

In the

ORIGINAL

Supreme Court of the United States

ASARCO INCORPORATED, ETC.,

APPELLANT,

V.

IDAHO STATE TAX COMMISSION

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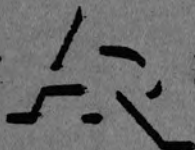
No. 80-2015

Washington, D. C.

Monday, April 19, 1982

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ASARCO INCORPORATED, ETC., :
4 Appellant, :
5 v. : No. 80-2015
6 IDAHO STATE TAX COMMISSION :

7 - - - - -x
8 Washington, D. C.
9 Monday, April 19, 1982

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:09 o'clock a.m.

13 APPEARANCES:
14 WILLIAM A. GOLDMAN, ESQ., Washington, D. C.; on behalf
15 of the Appellant.
16 THEODORE V. SPANGLER, JR., ESQ., Deputy Attorney General
17 of Idaho, Boise, Idaho; on behalf of the Appellee.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Asarco Incorporated against Idaho.

4 I think you may proceed whenever you are
5 ready, now.

6 ORAL ARGUMENT OF GEORGE W. BEATTY, ESQ.,
7 ON BEHALF OF THE APPELLANT

8 MR. BEATTY: Mr. Chief Justice, and may it
9 please the Court, the taxpayer Appellant in this state
10 income tax case is ASARCO, a New Jersey company which
11 has its corporate headquarters in New York. ASARCO's
12 business consists of mining, smelting, and refining
13 copper and various other metals at locations throughout
14 the United States. Its principal activity in Idaho is
15 the operation of a silver mine. Because all of ASARCO's
16 mining and processing operations are closely integrated
17 in a functional sense, everyone agrees that it is
18 appropriate for Idaho to apply its three-factor
19 apportionment formula to ASARCO's total operating income
20 in order to determine what portion of that income is
21 properly attributable to the Idaho activities and
22 therefore subject to Idaho tax.

23 QUESTION: Their total business --

24 MR. BEATTY: Their total business income from
25 the coordinated operation of their mining, smelting, and

1 refining operations in the United States.

2 QUESTION: Yes.

3 MR. BEATTY: The issue here is whether Idaho
4 can apply the same apportionment formula to dividends,
5 interest, and capital gains that ASARCO received from
6 investments in five other companies which conducted all
7 of their operations totally outside Idaho.

8 QUESTION: Doing what kind of business?

9 MR. BEATTY: Three of them were in the mining
10 business comparable to ASARCO's. The other two were
11 metal fabricators who did no mining themselves but
12 simply manufactured metal products.

13 QUESTION: Would it be any different in your
14 view if they had a chain of hotels and a chain of
15 supermarkets?

16 MR. BEATTY: I think there is no question,
17 Your Honor, at all, that if ASARCO operated a chain of
18 hotels, either as a division of ASARCO or as a
19 separately incorporated subsidiary that was wholly owned
20 by ASARCO, that Idaho would be constitutionally barred
21 by the due process clause from taxing any of the income
22 from the hotel operations, whether paid to ASARCO as a
23 share of divisional profits or as a dividend from a
24 separately incorporated subsidiary. The reason for that
25 is, I think, clear from this Court's prior decisions.

1 Absent functional integration at the operational level,
2 there is no basis for combining the income of two
3 distinct operations and treating them as though it were
4 one unitary business which earned its income as a whole.

5 QUESTION: Unless they had a hotel in Idaho.

6 MR. BEATTY: I am assuming, Your Honor, that
7 the hotel operations are conducted entirely outside
8 Idaho. I think this point was first established in a
9 dictum in the Adams Express case years ago, when this
10 Court posited exactly the type of question that the
11 Chief Justice just raised, and assumed that a single
12 party owned two separate and distinct operations in
13 different states. Despite the fact that those
14 operations were wholly owned by the same party so that
15 there was complete common control, this Court indicated
16 that there would be no basis for treating them as parts
17 of a unitary operation, precisely because they were
18 separate and distinct at the operational level.

19 I think the same point came out very clearly
20 in the dialogue between Justice Stevens and Mr. Dexter
21 of the MTC during the Mobil oral argument several years
22 ago, when you posited the case very similar to the Chief
23 Justice's of a toy operation being conducted by Mobil as
24 a division totally outside Vermont, the taxing state in
25 that case, and I think Mr. Dexter properly recognized

1 that Vermont would be constitutionally barred from
2 taxing any portion of the profits generated by the toy
3 business in that type of situation precisely because
4 there is no functional integration that would call into
5 question the accounting for the separate and distinct
6 operations.

7 QUESTION: That is whether it was operated as
8 a division or as a sub --

9 QUESTION: Yes. I think that Justice
10 Blackmun's opinion in Mobil makes it absolutely clear
11 that the focal point for the inquiry ought to be the
12 economic realities and not the legal form of doing
13 business. Specifically, what the Court said in Mobil
14 was that the legal distinction between a subsidiary and
15 a division doesn't affect the economic realities and
16 ought not to affect the apportionability of the income
17 the parent receives, and so --

18 QUESTION: On that subject, let me ask you,
19 Mr. Beatty, now, I suppose as to the short-term interest
20 earnings that ASARCO might have in the money market, or
21 short-term securities to maintain cash needs, you
22 concede that that can be taxable by Idaho.

23 MR. BEATTY: We do. That, it seems to us, is
24 clearly income earned from ASARCO's regular business
25 activities. It is employing its --

1 QUESTION: Well, all right.

2 MR. BEATTY: -- working capital on a
3 short-term basis.

4 QUESTION: Now, what if it is places it on a
5 little longer term basis, then? What is the difference?

6 MR. BEATTY: I think if it places it in
7 permanent investments, in sizeable stock investments, or
8 in debentures, which are involved here to an extent,
9 that that type of permanent investment becomes
10 disassociated from the normal operating --

11 QUESTION: But it is kind of hard to draw the
12 line, isn't it? Some of these investments are for
13 longer periods, and some for shorter, and all of a
14 sudden you have a stock acquisition. How do you
15 reasonably draw the line there?

16 MR. BEATTY: I think as in all instances that
17 basically involve factual determinations, that you've
18 got to do it gradually, on a case by case basis, as you
19 see appropriate factual situations developing. I think
20 there is a clear difference between a very short-term
21 investment, which we are not contesting here, and a
22 permanent long-term investment that is held for many
23 years, as the investments here were. Precisely where
24 the dividing line should be drawn, whether it should be
25 at a five-year, ten-year, or some other stated maturity,

1 I don't frankly know, but I think --

2 QUESTION: Well, what standard are we to lay
3 down constitutionally then to make the distinction?

4 MR. BEATTY: The basic issue, it seems to me,
5 in these cases is not the treatment of the interest
6 income, but rather the treatment of the dividend income
7 flowing from investments in major operating companies,
8 and there, I think it is clear that the test that you
9 ought to apply is the one suggested in Mobil, Justice
10 Brennan, and that is, are the underlying operations that
11 generate the income used to pay the dividends
12 functionally related with the business activities of the
13 recipient, so that it is impossible to unscramble the
14 business and break it into separate component parts. If
15 so, then it is a unitary business and the dividends
16 ought to be apportioned along with all the other income
17 of the unitary business.

