAN: If those were the facts, then we
16 would say that each state could -- would be,
17 constitutionally barred from taxing any of the income
18 earned in any other state.

19 QUESTION: All right. Thank you.

20 QUESTION: Of course, here you did have some
21 interlocking directorates.

22 QUESTION: Except in the German.

23 MR. GOLDMAN: That's correct, Your Honor.

24 QUESTION: Why was that different from the
25 others?

1 MR. GOLDMAN: My understanding is that the
2 form of corporate organization there did not include a
3 board of directors. That is what the record suggests,
4 that there were no directors of the German corporation.

5 QUESTION: So if it had, you would have had --

6 MR. GOLDMAN: We would have had the
7 opportunity to elect them as the controlling
8 shareholders.

9 QUESTION: And presumably would have put them
10 on as you did with the others.

11 MR. GOLDMAN: Well, the record shows that
12 there was some, although not totally overlapping, but
13 some interlocking directors. I think what that shows,
14 what that shows is that we owned the stock of the
15 subsidiaries. I mean, that is -- there is no question
16 about that, and in voting the stock we exercised the
17 normal stewardship functions, the normal functions of an
18 owner. But if that per se made the dividends
19 apportionable, then, contrary to this Court's statement
20 in Mobil, dividends from all subsidiaries would
21 inevitably be apportionable wherever the parent
22 conducted its business.

23 QUESTION: Was the management of the
24 individual companies sort of integrated with the
25 management of the entire organization? At least, did

1 they sort of rotate around? Did you say, well, now,
2 next year you are going to go run the store in Los
3 Angeles, and maybe next year in Berlin?

4 MR. GOLDMAN: Exactly the opposite was the
5 case. Each subsidiary hired and trained its own
6 officers. There was an attempt by counsel for the state
7 to develop a line of questioning that showed that
8 perhaps at an operational level the director of
9 purchasing from one company spoke to the director of
10 purchasing from another, and that was refuted by the
11 answers to the questions.

12 The record shows that the chief executive
13 officer of the U.K. sub, at least to the witness's
14 knowledge, had been in that position for at least ten
15 years prior to --

16 QUESTION: So none of the accumulated
17 experience in marketing that the F.W. Woolworth Company
18 had the advantage of ever was made available to these
19 subs?

20 MR. GOLDMAN: There certainly was no
21 centralized management in the sense of operating all of
22 the businesses in a cooperative fashion so as to
23 maximize the profits of the whole. It may be that as a
24 member of the board of directors, one brings with him
25 the knowledge he already has, but it wasn't employed in

1 an operational sense. There was no day-to-day control,
2 no supervision, no rotating of managers from one store
3 to another. Absolutely not, Your Honor.

4 QUESTION: They didn't call themselves Hans
5 Schmidt, though, in Germany, did they? They called
6 themselves Woolworth.

7 MR. GOLDMAN: That's correct. They had the
8 same name, and each corporation conducted its own
9 business in its country using the same name, and
10 developed presumably whatever good will in that country
11 accrued to its own --

12 QUESTION: Why did they start out using the
13 same name?

14 MR. GOLDMAN: Why did they start out?

15 QUESTION: Yes.

16 MR. GOLDMAN: The record doesn't show why they
17 started out. It does show that the U.S. company was
18 organized around 1911, and that the U.K. company was
19 organized about the same time. Presumably the separate
20 companies were started and operated in parallel fashion.

21 QUESTION: Doesn't that show some effort,
22 though, to capitalize on the value of the name?

23 MR. GOLDMAN: The answer -- I can give you my
24 own inference that it does not. I can't point to a
25 statement in the record that shows one way or the other,

1 except to point out that in managing and directing each
2 subsidiary, the management of each subsidiary was --
3 catered to local tastes and local needs, and that in
4 Germany, for example, there was an emphasis on soft
5 goods, dresses, coats, and so on, because apparently
6 that was found to be successful in Germany, and by
7 comparison, in the operation of the U.K. stores, they
8 had a supermarket and food operations, and that was
9 considered to be part of a Woolworth's operation in the
10 U.K. The operations were in fact dissimilar, and
11 operated in a fashion that made sense in each country.

12 QUESTION: Well, they wouldn't sell fur coats
13 in Phoenix, either, but you might in New York or Boston,
14 I suppose.

15 MR. GOLDMAN: That's correct, Your Honor, but
16 the point is that each subsidiary was functionally
17 independent, was a self-contained unit, had its own
18 management, its own purchasing, its own policy decisions
19 as to the type and quantity of inventory to carry
20 without regard or consideration as to what decisions
21 were made along parallel lines in the operation of the
22 same type of business in another location.

23 QUESTION: In Germany, the name Woolworth
24 would hardly be confused with a German organization,
25 would it? The local Germans would not think that was

1 some local German merchant.

2 MR. GOLDMAN: I can't say whether a German in
3 Berlin may think that -- may know about the Woolworth
4 operation in the U.S. or may ever have heard of it. He
5 may think it is totally indigenous to --

6 QUESTION: Well, sometimes the use of a name
7 is just a matter of family ego, is it not?

8 MR. GOLDMAN: Well, the fact is that at least
9 as far as the U.K. and the U.S. operations are
10 concerned, they started out at the same time, so neither
11 one was benefitting or could conceivably have benefitted
12 from whatever name recognition there was, and there is
13 no suggestion that in a retail type of operation which
14 is essentially local, that there would have been any
15 recognition on the part of a German resident of
16 Woolworth as being a U.S. or having any U.S. connections
17 at all. For all we know, they may have thought there
18 only was a German Woolworth. The record is silent on
19 that point.