18 QUESTION: Without otherwise affecting the
19 apportionment formula?

20 MR. BEATTY: Certainly not. If the dividends
21 are going to be treated as apportionable income, then I
22 think it is absolutely essential that the property,
23 payroll, and sales that generated that income be taken
24 into account in the apportionment factors.

25 QUESTION: All of them?

1 MR. BEATTY: All of them.

2 QUESTION: So you think there are only two
3 categories in this business. They are either unitary or
4 not.

5 MR. BEATTY: I think that is correct. It
6 seems to me that if the operations are going to be
7 treated as unitary, and the income is going to be
8 apportioned, Justice White, that it is essential in
9 order to get true apportionment to reflect all of the
10 factors associated with the earning of that income.

11 QUESTION: So no dividend income can be taken
12 into account unless the denominator changes, too.

13 MR. BEATTY: Let me indicate our recognition
14 of conceivable exceptions to that rule. We noted in our
15 brief the possibility that ownership of stock could be a
16 necessary part of the taxpayer's business in the sense
17 that applying the functional standards of Mobil, the
18 ownership is an indispensable adjunct to the conduct of
19 the business, as it would be clearly if the taxpayer
20 holding the stock investments that produced the income
21 were a securities dealer whose business was the buying
22 and selling of stocks.

23 Another possible example would be that of a
24 contractor who has to post bond in order to bid and
25 perform on jobs, and for that purpose maintains a

1 portfolio of investment securities, be they debt or
2 equity securities that he can use to fulfill his bonding
3 obligations. There, the ownership of the stock and
4 securities is clearly an adjunct to the actual conduct
5 of the taxpayer's own business, and in that type of
6 situation I think the proper application of Mobil is to
7 look at the functional relationship between the
8 ownership of those securities and the conduct of the
9 taxpayer's business, but nothing of that sort is
10 involved here.

11 QUESTION: Well, what if ASARCO, in order to
12 develop some sources for materials, wants to get some
13 copper out of some foreign country, and it finds out
14 that in order to do it it has to form a domestic
15 corporation, domestic in that other country, and it can
16 only buy 48 percent of it, and if it wants any of that
17 copper, that's the way it has to do business. Now, is
18 that one of your exceptions or not?

19 MR. BEATTY: We have several situations here,
20 and I think it might be helpful to deal with the facts
21 of those situations, because one of the dividend-paying
22 companies here, Southern Peru, comes approximately into
23 the range that you are describing.

24 QUESTION: Well, are you going to address that?

25 MR. BEATTY: I will indeed. Let me describe

1 the two polar cases that we see presented here. The
2 first is MIM's situation. The record shows that MIM is
3 a publicly held mining company operating in Australia
4 and England.

5 QUESTION: Mr. Beatty --

6 MR. BEATTY: Yes, sir.

7 QUESTION: -- does the record show why ASARCO
8 acquired its interest in MIM?

9 MR. BEATTY: It does not.

10 QUESTION: Here it owns --

11 MR. BEATTY: It is simply described as a
12 long-term investment.

13 QUESTION: -- 53 percent of it.

14 MR. BEATTY: We own 53 percent.

15 QUESTION: I suppose you know, but if it isn't
16 in the record, I won't ask.

17 MR. BEATTY: The operations of MIM, as I said,
18 are conducted entirely in Australia and England. The
19 state district court made an undisputed finding that
20 those operations were carried on entirely independently
21 of ASARCO. There were virtually no inter-company
22 transactions between the two companies, and there were
23 no common officers or directors.

24 QUESTION: Well, there is an intimation in the
25 other briefs that economic realities were the cause of

1 this. Do you agree with that?

2 MR. BEATTY: Well, there was testimony at
3 trial to the effect that ASARCO decided not to exercise
4 its controlling stock interest in order to elect the
5 board of directors or the officers of MIM because MIM
6 was performing admirably on its own. It was a separate,
7 free-standing enterprise, run and managed by
8 Australians. I think that our capacity theoretically to
9 control should not be controlling. What ought to be
10 controlling is the actual undisputed facts, and there is
11 no dispute about the fact that ASARCO played no role
12 whatsoever in the management or the operation of MIM's
13 mining and smelting activities in Australia and England.

14 QUESTION: Well, let me go back to my
15 question. It was in response, I thought, to you
16 statement that there were practically no inter-company
17 transactions with MIM.

18 MR. BEATTY: Correct.

19 QUESTION: And I was concerned, I thought
20 there was an inference in the other briefs that this was
21 because of economic realities.

22 MR. BEATTY: I am sorry, I misunderstood the
23 question.

24 QUESTION: And I would like your comment on
25 that.

1 MR. BEATTY: There was an indication that
2 because of the distance between Australia and the United
3 States, it would have been uneconomic in most instances
4 to ship ores and concentrates from Australia to the
5 United States, but I think it is immaterial why there
6 were no inter-company transactions. The important fact
7 is that there were none.

8 QUESTION: Do you think it would make a
9 difference if ASARCO had exercised its control and
10 elected all members of the board?

11 MR. BEATTY: By simply electing board members,
12 Justice White, I don't think ASARCO should have changed
13 the result here. To me it would be significant only if
14 there were an indication that the management of the
15 working operations was being dictated by ASARCO. Any
16 major stock investment is going to involve participation
17 by the investor in an oversight manner.

18 QUESTION: May I ask you, assume that ASARCO
19 did manage it intimately, ran the day-to-day
20 operations. Why would that make it different from a
21 hotel company in which they ran the day-to-day
22 operations?

23 MR. BEATTY: I don't think that participation
24 in management in and of itself would be significant,
25 Justice Stevens. I think it would begin to point in the

1 direction of functional integration, and would perhaps
2 call for a closer inquiry as to --

3 QUESTION: Would that be because you are
4 allocating part of the central office expense --

5 MR. BEATTY: Yes.

6 QUESTION: -- to the management? Is that what
7 it would be?

8 MR. BEATTY: Yes.

9 QUESTION: Why wouldn't that be true of a
10 hotel company, too?

11 MR. BEATTY: Well, to the extent that there is
12 overlapping centralized management so that the hotel
13 company benefits in some way from the operations of the
14 mining company or vice versa, you start to approach the
15 functional integration that was involved in the Exxon
16 case, but you only start to approach it. Again, I
17 think, as I indicated to Justice O'Connor, all these
18 questions are ones of degree.

19 QUESTION: Do you think, Mr. Beatty, our cases
20 have laid down any criteria by which one determines
21 functional integration?

22 MR. BEATTY: I think you have certainly
23 suggested it in the sense that every case --

24 QUESTION: Have we listed them?

25 MR. BEATTY: No, you haven't.

1 QUESTION: Have you any suggestions what they
2 ought to be?

3 MR. BEATTY: I think basically you need to
4 look at three factors, Justice Brennan. Ownership of
5 the different enterprises is clearly necessary, but not
6 sufficient. Unless there is a substantial degree of
7 common ownership, clearly, there is no basis for finding
8 a unitary business simply because of transactions
9 between the various elements of the activity that you
10 are looking at. As I indicated earlier, though, 100
11 percent common ownership I don't think is sufficient to
12 create a unitary business. You have got to go beyond
13 that. The second factor that I think should be looked
14 at is the management aspect, and by that I am not
15 referring to the board of directors' supervision of a
16 stewardship nature. I am referring to management
17 participation at an operational level.