20 QUESTION: Mr. Goldman, would you concede that
21 the domiciliary state could tax this income?

22 MR. GOLDMAN: The taxing jurisdiction of a
23 domiciliary state and the taxing jurisdiction of a
24 non-domiciliary state, which is what we are talking
25 about here, stand on different footing, I believe, for

1 due process purposes. The taxing jurisdiction of New
2 Mexico as a non-domiciliary state --

3 QUESTION: Right. Would you concede that the
4 domiciliary state can tax it? That is my question.

5 MR. GOLDMAN: Yes, I would.

6 QUESTION: In its entirety?

7 MR. GOLDMAN: For due process purposes, I
8 would agree that the domiciliary state could tax the
9 income because a domiciliary state is entitled to tax
10 income that may have its source outside the domiciliary
11 state, and so whatever its rights and prerogatives may
12 be don't answer the question, however, as to the rights
13 of New Mexico.

14 QUESTION: All right. What about the
15 taxability in the non-domiciliary state of short-term
16 investment income?

17 MR. GOLDMAN: If the short-term investment
18 income can be said to be part of the operating income of
19 the unitary business, then we agree, as we agreed with
20 the dividends here in issue, if that were an appropriate
21 conclusion, that the short-term investment income could
22 be included in the apportionable income base.

23 QUESTION: And under what circumstances would
24 long-term investment income be treatable in the same
25 fashion, in your view?

1 MR. GOLDMAN: If the underlying operations of
2 these subsidiaries were sufficiently functionally
3 integrated --

4 QUESTION: All right, and on the short-term
5 paper, buying Treasury notes wouldn't be taxable, the
6 income?

7 MR. GOLDMAN: If the short-term investment
8 income resulted from the investment management of
9 working capital, so that it was part of the cash flow
10 operation of the business, we would agree that managing
11 the cash flow of your business is sufficiently
12 functionally integrated with your business so that the
13 income from that type of short-term investment could be
14 apportionable. The reason it would be apportionable
15 would be because of the type of activities that gave
16 rise to it and their relationship to the business.

17 In this case, there is no relationship between
18 the businesses of the foreign subsidiaries and the
19 business, the domestic retail business in the United
20 States, except for the fact that you have the same
21 corporate owner, that Woolworth owns the stock, and if
22 owning the stock of a sub that is engaged in the same
23 line of business could give rise to apportionable
24 income, then we think there is no room for an investment
25 in an operating subsidiary. We think it plain also --

1 QUESTION: Mr. Goldman, may I interrupt you
2 for a second? In the other case, we talked a lot about
3 an intermediate category. I guess you heard the
4 argument. Do you understand the New Mexico Supreme
5 Court to endorse that concept or to treat the
6 subsidiaries in this case as part of the unitary
7 business?

8 MR. GOLDMAN: I don't believe that was at all
9 the basis for the decision below. I think the basis for
10 the decision below was the court's conclusion that
11 Woolworth cooperatively and jointly with the
12 subsidiaries was conducting a single unitary business,
13 and it felt for that reason that it could hold the
14 dividends to be apportionable under Mobil.

15 QUESTION: Then the two states really take a
16 different position, because as I understood the Idaho
17 argument, they would have agreed that the fact -- the
18 formula would be different in a case such as this.

19 MR. GOLDMAN: Well, I think the courts took a
20 different approach. I think the state in our case, if I
21 may characterize their argument from their brief, agrees
22 now that the businesses were not in fact part of a
23 single unitary business, so the state will have to make
24 its own argument this afternoon, but they were arguing
25 at least through the New Mexico Supreme Court level and

1 even in the briefs they filed in opposition to our
2 jurisdictional statement that all the corporate entities
3 here were cooperatively conducting a single unitary
4 business, and I understand that they no longer take that
5 position.

6 One point I would like to emphasize in
7 connection with the opinion below, there is a statement
8 in the decision of the New Mexico Supreme Court in
9 describing the evidence relied upon by the state to the
10 effect that there was some intercompany flow of goods, a
11 statement which might suggest that there indeed was some
12 functional integration. In fact, the record absolutely
13 refutes that, contradicts that, and that was just a
14 misstatement of fact by the New Mexico Supreme Court,
15 and again, we understand at this point, since we made
16 that point rather emphatically in our brief, that the
17 state agrees with us.

18 QUESTION: You cited in your brief -- does the
19 other side concede that that is error?

20 MR. GOLDMAN: I believe so. I believe so.

21 We think it plain under the decisions of this
22 Court that if the operations of the foreign subsidiaries
23 had been conducted directly in divisions of Mobil --
24 excuse me, of Woolworth, rather than in subsidiaries, we
25 think it plain that the income, the operating income of

1 those divisions could not have been apportioned to New
2 Mexico. We think that by putting the divisions, putting
3 the operations into subsidiaries, ought not to change
4 the result. We think that is the teaching of Mobil. We
5 think in Mobil what you held was where you have
6 admittedly unitary operations generating income that
7 would have been apportionable had they been conducted
8 directly by the parent, then the apportionability of
9 that income cannot be avoided by transferring the
10 operations to a subsidiary, but we think the converse is
11 equally true. You can't take non-apportionable,
12 non-unitary income and somehow make it unitary or make
13 it apportionable by transferring the operations to a
14 subsidiary.

15 We think that what the Court said was that the
16 form of organization does not affect the underlying
17 economic realities and cannot affect the
18 apportionability of the income that the parent receives.

19 If I may, I would like to turn at this point
20 to the Section 78 gross-up issue. It is a technical
21 issue, and it is covered at length in the briefs. I
22 would just like to make a few basic points about it.
23 Number One, I want to emphasize that unlike the state,
24 our position with respect to the Section 78 gross-up
25 amount is not dependent on your decision with respect to

1 the apportionability of dividends.

2 If you hold that dividends are not
3 apportionable, that automatically resolves the Section
4 78 gross-up question in our favor, but even if you
5 should hold that some of the dividends may be
6 apportioned, we still have all of our arguments with
7 respect to the Section 78 gross-up amount.

8 The basic point that we make with respect to
9 the Section 78 gross-up amount is that the taxpayer's
10 federal tax liability is unrelated to its state tax
11 calculation. If the taxpayer receives an apportionable
12 dividend of \$100, that is the amount that gets included
13 in apportionable income, and it is irrelevant for that
14 purpose whether the associated federal tax liability was
15 \$5 or \$50. In all events you still include the \$100 in
16 apportionable income, but the Section 78 gross-up amount
17 is related only to the computation of the federal tax
18 liability. It has no separate, independent existence of
19 its own, and even if coupled with the foreign tax
20 credit, it should reduce the foreign tax liability from
21 \$50 down to \$5, you still can't increase as a
22 consequence of that the amount of apportioned income --
23 apportionable income actually received.

24 Perhaps I can move on at this point to our
25 alternative arguments with respect to factor relief if

1 the Court should hold that any of the income is
2 includable in apportionable income. I think the key
3 point to be made here is that New Mexico can only tax
4 income that can be fairly said to be attributable to the
5 activities conducted in New Mexico, and if you include
6 in the apportionable income base any income which is in
7 fact attributable to activities conducted in Germany or
8 in the U.K., then you should correlatively reflect the
9 payroll, property, and sales that generated that income.

10 With the Court's permission, I will reserve
11 the rest of my time for rebuttal.

12 CHIEF JUSTICE BURGER: Very well.

13 Ms. Bennett.

14 ORAL ARGUMENT OF SARAH E. BENNETT, ESQ.,

15 ON BEHALF OF THE APPELLEE

16 MS. BENNETT: Mr. Chief Justice, and may it
17 please the Court, Woolworth has not attempted to prove
18 that formulary apportionment as applied by New Mexico
19 results in an attribution of an unreasonable amount of
20 income to New Mexico. Instead, it chooses to rest upon
21 its contention that a reasonable, fair on its face,
22 uniform apportionment formula is per se invalid when it
23 includes dividends from investments representing shares
24 of stock in foreign corporations it held in connection
25 with the business of this taxpayer, and from related

1 gross-up income in apportionable income of this unitary
2 business.

3 The question presented is whether the statute
4 as applied by New Mexico violates the due process
5 clause. Woolworth had choices in New Mexico about how
6 to calculate its income attributable to New Mexico.
7 First, primarily it could have chosen to separately
8 account for its income earned within New Mexico purely
9 within the boundaries of that state. It could and did
10 chose to report its income under the unitary
11 apportionment method adopted by the State of New Mexico.
12 Within the provisions and the boundaries of the Uniform
13 Division of Income for Tax Purposes Act, there are still
14 several alternatives available to this taxpayer.

15 Woolworth chose to report and characterize
16 itself as a nationwide unitary business. It reported
17 its income to New Mexico on that basis. It used the
18 factors of its domestic corporation. I think that
19 Woolworth could have had another alternative in this
20 case. It could have chosen worldwide combination for
21 reporting of its income and calculating the amount
22 attributable to New Mexico.

23 QUESTION: Was that one of the options on the
24 New Mexico return?

25 MS. BENNETT: Yes, it is available to a

1 taxpayer who is conducting a worldwide unitary
2 business. It may combine its income. It may then
3 include all the factors of the foreign corporations.

4 QUESTION: Is that specifically in your
5 statute?

6 MS. BENNETT: No, it isn't, but it is in the
7 regulations. What the statute says is that business
8 income, and interpretation of a business is -- we are
9 dependent to some extent on the characterization by a
10 taxpayer of what his business is. Woolworth reported as
11 a nationwide unitary business. Finally, within the
12 provisions of UDITPA, there is a relief provision. If a
13 taxpayer considers that application of a formula to it
14 results in attribution of an unfair amount of income to
15 New Mexico, it may prove that, and it will get relief.

16 Woolworth chose nationwide, and made no
17 attempt at all to show that it was eligible for any kind
18 of relief. Due process requires two things of a taxing
19 state. It requires that we not overreach to tax a
20 business which is not conducting business within the
21 borders of New Mexico, and it requires that we not
22 attribute too much income to New Mexico from business
23 conducted there. Woolworth has met neither of those two
24 requirements of the due process clause. Instead --

25 QUESTION: Ms. Bennett, may I ask you a

1 question --

2 MS. BENNETT: Yes.

3 QUESTION: -- about your theory and the theory
4 of the New Mexico Supreme Court? First of all, was it
5 the New Mexico Supreme Court's theory that these foreign
6 subsidiaries were part of the same unitary business as
7 the American operation?

8 MS. BENNETT: The New Mexico Supreme Court
9 found as a statutory matter that the income -- the
10 dividend income was business income of this unitary
11 business. I believe that it found that the fact that
12 the worldwide business was unitary indicates further
13 that the dividends received by this taxpayer from its
14 investments --

15 QUESTION: Your answer is yes. Isn't that
16 right?

17 MS. BENNETT: -- indicate the business nature
18 of those investments. I think it is really important
19 here to distinguish --

20 QUESTION: Please, I just want to be sure I
21 understand your answer.

22 MS. BENNETT: Right.

23 QUESTION: Your answer is that the New Mexico
24 Supreme Court did consider the worldwide operation as
25 part of one unitary business.