18 QUESTION: In other words, ASARCO's management
19 has to participate at the operational level of the
20 subsidiary before you have functional integration.

21 MR. BEATTY: I think so, yes. But again, I
22 don't think that that is sufficient. The third and most
23 important criteria that I think you have to look at is
24 the degree to which the various business activities
25 involved are interrelated in some sort of functional

1 working or operational sense. Mobil's and Exxon's cases
2 presented, I think, clear examples of that. In each
3 instance, you were looking at a vertically integrated
4 petroleum enterprise that performed all of the functions
5 from exploration to drilling to production to refining
6 to marketing of the end product, and clearly --

7 QUESTION: But it wouldn't be enough that both
8 are copper mines.

9 MR. BEATTY: The fact that both are engaged in
10 the same line of business doesn't thus mean that there
11 is any functional integration. It simply means that
12 there are two parallel lines of business which may never
13 intersect, and in the case of MIM virtually never did
14 intersect. Your earlier decisions, I think, reflect
15 this same emphasis on functional integration. If we go
16 back to the early apportionment cases, Underwood
17 Typewriter, and Bass, Ratcliff, and Moorman, and
18 Northwestern State Cement, all of those cases involved
19 situations where a common owner was manufacturing a
20 product in one jurisdiction and selling it in another,
21 and clearly, that is the classic example of a unitary
22 business that earns its income as a whole. The
23 manufacturing portion of the enterprise obviously can't
24 earn any income until its products have been sold by the
25 marketing organization.

1 QUESTION: So that if you had both in the
2 copper business and the subsidiary's product was
3 marketed to customers of the parent, that would be
4 enough?

5 MR. BEATTY: That is certainly a normal
6 indication of a unitary business, yes. It is
7 conceivable you might have exceptions, and --

8 QUESTION: But if it is all marketed in
9 England, and never sees any of the -- no customer in the
10 United States so the parent ever gets to it, then there
11 is no functional integration.

12 MR. BEATTY: I am not necessarily suggesting
13 that geographical boundary lines determine the extent of
14 a functionally related business. In Bass, Ratcliff, in
15 fact, ale manufactured in Great Britain was sold in New
16 York by the same company, and you, I think properly,
17 treated that as one unitary business. Obviously, as you
18 pointed out there, the manufacturing arm earned no
19 income until the product was sold, and it is equally
20 clear that the sales organization could have earned no
21 income unless it had a manufactured product to sell, so
22 that is the classic type of functional integration case.

23 QUESTION: Now, you were going to get to
24 another polar case, I guess.

25 MR. BEATTY: The other case that we do need to

1 deal with is Southern Peru, which is at the opposite end
2 of the spectrum from MIM in the array of individual
3 situations presented to you here, because we admittedly
4 did have substantial business dealings with Southern
5 Peru, and it was a source of supply to ASARCO. The
6 important factors, though, I think, are that ASARCO is
7 the major custom smelter of copper in the United
8 States. The record shows that at that time it handled
9 roughly 80 percent of the custom smelting business in
10 this country. ASARCO had numerous supply contracts with
11 many other unrelated parties who sold copper ores and
12 concentrates to ASARCO under long-term contracts
13 comparable to those which ASARCO had with Southern
14 Peru. There was testimony establishing that the prices
15 charged under those contracts were the same as the
16 prices paid to Southern Peru.

17 Under those circumstances, it seems clear to
18 us that ASARCO's unrelated suppliers can't be viewed as
19 part of ASARCO's unitary business. Why should the
20 result be any different in the case of Southern Peru?

21 QUESTION: What if one of the smelters had
22 been in Idaho?

23 MR. BEATTY: Hm?

24 QUESTION: What if one of ASARCO's smelters
25 had been in Idaho?

1 MR. BEATTY: We are recognizing, Justice
2 Rehnquist, that all of ASARCO's mining, smelting, and
3 refining activities in the United States are one unitary
4 business. That is our business that is comparable to
5 Exxon's business. We have included all of our
6 operations from exploration through sale of the refined
7 product in the apportionable income which has been taxed
8 in Idaho and all the other jurisdictions where we
9 operate. What we are trying to carve out from the
10 apportionable income is the dividend income which ASARCO
11 received from independently operated and managed
12 affiliates and subsidiaries operating overseas and also
13 the income received from customers, General Cable and
14 Revere, in which we had an ownership interest.

15 QUESTION: So it would have made no difference
16 then even if all the smelters had been --

17 MR. BEATTY: None whatsoever.

18 QUESTION: Mr. Beatty, would you concede that
19 any state can include this income for tax purposes, the
20 domiciliary state, for example?

21 MR. BEATTY: I think that the domiciliary
22 state can take no more than its fair share of
23 apportionable income.

24 QUESTION: It is your position that the
25 domiciliary state can't include it all?

1 MR. BEATTY: Whatever may not be properly
2 apportioned to the non-domiciliary states may be
3 properly available to the domiciliary state under the
4 due process clause. Under the foreign commerce clause,
5 which we have discussed in our brief, there may be
6 additional problems with the domiciliary state tax.

7 If I could, I would like to briefly turn to
8 the alternative issue that is raised by this case,
9 involving --

10 QUESTION: Are you finished with Peru? You
11 just say, well, why should it be any different than --

12 MR. BEATTY: I was trying to suggest that our
13 relationships with Southern Peru, Justice White, were no
14 different from the relationships which we had with many
15 other totally unrelated suppliers of ores and
16 concentrates, all of whom are admittedly not part of our
17 business.

18 QUESTION: Well, except you own -- how much do
19 you own of Southern Peru?

20 MR. BEATTY: We own 51.5 percent.

21 QUESTION: Fifty-one, and you have the power
22 to control it, I suppose.

23 MR. BEATTY: We have the power to control, but
24 there is --

25 QUESTION: Do you?

1 MR. BEATTY: -- clear testimony in the record
2 establishing that ASARCO does not control Southern Peru
3 by virtue of bylaws that --

4 QUESTION: Well, one of your factors is
5 present here that isn't true with the other.

6 MR. BEATTY: That is absolutely correct, and
7 we recognize that Southern Peru is not as strong a case
8 from our standpoint as MIM for that precise reason. But
9 I don't think that it reaches the point of functional
10 integration or unity that is involved in a situation
11 like Exxon's, where a wholly owned enterprise was being
12 conducted in a way that maximized the operating
13 efficiencies.

14 QUESTION: Well, I suppose you would say, Mr.
15 Beatty, that even if the third criterion is met, the
16 second is not, in the case of Southern Peru.

17 MR. BEATTY: Correct, although we have the
18 capacity to manage, and although ASARCO's officers --

19 QUESTION: But you don't in fact.

20 MR. BEATTY: -- ASARCO's officers do in fact
21 serve in some years as officers of Southern Peru, we
22 cannot unilaterally control Southern Peru by virtue of
23 this bylaw structure that ensures that the other
24 shareholders collectively can outvote us.