1 MS. BENNETT: Well, yes, but the business we
2 are taxing here is not that unitary business. I think
3 that what the New Mexico Supreme Court recognized is
4 that if in fact Woolworth is a worldwide unitary
5 business, it is pretty clear that the dividends we are
6 taxing here are business income of the unitary business
7 that we are taxing in the taxing state.

8 QUESTION: Well, if they are part of one
9 worldwide unitary business, then their theory was
10 somewhat different from the theory of the Idaho Supreme
11 Court. Would you agree with that?

12 MS. BENNETT: If in fact there was -- yes,
13 some distinction.

14 QUESTION: And the Idaho Supreme Court left
15 out the assets and property, payroll, and so forth from
16 the subsidiaries because it regarded those as not part
17 of the unitary business. Now, why does New Mexico leave
18 out these parts of the -- the denominator from income
19 generated by the same unitary business?

20 MS. BENNETT: I don't think this question can
21 be answered without looking at the taxpayer that we are
22 taxing. I think that the question here is a precise
23 one. The taxpayer that is reporting to New Mexico is
24 the nationwide unitary business. I think that in this
25 sense it is not necessary that the foreign corporations

1 that represent -- well, the corporations underlying the
2 investments which Woolworth holds be unitary. I think
3 in this case they may be. The question is, when you
4 have a domestic unitary business and you don't have any
5 indication that there are two businesses being conducted
6 by that business that is reporting its taxes to the
7 taxing state, whether or not we can include dividends as
8 part of the apportionable business income of that
9 business. I think that the fact that Woolworth may in
10 fact be -- may include these foreign corporations as
11 part of its unitary business indicates in a factual
12 sense that the investments are held for a business
13 purpose, that they are part of the unitary business in
14 this case, as it is reporting its income to the taxing
15 state.

16 QUESTION: Well, do you defend all parts of
17 the New Mexico Supreme Court's decision or not?

18 MS. BENNETT: We support the concept that
19 there may be a unitary business --

20 QUESTION: Do you support their seeming view
21 that this entire bundle of companies, including the
22 foreign companies, were not a unitary business, or not?

23 MS. BENNETT: Yes. The only quarrel I have
24 with the holding by the New Mexico Supreme Court is that
25 that is the only question, that that is the controlling

1 question in a situation like this. If in fact there is
2 a worldwide unitary business, and Woolworth considers
3 itself to be a unitary business, it can report that way
4 to New Mexico. It can get factor relief. It includes
5 all the income earned by all the business. It factors
6 and apportions by all the factors relating to that
7 worldwide unitary business. We were stuck with a
8 characterization that New Mexico gave itself, a domestic
9 business. That is the one that is being taxed.

10 QUESTION: I know, but when they made the
11 choice that they made, they operated on the assumption
12 that dividends were not includable.

13 MS. BENNETT: Yes. Were includable, or --

14 QUESTION: So now would you let them change
15 their -- change?

16 MS. BENNETT: The option was offered to them
17 below. I don't know if they can go back in this
18 particular case and go and change it this way. The
19 taxpayer is presumed to know what the law requires, and
20 in New Mexico the regulations are very clear that
21 dividends are includable if they are obtained from
22 investments that are acquired for a business purpose.

23 QUESTION: For a business purpose. Like
24 making money?

25 MS. BENNETT: Making money is one aspect of it.

1 (General laughter.)

2 QUESTION: Is that all you have to do to have
3 a business purpose that would make the dividends
4 includable? How about from the hotel chain?

5 MS. BENNETT: The hotel chain is a good
6 example. The hotel chain, if we posit that the hotel
7 chain is a separate corporation, and Woolworth invests
8 its money --

9 QUESTION: For a business purpose. They want
10 to make the money.

11 MS. BENNETT: Well, I think the dividends in
12 that sense are includable unless Woolworth --

13 QUESTION: So you disagree with both sides in
14 the previous case.

15 MS. BENNETT: I think that the real test is
16 not what the nature of the foreign -- of the corporation
17 underlying the investment is. It is what Woolworth is
18 doing. What is Woolworth doing?

19 QUESTION: Okay. So you do disagree with both
20 sides in the other case.

21 MS. BENNETT: I think that --

22 QUESTION: They both seem to agree that the
23 hotel chain wouldn't be, dividends from the hotel chain,
24 unrelated to the mining company, would not be includable.

25 MS. BENNETT: That is not my understanding of

1 Idaho's position. If they said that, I do disagree with
2 it.

3 QUESTION: You disagree with it. If they said
4 it, you disagree with it.

5 MS. BENNETT: I think that you have to look at
6 the taxpayer that is operating and look at that
7 business. Woolworth could have shown that it had two
8 businesses, and one of them was investing, for whatever
9 purpose, and that could be a separate business under a
10 particular given state of facts. We don't have that
11 here. We have one integrated business. They have
12 always contended it to be an integrated business,
13 conducting -- conducting as a part of that business --

14 QUESTION: To -- in the United States.

15 MS. BENNETT: -- earning, you know, conducting
16 retail stores, making substantial investments. Many of
17 those investments it concedes to be business income. If
18 it is short-term, it is business income. It seems to
19 make the distinction on an illogical basis, the length
20 of time that the investments are made, and the fact that
21 they are big.

22 QUESTION: You don't have any doubt about what
23 Idaho's position was, do you, with respect to that point?

24 MS. BENNETT: I --

25 QUESTION: Lay aside the hypothetical question

1 about the hotel chain or the -- some other kind of a
2 chain, a supermarket chain. The asbestos company in
3 Canada, which was in the mining business, and producing
4 the raw materials and some finished product, they said
5 was not subject, was not includable.

6 MS. BENNETT: I don't agree with that
7 conclusion. I think that the question here is whether
8 or not the investment activities are an integral part of
9 the taxpayer's business. That has been found to be
10 true. It is constitutional to do it that way.

11 QUESTION: Well, as Justice White put it to
12 you, if it is making money, then New Mexico is going to
13 include it.

14 MS. BENNETT: Well, if it is making money to
15 which business. I mean, the business that we are
16 talking about here is an integrated, unitary business.

17 QUESTION: Well, the dividends are paid to the
18 parent corporation --

19 MS. BENNETT: Right.

20 QUESTION: -- which you are taxing, so that is
21 all you need. All it needs to do is earn from its
22 investment.

23 MS. BENNETT: We may presume that, we believe,
24 to be true. The taxpayer can show that it is earned in
25 a different business.

1 QUESTION: What is the New Mexico law that you
2 are -- it sounds to me like you are saying, if the
3 parent company or the company you are trying to tax is
4 earning income on any investment whatsoever, it is
5 includable.

6 MS. BENNETT: If it is for a business
7 purpose. If it is related to the business. Yes, and
8 making income is one aspect of that.

9 QUESTION: What contribution does New Mexico
10 make to the total other than the sales and the
11 operations within the borders of the state?

12 MS. BENNETT: Well, first of all, we don't
13 know what the activities are in the state. We don't
14 have any evidence on what they do in New Mexico. We
15 know they operate at least one store. We know they make
16 \$13 million worth of gross receipts in New Mexico in
17 this taxing year. But we do not know the extent of
18 their activities within New Mexico. But when a unitary
19 business is operating nationwide and operates in a
20 taxing state, it is not a question of how much income
21 you actually earned in New Mexico, because it is
22 presumed that all aspects of a unitary business
23 contribute to the production of the total income, and
24 that that income can be apportioned on a formulary
25 basis, and New Mexico can tax its fair share by using a

1 reasonable and fair apportionment formula.

2 Now, I don't think that there is anything
3 different necessarily about dividends. Investments are
4 made for business purposes, it is known. They increase
5 the overall assets of the corporation. A corporation
6 with substantial assets is thereby better off, in a
7 better position to make money in every state in which it
8 makes money. It is better able to absorb losses than a
9 corporation without such assets. The holding of
10 intangible assets in many ways benefits a corporation.

11 So, the question is not, is it directly
12 related to the taxing state. That is a situs concept.

13 QUESTION: I suppose it follows then that
14 constitutionally every state in the country can do just
15 what New Mexico is doing here.

16 MS. BENNETT: We believe so, as long as --
17 especially here we have a uniform act, which apportions
18 things, we hope, consistently, from state to state to
19 state, and each state is taxing only a proportionate
20 share of the amount of value there. For things which
21 have location, we make recognition in the factors. We
22 have a three-factor formula which we think includes most
23 aspects of a unitary business, and does indicate fairly
24 what proportion of the total business is earned in the
25 taxing state.

1 QUESTION: May I ask you a question about
2 that? Assume that our Mexican subsidiary in this case
3 were in fact located in Texas instead of Mexico, and
4 they contended it was an entirely separate operation,
5 with separate management, no purchases, and so forth,
6 and you concluded to the contrary, that it was part of
7 the American unitary business. Would you have taxed
8 them the same way as you tax the Mexican company? They
9 paid the same dividends.

10 MS. BENNETT: Well --

11 QUESTION: Would you have taxed dividends, or
12 would you have pierced the corporate veil and looked
13 through into income and assets?

14 MS. BENNETT: We have a unitary business that
15 reported, and they called them that. We are talking --
16 Are we talking --

17 QUESTION: I understand all that. I am just
18 asking what you would have done in that hypothetical.

19 MS. BENNETT: In that hypothetical, if the
20 taxpayer wanted to recognize it as a corporation?

21 QUESTION: He filed the return I described.

22 MS. BENNETT: All right.

23 QUESTION: He described the Texas operation as
24 a separate business, not part of the unitary business.
25 You investigated and disagreed. What would have been

1 the tax consequences?

2 MS. BENNETT: We would eliminate the
3 intercorporate dividends, include the corporation as
4 part of the unitary business, apportion by all the
5 factors. We could do the same thing worldwide. We are
6 glad to.

7 QUESTION: So you wouldn't have done something
8 different than you did with respect to the Mexican
9 subsidiary.

10 MS. BENNETT: We are glad to do it --

11 QUESTION: That is correct, is it not?

12 MS. BENNETT: -- if it is a Mexican
13 subsidiary. No --

14 QUESTION: I want to be sure I -- what?

15 MS. BENNETT: No, I don't think it's -- we
16 don't treat Mexico --

17 QUESTION: You told me that you would have
18 pierced the corporate veil in the Texas hypothetical --

19 MS. BENNETT: Well, no --

20 QUESTION: -- but you did not pierce the
21 corporate veil with the Mexican case. Why is there a
22 difference?

23 MS. BENNETT: The difference is only in the
24 exercise of the state's power. The state of New Mexico
25 does not go out and redefine a taxpayer as a unitary

1 business. We accept it. If a taxpayer reported a
2 unitary business, and excluded one corporation that it
3 owned, we very seldom challenge that analysis.