25 QUESTION: Would your claim on Southern Peru

1 be equally strong if Southern Peru were in fact in
2 southern Florida?

3 MR. BEATTY: I think it would be the same
4 issue.

5 QUESTION: And I take it then if ASARCO bought
6 a different metal mine in Utah, and sold all the product
7 from that mine to a Utah smelter, and it was a
8 completely different metal, you just bought the metal,
9 you were in the mining business, but none of that metal
10 ever came to Idaho, that would be an MIM case.

11 MR. BEATTY: No. I doubt that, because our
12 domestic operations are so functionally integrated,
13 Justice White, that we would, I think, have to recognize
14 that the --

15 QUESTION: Well, there would just never be any
16 transactions between the two companies.

17 MR. BEATTY: Perhaps we have been unduly
18 generous to Idaho and the other states in the reaction
19 that we have pursued thus far.

20 (General laughter.)

21 MR. BEATTY: But we have not challenged the
22 idea that all of our domestic metals operations are
23 unitary. We operate only a silver mine in Idaho, as we
24 indicated in our brief. We could have taken the
25 position that all of our operations involving copper

1 should be totally excluded from any apportionment
2 formula that Idaho applies.

3 QUESTION: All right.

4 MR. BEATTY: Let me, if I could, turn just
5 briefly to the alternative questions relating to
6 adjustment of the apportionment factor. The state urges
7 that no adjustment be made because the income that we
8 are receiving is income from intangibles, and that
9 somehow those intangibles should be viewed as being
10 owned everywhere where our domestic business is being
11 conducted.

12 That is not the economic realities of this
13 case at all. The economic realities are that the income
14 in question was generated by the property, payroll, and
15 sales of Mount Isa and Southern Peru and General Cable.
16 The stipulated record shows that the five
17 dividend-paying companies had aggregate sales in each
18 year of over \$1,100,000,000. Idaho didn't take into
19 account one cent of that money in its apportionment
20 formula. The record shows that the five dividend-paying
21 companies owned smelters, refineries, mines, seaports, a
22 whole host of property values, none of which Idaho took
23 into account.

24 QUESTION: But you are saying they have to
25 take all of it into account.

1 MR. BEATTY: They should take into account, we
2 believe, a pro rata portion --

3 QUESTION: Oh, so not all of it.

4 MR. BEATTY: -- equivalent to the pro rata
5 portion of the earnings of the enterprise that flow to
6 ASARCO.

7 QUESTION: Because otherwise you would have to
8 take into account all of the gross income, all of the
9 net income.

10 MR. BEATTY: We are talking here, the state
11 has conceded in its brief that these operations are not
12 unitary, and it has conceded that a combined report of
13 the sort you will hear about this afternoon would be
14 inappropriate. We are talking only about the income
15 that was actually received. The question is --

16 QUESTION: So you would take a pro rata share.

17 MR. BEATTY: -- what property, payroll, and
18 sales properly belongs to that pro rata share.

19 I would like to reserve my remaining time, if
20 I could, for rebuttal.

21 CHIEF JUSTICE BURGER: Very well.

22 Mr. Spangler.

23 ORAL ARGUMENT OF THEODORE V. SPANGLER, JR., ESQ.,

24 ON BEHALF OF THE RESPONDENT

25 MR. SPANGLER: Mr. Chief Justice, and may it

1 please the Court, Idaho's position in this case is
2 really quite simple, and very fundamental, and, we
3 think, entirely consistent with the previous decisions
4 of this Court. That is that when intangible assets such
5 as, for example, shares of stock, are found to be a part
6 of a taxpayer's own unitary business, that is, when
7 they, the intangibles, contribute to or relate to or are
8 some way in furtherance of the taxpayer's own trade or
9 business, there is no logical or constitutional reason
10 why the income from those same intangibles should be
11 treated any differently than any other business income
12 that that taxpayer might earn.

13 QUESTION: How about the income from the hotel
14 chain, or the dividends from the hotel chain?

15 MR. SPANGLER: Mr. Justice, I might answer
16 that question by pointing out that the Idaho Supreme
17 Court in this case did not permit apportionment of
18 dividends from a company that was engaged in asbestos
19 mining in Canada. What the Idaho court found there was
20 that the intangible asset was not held for purposes that
21 were specifically related to or in furtherance of this
22 unitary business that ASARCO admittedly conducts partly
23 in the state of Idaho.

24 The issue for due process purposes, we think,
25 is whether or not the intangible asset itself, like any

1 other asset that the taxpayer may own, is held for
2 purposes relating to or in furtherance of that unitary
3 business.

4 QUESTION: I am sorry, Mr. Attorney General.
5 How did your Supreme Court distinguish the asbestos from
6 what we have here?

7 MR. SPANGLER: What they said, sir, was that
8 these particular asbestos companies, that the shares of
9 stock in those asbestos companies that ASARCO had
10 clearly and convincingly and cogently segregated by
11 showing that those intangible assets --

12 QUESTION: Was there record evidence on this
13 question?

14 MR. SPANGLER: Yes, sir, there was record
15 evidence. There was testimony, and the Idaho court said
16 that because they had shown a complete lack of
17 relationship between the asset, the intangible asset,
18 the shares of stock, and their mining, smelting, and
19 refining of non-ferrous metals activities that they
20 conducted in the United States, that those were not
21 apportionable, and that, I think, is responsive probably
22 to the --

23 QUESTION: Whereas there are contrary findings
24 as to the affiliates and subsidiaries we have here. Is
25 that it?

1 MR. SPANGLER: Precisely, sir. In regard to
2 the five corporations at issue here, the Idaho court
3 specifically said that ASARCO had acquired and
4 maintained its ownership interest in these companies as
5 an integral and necessary part of its mining and
6 smelting business.

7 QUESTION: Again based on record evidence?

8 MR. SPANGLER: Yes, sir.

9 QUESTION: Had those findings been made by
10 your trial court as well?

11 MR. SPANGLER: At the trial court level, the
12 trial judge had concluded to the contrary in regard to
13 these particular subsidiaries, and what the Idaho court
14 said was that in regard to these particular
15 subsidiaries, the trial court's conclusion was not
16 consistent with the evidence that was in the record.

17 QUESTION: Well, do you think the standard you
18 are urging on us here is the same as the Idaho court
19 applied?

20 MR. SPANGLER: Yes, sir, I do.

21 QUESTION: You mean, in furtherance of?

22 MR. SPANGLER: The language of the Uniform
23 Act, the Uniform Division of Income for Tax Purposes
24 Act, which is really -- the constitutionality of which
25 is really at issue here, the statutory standard that the

1 Idaho court followed was, were these -- was this income
2 from tangible or intangible property acquired, managed,
3 or disposed of in the regular course of the taxpayer's
4 trade or business, and that is -- before they ever got
5 to the constitutional issue, the Idaho court had to
6 conclude under that uniform statute standard that the
7 intangible assets were related to and in furtherance of
8 the unitary business activity.