4 QUESTION: Which is what it did in this case.
5 It excluded the Mexican subsidiary --

6 MS. BENNETT: For the same reason, we would
7 not challenge the exclusion of a United States
8 corporation. It is a matter of the exercise of the
9 state's power, and not --

10 QUESTION: Well, you just told me you would
11 with respect to the Texas company.

12 MS. BENNETT: We don't -- we --

13 QUESTION: You said you would there pierce the
14 corporate veil.

15 MS. BENNETT: We would agree to it.

16 QUESTION: Why don't you pierce the corporate
17 veil here?

18 MS. BENNETT: We would not enforce it. That
19 is the question.

20 QUESTION: It is just a matter of discretion
21 with respect to the taxing authority.

22 MS. BENNETT: The taxpayer chooses in New
23 Mexico how to report a tax. If the taxpayer wanted to
24 include that, it could. If it wanted to include
25 worldwide, it could. I think probably New Mexico

1 constitutionally has the power to force it to. New
2 Mexico does not choose to exercise that kind of power.
3 We would recognize the Mexican subsidiary as a unitary
4 part of the business in the same manner as we would
5 recognize any domestic corporation as part of the
6 unitary business. We are dependent very much on the
7 taxpayer's characterization, however.

8 QUESTION: Do you think you would have had the
9 constitutional power in my Texas example to decline to
10 pierce the corporate veil and just accept the -- throw
11 the dividends into the pot without looking at the
12 denominator?

13 MS. BENNETT: If that is how the taxpayer
14 characterizes its business.

15 QUESTION: No, no, the taxpayer in each case
16 has characterized the unitary business as not including
17 the subsidiary which you then find to be part of the
18 unitary business. And I am saying, can you
19 constitutionally make such a finding with respect to a
20 domestic corporation and then say, we will just look at
21 the income, we won't look at the factors that generate
22 the income.

23 MS. BENNETT: Yes.

24 QUESTION: You think you can.

25 MS. BENNETT: Well, the factors that generate

1 it is the whole question. What factors generated
2 production of dividend income. Certainly not --

3 QUESTION: Well, by hypothesis, we are talking
4 about a unitary business.

5 MS. BENNETT: But the taxpayer -- How do we
6 know that?

7 QUESTION: You found it.

8 MS. BENNETT: We found it?

9 QUESTION: Yes.

10 MS. BENNETT: We found it based on what? We
11 have to have evidence to show --

12 QUESTION: Well, on your theory, counsel, the
13 single store in New Mexico might lose \$10 million in a
14 given year, but by applying your formula, they might
15 have to pay a tax notwithstanding that New Mexico's
16 contribution was to help produce a \$10 million loss. Is
17 that not so? If the store in Homburg, Germany, and in
18 Birmingham, England, and a lot of other places made a
19 lot of money?

20 MS. BENNETT: Well, there are two related
21 concepts that I have to address here. First --

22 QUESTION: Well, that is an easy one to
23 answer, isn't it?

24 MS. BENNETT: First -- well, the first
25 question is, can we tax, you know, if they can prove by

1 separate accounting that the store in New Mexico
2 operated at a loss, can they defeat the whole purpose of
3 formulary apportionment.

4 QUESTION: Well, with the autonomous
5 accounting type that has been described here, that
6 wouldn't be difficult. Each one would have its own
7 accounting.

8 MS. BENNETT: We have a management of each of
9 the stores. The stores do not stand alone. They have a
10 management that makes decisions about how to operate
11 their stores.

12 QUESTION: Then your answer is, they could
13 have a \$10 million loss, definitely established by
14 Certified Public Accountants, but still pay a tax on the
15 apportioned --

16 MS. BENNETT: If in fact their evidence showed
17 that the amount of income attributed to the state was an
18 unfair amount, we would make adjustments for that.

19 QUESTION: I suppose the same might have been
20 true with respect to Vermont taxing Mobil and the assets
21 it had in Vermont. I suppose Mobil could have hired
22 some accountant to come up with the conclusion it
23 suffered a loss, but I don't believe under the Court's
24 opinion that would have impaired the state of Vermont's
25 power to tax.

1 MS. BENNETT: Right, and in fact in Butler
2 Brothers, look at what they did. They showed that the
3 distribution center in California was operating at a
4 loss, and this Court recognized correctly that it is a
5 unitary business. All aspects contribute to income.
6 All -- and it is fair to attribute the total income of
7 that business by the factors giving rise to it. I think
8 there is a second --

9 QUESTION: I suppose it would be the same
10 result, counsel, under your approach if the so-called
11 unitary business that you were taxing in this case,
12 namely the domestic unitary business, everybody agreed
13 and you would agree had no -- had a loss, the entire
14 unitary business. Except for the dividends from abroad,
15 the company had a loss. The entire United States was in
16 the red, but then comes the dividends from abroad. You
17 would still say New Mexico is entitled to a tax.

18 MS. BENNETT: I think we are still indulging
19 in separate accounting here. I think that the
20 fundamental problem in this is that we are throwing out
21 the distinction between dividends earned from
22 investments and the profits of the corporation paying
23 those dividends. They are distinct.

24 The corporation earns money. It may pay any
25 amount of dividends. Those dividends do not have any

1 necessary relation to the amount of profits earned by
2 that corporation. A recipient of dividends is receiving
3 income from its capital investments. It is analogous to
4 many other kinds of income. It is analogous to interest
5 earned from your investment which is called a loan. It
6 is analogous to rents in some senses.

7 QUESTION: So again the taxability of income
8 according to New Mexico doesn't depend on any kind of an
9 integrated relationship.

10 MS. BENNETT: Not with the foreign
11 subsidiaries. We are talking about an integrated
12 relationship among all the aspects of the business doing
13 business within the boundaries of the unitary business,
14 and the unitary business has been described to us as the
15 domestic one. That is the one that has been taxed. We
16 think that this formulary apportionment fairly
17 attributes income based on that.