9 QUESTION: Why?

10 MR. SPANGLER: Clearly because --

11 QUESTION: Those words aren't in the Uniform
12 Act.

13 MR. SPANGLER: What, the acquisition,
14 management, and disposition?

15 QUESTION: No, the related to or in
16 furtherance of.

17 MR. SPANGLER: No, those words are not, but
18 they are an integral and necessary part --

19 QUESTION: That is the standard you are urging
20 on us. Now, did the Idaho court apply that standard, or
21 not?

22 MR. SPANGLER: Well, I think -- I am intending
23 to use those words with virtually the same meaning, that
24 is, that they are --

25 QUESTION: Well, why don't you use the Idaho

1 court's words?

2 MR. SPANGLER: The Idaho court's words were
3 the statutory words which were, are an integral and
4 necessary part.

5 QUESTION: Well, why don't you use them? Why
6 don't you use them?

7 MR. SPANGLER: Yes, sir. I will.

8 QUESTION: Well, you don't -- I just wondered
9 why you don't.

10 MR. SPANGLER: I guess because I didn't
11 perceive a constitutional difference between those. If
12 they are an integral --

13 QUESTION: I am not sure there is, but it just
14 sounds like a different standard.

15 MR. SPANGLER: Yes, sir. If they are an
16 integral and necessary part in the statutory language of
17 the taxpayer's trade or business. Here, for example,
18 you have heard of Southern Peru being a source of raw
19 materials, copper concentrates for the smelters that
20 were part of the unitary business in the United States.
21 Other companies were -- and under the record, major
22 customers of ASARCO.

23 QUESTION: On that customer point, directing
24 your attention to General Cable, which I understand was
25 partially owned and then sold, and as I understand the

1 business relationship continued to be the same before
2 and after the sale. Is that correct? Was it a
3 necessary part of the integrated business at one time
4 and not at another time, or at both times, or neither?

5 MR. SPANGLER: No, the -- we don't see that
6 the continuing customer-supplier relationship before and
7 after the sale is necessarily relevant. What we think
8 was that the -- that ASARCO did not, and the Idaho court
9 properly concluded did not show that the shares of stock
10 were unrelated to the business activity. I think there
11 are a couple of things that are sort of getting confused
12 here. One of the prior questions was, are there two
13 things here. Are there just unitary and not unitary.
14 We don't think there are just two things here. We think
15 there are three things. That is, you have this
16 situation like with the asbestos companies where the
17 shares -- the companies are not functionally integrated
18 with the taxpayer, nor are the shares of stock held for
19 purposes related to the business activities.

20 You then have on the other end of the
21 spectrum, and there were six subsidiaries with ASARCO
22 that were held to be so functionally integrated, so
23 interdependent in their business operations that they
24 should be included in a combined report, with the result
25 that all of the income was in the apportionable base,

1 the dividends were eliminated, and the property,
2 payroll, and sales of all six were included in the
3 apportionment formula. That is the issue that you will
4 have later this afternoon in the Chicago Bridge and Iron
5 v. Caterpillar case.

6 This is really the third case. This is the
7 case where the payor and the payee corporations are not
8 so functionally integrated that they are together
9 conducting one single unitary business operation, but
10 the shares of stock, the assets are held for purposes
11 that are an integral and necessary part of that
12 unitary --

13 QUESTION: May I ask, to be sure we have it
14 clearly understood, do you concede that this
15 intermediate category is not part of the unitary
16 business?

17 MR. SPANGLER: We have conceded, or we have
18 not asserted that those subsidiary corporations are
19 themselves together engaged with ASARCO in one unitary
20 business. We do not concede --

21 QUESTION: And you have conceded that they are
22 not part of the unitary business?

23 MR. SPANGLER: The companies themselves are
24 not. The intangible assets --

25 QUESTION: But the income from the companies

1 is what you say is the only part of unitary business.

2 MR. SPANGLER: The intangible asset and the
3 income earned from the intangible asset.

4 QUESTION: Then explain to me, how does that
5 income either increase or decrease the profitability of
6 the Idaho operations? That is ultimately what we are
7 searching for, the earnings of the Idaho operation, is
8 it not?

9 MR. SPANGLER: Because the Idaho operations
10 are part of this overall unitary business, and were
11 apportioning unitary income, what we are looking to is
12 those activities that relate to the entire unitary
13 income --

14 QUESTION: But you are only looking to
15 out-of-state activities insofar as they affect the
16 profitability of the in-state activities. Is that not
17 true?

18 MR. SPANGLER: Yes, sir, but because the
19 in-state activities are part of this inseparable unitary
20 business that --

21 QUESTION: Well, but we are talking about now,
22 a group of companies that are not, as I understand your
23 concession, part of the unitary business.

24 MR. SPANGLER: Yes, sir, but the point I seem
25 not to be getting across is that we don't see that there

1 is a different due process standard for different kinds
2 or classes of income. The due process standard is,
3 first, you know, is there a nexus --

4 QUESTION: Well, is it not clear that the
5 purpose, the entire purpose of the due process standard
6 is to measure the profitability of the in-state
7 operations?

8 MR. SPANGLER: Well, yes, sir.

9 QUESTION: And unless it affects the
10 profitability of the in-state operations, you are
11 constitutionally prohibited from taxing out of state
12 income?

13 MR. SPANGLER: Yes, sir, and our point is that
14 it does affect the profitability of the in-state
15 operation, because that in-state operation is part of
16 this inseparable unitary business, and these intangible
17 assets, as distinguished from the corporations, the
18 other corporations themselves, are also part of that
19 inseparable unitary business, and because intangibles by
20 their very nature have no particular geographic source,
21 then when they relate to where -- to every place where
22 the business activity occurs, that it is entirely
23 reasonable and constitutional to say that all of the
24 states where that unitary business activity occurs have
25 a constitutional right to tax a fairly apportioned share

1 of that income.

2 QUESTION: Well, on that basis, your integral
3 and necessary part standard goes right out the window.
4 You just say, if the unitary business as you define it,
5 excluding these companies, has any kind of income
6 whatsoever, whether it comes from an intangible asset
7 that is an integral and necessary part or not, is to be
8 taken into account.

9 MR. SPANGLER: No, sir. If they are part of
10 the intangible asset being an integral and necessary
11 part --

12 QUESTION: Well, give me an example of some
13 income of this unitary business that you wouldn't want
14 to apportion. I don't understand why you would agree to
15 the asbestos set-aside, then.

16 MR. SPANGLER: Well, the question there, of
17 course, was a question of --

18 QUESTION: That is certainly -- they owned a
19 business in Canada.

20 QUESTION: And it is a mining business.

21 MR. SPANGLER: That is a mining business.
22 Yes, sir.

23 QUESTION: And it is income, and you get
24 dividends from it.

25 MR. SPANGLER: Yes, sir.

1 QUESTION: So how do you put that aside?

2 MR. SPANGLER: The issue there is an issue of
3 fact. They were mining businesses. They did own it.
4 But the record that was established was related to
5 things like the technological differences in regard to
6 asbestos as opposed to others, and the lack of any
7 relationship or contribution of the asbestos company,
8 very much like a motel chain --

9 QUESTION: Well, income. Income to the
10 unitary business.

11 MR. SPANGLER: No, income from activities.
12 The activities that are relevant are the -- in using the
13 statutory standard -- the management, acquisition, and
14 disposition of intangible properties. That is, ASARCO
15 is not mining in Canada or mining in Southern Peru.
16 That is, that is not the activity -- excuse me. That is
17 not the activity --

18 QUESTION: But you are conceding that it is
19 income from operations that are not a part of the
20 unitary business.

21 MR. SPANGLER: No, sir. That is not what I am
22 conceding. What I am conceding is --

23 QUESTION: Well, then, I misunderstood you
24 earlier.

25 MR. SPANGLER: What I am conceding is that

1 the --

2 QUESTION: Let me ask again. Are these
3 intermediate companies part or not part of the unitary
4 business?

5 MR. SPANGLER: The payor corporations --

6 QUESTION: The payor corporations.

7 MR. SPANGLER: -- have not been found to be
8 part of the unitary business. If they --

9 QUESTION: They are not.

10 MR. SPANGLER: If they were --

11 QUESTION: Now, how does not income from those
12 corporations differ from income from the asbestos
13 company then?

14 MR. SPANGLER: Because we are failing to --

15 QUESTION: They both paid to the unitary
16 business.

17 MR. SPANGLER: We are failing to distinguish
18 that the income is ASARCO's income not from mining in
19 Southern Peru, but from its acquisition, management, and
20 disposition of these shares of stock which assured it
21 sources of --

22 QUESTION: But then how are they different
23 from acquisition, management, and shares of stock in a
24 hotel company or an asbestos company?

25 MR. SPANGLER: Because if they did own stock

1 in the hotel company, there would be no relationship
2 with the mining business. That is, that intangible
3 asset would be unrelated to the mining business. This
4 intangible asset, the shares of stock in the mining
5 company that provided them a guaranteed source of
6 supply, is related to this unitary business, part of
7 which is conducted in the state of Idaho.

8 QUESTION: Well, just being related, then,
9 satisfies the integral and necessary part standard?
10 Just being related. As long as your intangible relates
11 to the mining business, it is ipso facto an integral and
12 necessary part.

13 MR. SPANGLER: Well, sir, I guess I keep
14 falling in that same -- in that same trap. I do think
15 that the statutory --

16 QUESTION: Well, it isn't a trap. I am trying
17 to figure out what your standard is.

18 MR. SPANGLER: Well, my standard, Your Honor,
19 or the standard of the Idaho -- was the standard of the
20 Idaho court, which is statutory language. The
21 intangible asset has to be an integral and necessary
22 part of the taxpayer's regular unitary business
23 activities. That --

24 QUESTION: Well, now you tell us all you have
25 to do is satisfy that is to have some relationship.

1 MR. SPANGLER: Not -- I suppose not any
2 relationship.

3 QUESTION: Well, that is what -- that is the
4 way you distinguished the hotel business. You say, it
5 just doesn't have any relationship to the mining
6 business.

7 MR. SPANGLER: It is not an integral and
8 necessary part of the mining business. It makes no
9 contribution, does not act in furtherance of the mining
10 business. Here, the intangible assets did make
11 contributions, or they were in furtherance of, they were
12 -- or at least ASARCO had failed to show that in the --

13 QUESTION: What about asbestos in Canada?

14 MR. SPANGLER: The evidence that persuaded the
15 Idaho court was that there was such a different -- such
16 difference in that business activity that it made no
17 contribution at all, and --

18 QUESTION: Well, do you agree the Idaho court
19 was right in that respect? Some of the things you have
20 been saying suggest --

21 MR. SPANGLER: Well --

22 QUESTION: -- that maybe you don't, but in any
23 event, you didn't seek any review of that, did you, by a
24 court?

25 MR. SPANGLER: Well, because that was part of

1 the Idaho court's interpretation of the Idaho statute,
2 it would presumably --

3 QUESTION: You were bound by it.

4 MR. SPANGLER: Right, we were bound by it, and
5 part of the problem had to do --

6 QUESTION: Well, maybe that is not a fair
7 question to ask --

8 MR. SPANGLER: Well, part of it.

9 QUESTION: -- but I will ask it anyway. Do
10 you agree with the Idaho court as to the asbestos?

11 MR. SPANGLER: In the sense that we probably
12 didn't make as much -- as good a factual record in
13 regard to the asbestos companies as we maybe should have
14 at trial. If we had made a better record, we might have
15 gotten a different result there. But on the record that
16 it had --

17 QUESTION: Or if ASARCO hadn't made such a
18 good one.

19 (General laughter.)

20 QUESTION: Who put in the evidence?

21 MR. SPANGLER: Either way, Your Honor.

22 QUESTION: Mr. Spangler, let me approach this
23 same question that I think is troubling others, and see
24 if you can help my understanding as well. One approach
25 that would give the most latitude to the states in

1 taxing income, I suppose, would be to say that making
2 investments by a company is always part of the unitary
3 business, so whether it is a short-term investment or a
4 long-term investment, it is always part of the unitary
5 business in that sense. Is that right? That would be
6 the approach that would give the states the most
7 latitude.

8 MR. SPANGLER: Yes, ma'am. That would be the
9 approach that would give the state the most latitude.

10 QUESTION: But you are not urging us to adopt
11 that approach. Is that right?

12 MR. SPANGLER: That's right. We're not saying
13 that every investment --

14 QUESTION: But short-term investments, you
15 would urge us to adopt that approach. Is that correct?

16 MR. SPANGLER: Yes, ma'am.

17 QUESTION: But not long-term investments.

18 MR. SPANGLER: No.

19 QUESTION: And where would you draw the line?

20 MR. SPANGLER: I would not draw the line
21 between long-term and short-term investments at all. I
22 would look to what is the purpose for making this
23 investment, whether it is an investment in a -- whether
24 it is a short-term investment of working capital,
25 whether it is a long-term investment in shares of stock,

1 whether it is an investment in tangible plant. I would
2 look to the purpose of the investment and say, is this
3 investment being made for purposes which are an integral
4 and necessary part of the taxpayer's unitary trade or
5 business, and I would not apply, as ASARCO is asking the
6 Court to do here, a different due process standard to
7 one category of investment as opposed to another.

8 What ASARCO is saying is that fine, if it is
9 an investment, a short-term investment of working
10 capital, the fact that that is part of the unitary trade
11 or business is sufficient to allow it to be fairly
12 apportioned, but they want to establish a stricter or a
13 more -- a higher standard when the investment happens to
14 be in shares of stock.

15 Now, we don't think that the standard is
16 different, whether it is investments in shares of stock,
17 whether it is investments in working capital, whether
18 the income is being earned from short-term accounts
19 receivable, or whether it is investment in the physical
20 operating factories and mines, that the same due process
21 standard applies, and once -- you know, they have not
22 contended that the Idaho court was wrong in its factual
23 conclusion. That is, they have not contended that the
24 intangible shares of stock were not acquired and
25 maintained as part of ASARCO's integral and necessary

1 trade or business.

2 What they have said is that in the case of the
3 shares of stock, there is an additional standard, that
4 is, functional integration, and as we read Mobil, what
5 this Court rejected in that Mobil decision was the idea
6 that some special due process standard applied to
7 dividends, that instead, whether -- whatever the
8 category of intangible or whatever the category of asset
9 producing the income, the Court said that it was still
10 incumbent upon the taxpayer to carve out some clear and
11 cogent exception.