18 QUESTION: Would you address yourself, Ms.
19 Bennett, to what is fair and reasonable about New
20 Mexico's treatment of the gross-up income, this
21 fictional figure?

22 MS. BENNETT: Woolworth argues that it is a
23 per se violation to include gross-up, and I think we've
24 got to look at what we did in this case. New Mexico was
25 faced with the problem of how you come up with a number

1 that you call income. What is the income of this
2 business? It is quantification of an abstract concept,
3 and New Mexico decided to solve that problem by adopting
4 the federal terminology, the federal definition. What
5 is income for federal purposes is income for state
6 purposes. We could do it differently.

7 QUESTION: Well, of course, the federal
8 government allowed credits and New Mexico doesn't, so
9 how does that become a fair procedure for New Mexico?

10 MS. BENNETT: It is facially fair. Gross-up
11 is included by accident. There are many other amounts
12 which are included by accident. If the due process
13 standard is violated, we can make adjustments. The due
14 process concept is, have we attributed more than a fair
15 and reasonable amount of income to New Mexico, and there
16 is no showing in this case that we have done that. In
17 fact, Woolworth realized \$13 million of gross receipts
18 in New Mexico for the taxing year. What we have done as
19 a result of this formula is attribute \$400,000 worth of
20 income to New Mexico, a modest amount considering the
21 activities of the taxpayer in the state.

22 Also, if the taxpayer wanted to, it could
23 prove that that was an unfair amount, if it had some
24 indication, some evidence that really that does not
25 fairly reflect income from New Mexico. There are

1 adjustments which can be made. Woolworth completely
2 ignored any of the statutory alternatives available to
3 it, especially in the light of having absolute choices
4 that it could make about different ways to calculate its
5 New Mexico income attributable to New Mexico sources,
6 and chose instead to attack only one aspect of a number
7 which does not indicate outside the whole what the
8 income of this business is.

9 We have -- If we subtract, as Woolworth wants
10 us to do, this amount, we have a much lower amount,
11 which has no necessary relation in itself to income
12 earned by this unitary business. There are many amounts
13 included in federal taxable income. Some work to the
14 detriment of a taxpayer, and some work to the benefit of
15 a taxpayer. Accelerated depreciation is an example of
16 something which will dramatically reduce your federal
17 taxable income, and for state purposes, it will reduce
18 the state coffers proportionately and dramatically, and
19 it is an amount which has no constitutional
20 significance. It is an amount which relates to federal
21 taxing policy, which all of these amounts are.

22 What New Mexico has done is determine that the
23 total amount there has some indications of
24 reasonableness. If a taxpayer can show that it is
25 unreasonable in a given case, we will make adjustments

1 for that.

2 QUESTION: May I ask, Ms. Bennett, you
3 mentioned earlier that you have a Uniform Act. Do all
4 the states with a Uniform Act interpret the gross-up
5 situation the way New Mexico does?

6 MS. BENNETT: No. There are some which
7 include gross-up. There are some who have by statute
8 decided to eliminate that amount.

9 QUESTION: Does the Multi-State Tax
10 Organization, whatever they call it, do they take a
11 position on gross-ups? I don't think they did in their
12 brief.

13 MS. BENNETT: I don't think so. I don't know
14 if they have --

15 QUESTION: They haven't supported it.

16 QUESTION: Well, they filed an amicus brief
17 supporting --

18 MS. BENNETT: They did not address the
19 gross-up issue.

20 QUESTION: They didn't?

21 MS. BENNETT: I don't think it's a question of
22 constitutional significance. The questions under the
23 due process clause are two. The one that relates to
24 this situation is, is the amount attributable to the
25 taxing state out of proportion to values located there.

1 It is a result-oriented approach. If the taxpayer can
2 show that the result is grotesque, is distorted, it
3 certainly can get apportionment relief. There is no
4 showing here. It is a fair amount.

5 QUESTION: Well, is it your argument -- I want
6 to be sure I understand it -- that you don't look at
7 individual components of the return, you look at the end
8 result, and if the end result seems fairly reasonable,
9 the fact that they might have included \$1 million of
10 salary to the King of England would be irrelevant, if
11 the total figures --

12 MS. BENNETT: Well, I don't think I'd go that
13 far with it --

14 QUESTION: Well, why not?

15 MS. BENNETT: -- but we don't have anything
16 like that.

17 QUESTION: Well, you have a fairly significant
18 amount in gross-ups.

19 MS. BENNETT: Well, the federal government
20 determined that it was an amount that was reasonably
21 related to values of this particular taxpayer. Remember
22 that it is related.

23 QUESTION: Well, they did it as an adjustment
24 to calculate the amount of tax credits which should be
25 given.

1 MS. BENNETT: Which -- the taxpayer elected --

2 QUESTION: But you don't give any tax credits.

3 MS. BENNETT: -- to take this adjustment.

4 QUESTION: Pardon me?

5 MS. BENNETT: The taxpayer elected to take
6 this adjustment. Remember, the gross-up goes hand in
7 hand with receipt of dividends from your foreign
8 corporations.

9 QUESTION: Well, as I understood it, it was
10 amount that they did not receive but they are treated as
11 though they had received. Isn't that correct?

12 MS. BENNETT: Well, yes. The federal
13 government deems it to have been received when a
14 taxpayer elects to take as a credit --

15 QUESTION: Well, did they deem it to be
16 received, or did they merely require that it be reported
17 on the return for the purpose of calculating the correct
18 amount of the tax?

19 MS. BENNETT: The federal government deems it
20 to have been received. It uses that language, and it
21 calls it income for other purposes under the Code.