12 Now, the functional integration language in
13 ASARCO is useful to help show that there was a business
14 purpose, that the -- was a part of or that -- at least
15 that Mobil had not shown that these assets were not part
16 of its regular trade or business activities, but it is
17 the business purpose for which those intangibles were
18 held, in our view, that is the significant thing for due
19 process purposes, not whether or not there was or wasn't
20 functional integration.

21 If there was functional integration, then we
22 would combine, and we would view that as one single
23 business entity, and we would in Idaho recognize the
24 property, payroll, and sales of the entire business
25 activity, and we would eliminate the inter-company

1 transfers, including the dividends.

2 Once that's clear, you know, once it's clear
3 that the justification for the apportionment is the fact
4 that this is an asset which is part of that business
5 activity, then it becomes clear, we think, that there is
6 no logic at all to reaching outside the confines of that
7 unitary business activity to bring in the property,
8 payroll, and sales of some other business for the
9 purpose of apportioning that, any more than you would in
10 the case of interest on a trade account receivable. You
11 would not say that the customer must be functionally
12 integrated, or that you must reflect the property,
13 payroll, and sales of that trade --

14 QUESTION: Mr. Spangler, would you take the
15 position that if they were part of the functionally
16 integrated business, then you would apply the sales,
17 property, and payroll factors?

18 MR. SPANGLER: Yes, sir, and that is exactly
19 what we have done in this case.

20 QUESTION: That is what you did with oh-six.

21 MR. SPANGLER: Yes, sir.

22 QUESTION: Yes.

23 MR. SPANGLER: And that is why we say that
24 rather than there being simply two circumstances,
25 unitary or not unitary, there is really three, because

1 we are talking about, are they functionally integrated
2 as one business activity, or are they -- are the assets
3 held for business purpose or is neither true.

4 QUESTION: How many states have the -- follow
5 the Idaho approach of there being a third category? Do
6 you know?

7 MR. SPANGLER: Your Honor, not specifically.
8 A majority of the income tax states have adopted the
9 Uniform Act, and --

10 QUESTION: Yes. They interpret it
11 differently, I suppose.

12 MR. SPANGLER: Your Honor, at least all of the
13 state supreme court cases that have reached the issue
14 have interpreted it consistently.

15 (Whereupon, there was an interruption from a
16 member of the audience.)

17 CHIEF JUSTICE BURGER: You may proceed,
18 counsel.

19 MR. SPANGLER: Thank you, Your Honor.

20 CHIEF JUSTICE BURGER: Well, I think we will
21 resume there at 1:00 o'clock.

22 MR. SPANGLER: All right.

23 (Whereupon, at 12:00 o'clock p.m., the Court
24 was recessed, to reconvene at 1:00 o'clock p.m. of the
25 same day.)

1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: Mr. Spangler, you may
3 continue.

4 ORAL ARGUMENT OF THEODORE V. SPANGLER, JR., ESQ.,
5 ON BEHALF OF THE APPELLEE - CONTINUED

6 MR. SPANGLER: Thank you, Mr. Chief Justice,
7 and may it please the Court, returning to the discussion
8 that we had this morning about the standard that was
9 applied, of course, the standard that the Idaho court
10 applied first, in the first instance, was a statutory
11 standard, and then it proceeded to say that that
12 statutory standard was consistent with the due process
13 requirements of the Constitution. That is not to say,
14 of course, that the statutory standard is necessarily,
15 as applied by the Idaho court, is necessarily equal to
16 the full extent of what that constitutional standard
17 might be.

18 I would think in terms of trying to formulate
19 a constitutional standard there are probably two
20 questions that should be asked in regard to income such
21 as that that is at issue here, to determine whether or
22 not there is a violation of the due process clause. The
23 two questions are, what is the purpose of the
24 investment, and the second is, how is the income used?

25 If in answering those two questions the

1 taxpayer is able to show that the purpose of the
2 investment has no relation at all to its regular
3 business activities --

4 QUESTION: How could you show that? How could
5 you show that in any case? Wouldn't it be bound, any
6 income they had, wouldn't it be bound to enhance their
7 total operations?

8 MR. SPANGLER: Depending upon how the income
9 was used. That was the second question. If the income
10 flows straight through, for example, and does not
11 enhance -- you know, to the ultimate shareholders, and
12 does not in any way enhance the business activities or
13 the ability to do business, that may well meet that
14 standard. If the taxpayer is able to show that total
15 lack of relationship, then it would have done what this
16 Court seemed to say in Mobil when it was talking about
17 carving out something different about the particular
18 income that distinguishes it from other business income
19 of the taxpayer.

20 QUESTION: Mr. Spangler --

21 QUESTION: I gather you start with the
22 presumption then, do you?

23 MR. SPANGLER: I am sorry, sir?

24 QUESTION: You start with a presumption. You
25 say the taxpayer has the burden of proving it.

1 MR. SPANGLER: Yes, sir. In fact, our statute
2 starts with the presumption that statutorily the
3 taxpayer has the burden of proof, and of course the
4 assessment is being made by the state, which does
5 procedurally put the taxpayer in the position of having
6 the initial burden of proof. Yes, sir.

7 QUESTION: Initial burden of proof or ultimate
8 burden of proof?

9 MR. SPANGLER: Well, the ultimate burden of
10 proof, I suppose. The state has to make a conclusion,
11 has to come to a conclusion before it makes the
12 assessment in the first place. Yes, that's true.

13 QUESTION: Mr. Spangler --

14 MR. SPANGLER: Yes, ma'am.

15 QUESTION: -- assuming that the dividend
16 income is taxed at the source by the foreign government,
17 is it your position that Idaho can also tax it?

18 MR. SPANGLER: Yes, ma'am. It is our position
19 that there is no foreign commerce issue involved here at
20 all, because the activities generating the income are
21 the taxpayer's activities in the United States. Mobil
22 decision recognized the concurrent -- or the established
23 norm of concurrent state and federal taxation. That is,
24 both states and the federal government tax the same net
25 income of taxpayers.

1 The mechanism that works at the federal level
2 is conceptually entirely different than the mechanism
3 that works at the state level. The mechanism at the
4 federal level is, the taxpayer is given the election of
5 a credit or a deduction -- most take credits -- for the
6 foreign taxes that have been paid.

7 QUESTION: Well, it is a mechanism for
8 avoiding double taxation, right?

9 MR. SPANGLER: That's -- yes, ma'am. That's
10 true. The mechanism that functions on that concurrent
11 subsidiary level or the lower level at the state is the
12 apportionment of the income based on where the
13 activities occur. Unlike the federal government, we
14 don't claim that we can tax all of the income wherever
15 earned and then give an offsetting credit. It is mixing
16 up these two different levels, if you try to say that
17 you have to apply the credit mechanism to the
18 apportionment process, which is conceptually an entirely
19 different method for reaching the result of taxing only
20 that --

21 QUESTION: Do you think Congress could
22 prescribe what is apportioned?

23 MR. SPANGLER: Yes, sir. There is no doubt in
24 my mind that Congress could enact legislation in this
25 area through its powers to regulate both interstate --

1 QUESTION: And foreign.

2 MR. SPANGLER: -- and international commerce,
3 but I think clearly they have not done that in this
4 area. The only thing they have done is limit -- enact
5 some nexus requirements.

6 That same reasoning is also fallacy in the
7 idea that it is logical to reach out beyond the confines
8 of this unitary business to attribute the property,
9 payroll, and sales of the payor corporation to the
10 payee, and I think there is a lot of confusion that gets
11 caused by this business -- by this term "unitary",
12 because we are really talking about two related but
13 somewhat different things.

14 The first is the contours of the unitary
15 business itself. The unitary business may be, that
16 business enterprise, the enterprise, may be conducted by
17 one corporation or a group of corporations. Here, it
18 was seven corporations that were conducting the unitary
19 business enterprise. The other aspect of it is what
20 income of that enterprise is attributable to its regular
21 business activities. That is --

22 QUESTION: You don't regard the term "unitary
23 business" as a word of art, but simply kind of a
24 descriptive phrase?

25 MR. SPANGLER: It is a phrase that has been

1 used in a lot of these cases.

2 QUESTION: Yes.

3 MR. SPANGLER: It is not a statutory phrase at
4 all, and I think it has been used to describe in some of
5 these cases and some of the arguments, to describe those
6 two different things, and because it has, it has caused
7 some confusion. That is --

8 QUESTION: Well, it was used in connection
9 with deciding constitutional issues.

10 MR. SPANGLER: Yes, sir.

11 QUESTION: I wouldn't think it would be some
12 statutory standard.

13 MR. SPANGLER: Well, yes, sir. You did say in
14 Mobil that the unitary business principle is the
15 touchstone of apportionability, but we still -- we do
16 see --

17 QUESTION: You talk as though the Uniform Act
18 governed us or something.

19 MR. SPANGLER: Sir, I don't follow the
20 question.

21 QUESTION: You needn't. It is just my
22 observation.

23 MR. SPANGLER: All right. I'm sorry. But the
24 underlying concept that we keep coming back to is
25 understanding that distinction between the contours of

1 the enterprise that constitute a unitary business.
2 Conceivably that unitary business could be less than the
3 full activities of one corporation, or it could be a
4 group of corporations or only one corporation.

5 QUESTION: Mr. Spangler, can I ask you, is
6 this a correct understanding of your test of relatedness
7 for the intermediate category? Would it be that the
8 security is owned by the taxpaying entity or the unitary
9 business for a reason related to the unitary business
10 other than the income that it produces? In other words,
11 for example, you own stock in a customer because you
12 think it will buy from the --

13 MR. SPANGLER: Yes, sir.

14 QUESTION: You have to find a reason other
15 than the mere fact that it generates income.

16 MR. SPANGLER: Yes, sir. The mere fact that
17 it generates income --

18 QUESTION: In other words, a sufficient reason
19 for having the investment other than --

20 MR. SPANGLER: Other than the mere generation
21 of the income, and the two questions that I suggest are,
22 you know, what is the purpose for the investment, is it
23 a customer or source of raw materials, or conceivably
24 what is the income used for.

25 QUESTION: But if you answer the first

1 question in a way that is favorable to your position,
2 you really don't need to answer the second one, do you?

3 MR. SPANGLER: Yes, sir. That would be
4 correct.

5 QUESTION: Yes.

6 CHIEF JUSTICE BURGER: Thank you, counsel.

7 MR. SPANGLER: Thank you.

8 CHIEF JUSTICE BURGER: You have one minute
9 remaining, Mr. Beatty.

10 ORAL ARGUMENT OF GEORGE W. BEATTY, ESQ.,

11 ON BEHALF OF THE APPELLANT

12 MR. BEATTY: In Mobil, the Court stated that
13 the lynchpin of apportionability is the unitary business
14 principle. You repeated that statement --

15 QUESTION: Everyone repeats that in his brief.

16 MR. BEATTY: Right. You repeated the
17 statement in Exxon. Idaho is --

18 QUESTION: Did we say what a unitary business
19 was?

20 MR. BEATTY: No, I think it is defined, Your
21 Honor, but the cases, and I hope that in response to
22 Justice Brennan's question I outlined the three factors
23 that we think are important, ownership, management, and
24 most important of all, the degree of functional
25 relationship at the operational level. The state here

1 has conceded in its brief, and Mr. Spangler has twice
2 said during oral argument today that the five
3 dividend-paying companies involved in this case were not
4 part of ASARCO's unitary business. We think the
5 undisputed facts in the record of this case, and there
6 is absolutely no dispute about those facts, bears out
7 the correctness of that concession, and on that we rest
8 our case.

9 QUESTION: But may I ask one question? That
10 just makes this income from those companies like the
11 income in Mobil from, say, the utility company.
12 Remember the list of subsidiaries. Now, clearly, the
13 utility companies were not part of Mobil's unitary
14 business. But supposing Mobil could -- or supposing the
15 state in that case could have proved that Mobil could
16 only sell its products to one of those utilities if it
17 was also a shareholder, that it was just necessary in
18 order to generate the sales. Would the income from the
19 utility stock then have been treated as part of the
20 unitary business?

21 MR. BEATTY: May I first begin with the
22 observation that in Mobil, there was absolutely no proof
23 at all of the relationship --

24 QUESTION: I understand.

25 MR. BEATTY: -- between Mobil and those

1 companies, so the decision in Mobil, it seems to me,
2 proves nothing. The taxpayer lost in that case because
3 of the failure of proof.

4 QUESTION: I understand.

5 MR. BEATTY: If the record showed that an
6 investment was made purely and simply for the purpose of
7 obtaining needed supplies or providing a customer
8 outlook, if that were the only purpose of the
9 investment, I think it might indeed be relevant. It
10 might be one of the cases that you were suggesting
11 earlier where ownership of the stock was so integrally
12 involved in the taxpayer's own business activities that
13 it would be a part of the unitary business.

14 QUESTION: So you would acknowledge then there
15 could be an intermediate category, but you just define
16 it more strictly than the state would.

17 MR. BEATTY: I do. You might in that
18 connection want to take a look at a case called W.W.
19 Windell, 65 TC 694, which discussed somewhat similar
20 problems as they arise under federal tax law. That case
21 held that the existence of a significant business
22 motivation for an investment did not convert the
23 business investment from the normal capital asset status
24 that it would have for federal tax purposes into a
25 business asset that would give rise to ordinary income

1 or loss on disposition.

2 I do not want to suggest in any sense that the
3 constitutional test ought to be the same as the federal
4 income tax test, but if you wanted to pursue that line
5 of inquiry, it seems to me that that is a line of cases
6 that you might want to look at.

7 QUESTION: Mr. Beatty, when you answered
8 Justice Stevens, yes, there is an intermediate category,
9 but you would define it more strictly, I take it you
10 would still insist on the other leg of your argument,
11 that there should be a change in the denominator.

12 MR. BEATTY: Absolutely.

13 CHIEF JUSTICE BURGER: Thank you, gentlemen.
14 The case is submitted.

15 (Whereupon, at 1:12 o'clock p.m., the case in
16 the above-entitled matter was submitted.)

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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:
ASARCO INCORPORATED, ETC., Appellant, v. IDAHO STATE TAX COMMISSION
No. 80-2015

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BY Reene Hammond

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