22 QUESTION: Well, the Multi-State Tax brief
23 says, Woolworth has raised no substantial federal
24 question by arguing that the inclusion of gross-up
25 dividends entitled to relief.

1 MS. BENNETT: That must be in the -- at this
2 -- in the earlier brief filed by the Multi-State Tax
3 Commission. I had neglected that. In their primary
4 amicus brief, they didn't address the issue, but in
5 their earlier -- they filed two amicus briefs.

6 QUESTION: Well, the question was whether they
7 have a position on it.

8 MS. BENNETT: I am sorry. I was mistaken.

9 QUESTION: I don't say that they have
10 abandoned it, do they, have they?

11 MS. BENNETT: I am sorry, I was mistaken.
12 They --

13 QUESTION: The statement Justice White read
14 was from the motion to affirm, in support of the motion
15 to affirm --

16 MS. BENNETT: Right.

17 QUESTION: -- not from the brief they filed
18 after the case --

19 MS. BENNETT: Right, I was referring to the
20 brief --

21 QUESTION: So you were dead right the first
22 time.

23 MS. BENNETT: With regard to the apportionment
24 question, there is no attempt to show that the
25 apportionment results in unreasonable attribution of

1 value. I think that Woolworth's arguments that we must
2 include certain factors, especially of reasonable, and
3 we did make some adjustments in this case. We reflected
4 the dividends received here in the sales factor, in the
5 denominator. Woolworth had other choices for how to
6 calculate its income tax for income attributable to New
7 Mexico.

8 No facts support its contentions of unfairness
9 in this case, and the facts demonstrate the other, that
10 it is a manifestly fair result, and the changes which it
11 advocates to the apportionment formula are unreasonable
12 changes. It wants to include the factors of the foreign
13 corporations. It is impossible to imagine a reason for
14 inclusion of factors of foreign corporations unless we
15 assume that dividends represent the profits of the
16 corporation paying them.

17 They disclaim that argument. They don't want
18 to argue that dividends are not different from profits
19 of the corporation paying them. They recognize the
20 distinction between dividends and the profits of the
21 foreign corporation. We must in order to be consistent
22 in the law recognize the dividends are earned by the
23 domestic activities of the domestic taxpayer.

24 As a commerce clause question, we submit Mobil
25 conclusively disposed of the issue raised here, and that

1 is whether Japan Lines dictates elimination of some of
2 the amounts included here in apportionable business
3 income. The reason is because we are taxing domestic
4 income. We have apportioned domestic income, and we
5 have calculated the amount of tax attributable to the
6 State of New Mexico. Woolworth seems to agree that if
7 the apportionment formula calculates an amount of
8 domestic income, the commerce clause does not apply.

9 Woolworth attempts to distinguish this case
10 from the Mobil case by revoking its concession that for
11 commerce clause purposes the dividends are attributable
12 to some state within the United States. It is reducing
13 the question to a litigation -- to a question of
14 litigation strategy. I think that Mobil's concession
15 was a necessary concession. If a domestic taxpayer has
16 domestic income, obviously, some state in the United
17 States must have jurisdiction to tax that income that is
18 earned by the activities of the domestic Woolworth
19 corporation.

20 QUESTION: Is it possible that under this
21 formula, if every state did exactly what New Mexico did,
22 that some of these taxpayers would be paying taxes in
23 more than one state on the same dollar?

24 MS. BENNETT: I don't think it's possible.
25 The income here is the domestic income of this

1 business. If it is apportioned among the 50 states, if
2 all 50 states had this taxing scheme, there would be
3 attribution of a reasonable amount, an aliquot share of
4 the whole to each of the states in which the taxpayer
5 does business. The taxing scheme would result in
6 fairness to the taxpayer in every state in which it did
7 business. And the states are moving towards this kind
8 of uniformity in adjusting their apportionment formula
9 when evidence produced indicates that an unreasonable
10 result has been reached in a case.

11 Thank you.

12 CHIEF JUSTICE BURGER: Very well.

13 Do you have anything further, counsel?

14 ORAL ARGUMENT OF WILLIAM L. GOLDMAN, ESQ.,

15 ON BEHALF OF THE APPELLANT

16 MR. GOLDMAN: I will take just a minute of the
17 Court's time. I think the essential point I would like
18 to make is that the state's case is totally dependent on
19 corporate form and the choice of corporate form. The
20 state says that the underlying activities were not
21 unitary. That means the income couldn't have been
22 apportioned had it been conducted in divisions. The
23 state says we could have filed a combined report, but of
24 course that would have meant taking into account income
25 unrelated to our unitary business, an antithetical

1 concept to filing the combined report.

2 I think the essential aspect of the state's
3 argument is that since these activities were conducted
4 in subsidiaries, now somehow the dividends paid out of
5 these non-unitary profits are taxable, and the full
6 scope or implications of that argument is reflected by
7 the statement that, yes, the state could have taxed
8 income from an unrelated hotel subsidiary. I think the
9 state needed to give that answer to that question,
10 because this case stands on the same footing with that
11 question. In both cases, the profits would be paid out
12 of -- the dividends would be paid out of profits earned
13 in totally unrelated activities, and that is the sole
14 question when you come to apportionment. How are the
15 profits earned? We are allocating profits here, and if
16 the profits were earned from unrelated activities, then
17 they needn't be taken into account for purposes of the
18 New Mexico tax calculation.

19 Thank you very much.

20 CHIEF JUSTICE BURGER: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 2:11 o'clock p.m., the case in
23 the above-entitled matter was submitted.)

24

25

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

F. W. WOOLWORTH CO., Appellant, v. TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO No. 80-1745

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Deene Hammond

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