

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

IN THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2394

TITLE WESTINGHOUSE ELECTRIC CORPORATION, Appellant
v. JAMES H. TULLY, JR., et al.

PLACE Washington, D. C.

DATE November 1, 1983

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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -x
3 WESTINGHOUSE ELECTRIC CORPORATION, :
4 Appellant :
5 v. :
6 JAMES H. TULLY, JR., ET AL. :
7 - - - - -x
8 Washington, D.C.
9 Tuesday, November 1, 1983
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:15 p.m.
13 APPEARANCES:
14 PAUL M. DODYK, ESQ., Sun City Center, Pennsylvania; on
15 behalf of the Appellant.
16 PETER H. SCHIFF, ESQ., Acting Attorney in Chief,
17 Department of Law, New York, New York; on behalf
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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Dodyk, I think you
3 may proceed whenever you're ready.

4 ORAL ARGUMENT OF PAUL M. DODYK, ESQ.,

5 ON BEHALF OF THE APPELLANT

6 MR. DODYK: Mr. Chief Justice, and may it
7 please the Court:

8 In this appeal, Westinghouse Electric
9 Corporation challenges the constitutionality of the way
10 in which the State of New York taxes the income of a
11 domestic international sales corporation or DISC.

12 A DISC is not a typical business corporation.
13 It is a vehicle established under the Internal Revenue
14 Code to permit the deferral of income taxes with respect
15 to certain income from exports. The income which may be
16 attributed to a DISC and on which tax may be deferred is
17 determined by a formula set forth in the Internal
18 Revenue Code such as 50 percent of net income or 4
19 percent of gross receipts derived from exports.

20 DISCs typically perform no functions, own no
21 property, have no employees. A DISC is essentially an
22 accounting segregation of a portion of a taxpayer's
23 export-related income for purposes of tax deferral.

24 The export-related income so segregated is
25 essentially pure income separated from the costs which

1 generate that income. Those costs remain on the books
2 of the business entities whose exports are in question.

3 Under the Internal Revenue Code as it was in
4 effect during the relevant period, a taxpayer was
5 essentially permitted to defer federal taxes on 50
6 percent of income allocated to the DISC until that
7 income is distributed to the parent.

8 Turning to Westinghouse, Westinghouse and its
9 affiliates are engaged in a variety of businesses, some
10 of which exports products, a portion of the income from
11 which during the relevant period was allocated by
12 Westinghouse to the DISC.

13 During the years here in question, 1972 and
14 1973, approximately 75 to 80 percent of the Westinghouse
15 DISC income was derived from Westinghouse exports,
16 approximately 20 to 25 percent from affiliates of
17 Westinghouse.

18 The record in this case establishes that the
19 affiliates of Westinghouse did no business in New York.
20 It further establishes that the affiliates are
21 autonomous, independently managed, and deal with
22 Westinghouse on an arm's length basis.

23 The State of New York does not treat these
24 affiliates as unitary with Westinghouse and has not
25 attempted to tax their income in recognition of the fact

1 that they do not do business in the State of New York.

2 The tax practices here at issue arise from New
3 York's taxation of accumulated DISC income. The
4 particular tax involved is the New York corporate income
5 tax. The New York corporate income tax is a formula
6 apportioned tax.

7 In determining the amount of income which the
8 State of New York taxes, it first attempts to determine
9 the taxpayer's total income. It then multiplies it by a
10 fraction which is determined by the relationship of the
11 taxpayer's New York property, payroll and revenue to the
12 total payroll, property and revenue of the taxpayer.

13 In determining the amount of a taxpayer's
14 income to be apportioned to New York, the state in this
15 case added to the income of Westinghouse the total
16 income of its DISC, including the amount on which
17 federal taxes were deferred, and including the amount
18 derived by reason of exports by Westinghouse non-New
19 York affiliates.

20 Having determined the income apportioned to
21 New York, the state then applied a tax rate of 9 percent
22 to that income as allocated to the State of New York.
23 In computing the tax actually due, however, the court
24 took another step, and that is, it permitted a credit
25 with respect to 70 percent of the tax due on accumulated

1 DISC income. And it is that credit which is at issue in
2 this case, because the State of New York, although it
3 permits that credit, it permits it only with respect to
4 exports which are shipped from a regular place of
5 business in the State of New York. More specifically,
6 in calculating the credit, the New York statute requires
7 the taxpayer to multiply its accumulated DISC income by
8 a fraction of which the numerator is gross receipts
9 shipped from New York, and the denominator gross
10 receipts from exports shipped from all sources.

11 In this case the result was to limit the
12 credit permitted Westinghouse to approximately 5 percent
13 of the accumulated DISC income which New York taxed. Of
14 course, with respect to other corporations which have
15 their base of operations in New York, such as General
16 Electric, the credit is much greater.

17 The basic result of New York's limitation on
18 the availability of the credit is that if a firm ships
19 exports from New York, it will pay a tax of 2.7 percent
20 on accumulated DISC income attributed to that shipment,
21 but if it ships that export from New Jersey or any state
22 other than New York, it will pay a tax of 9 percent.
23 But in terms of dollars, if you assume a corporation
24 with \$100 million of accumulated DISC income, 50 percent
25 of which is apportioned to the State of New York, that

1 taxpayer will pay to the State of New York a tax in the
2 amount of \$4,500,000 if it ships from non-New York
3 facilities, but if it ships from New York facilities,
4 its tax bill will only be \$1,350,000.

5 QUESTION: Mr. Dodyk, what you're saying is
6 basically that the federal Constitution requires the
7 credit New York extends you to be larger than it was
8 calculated to be under the statute.

9 MR. DODYK: That is correct, Your Honor.

10 QUESTION: I suppose you could win on that
11 point and still be worse off financially if the case
12 went back to the New York Court of Appeals after
13 reversing, and the New York Court of Appeals decided
14 that the New York legislature never would have enacted
15 the credit at all if it knew that this was going to be
16 the result.

17 MR. DODYK: Well, I guess in that case my
18 client, Westinghouse, would be a very altruistic
19 enforcer of constitutional principle. Or some would
20 have said I would have succeeded in shooting myself in
21 the foot.

22 But in any event, that's something for the
23 Court of Appeals on remand to determine.

24 QUESTION: If you win.

25 MR. DODYK: Yes, of course.

1 Our argument is essentially a simple one, and
2 that is, that any tax scheme which works that
3 difference, which imposes a higher rate of tax on
4 shipments which are made outside the taxing state than
5 it does on the same equivalent shipment made inside the
6 State of New York is an unconstitutional burden on the
7 commerce clause because it discriminates against
8 interstate commerce.

9 In this particular case we believe that the
10 operation of the credit and its unconstitutionality is
11 exacerbated by the fact that the State of New York
12 requires the taxpayer to add to its income base the
13 entire amount of DISC income, but excludes from the
14 denominator of the apportionment formula the property,
15 payroll and revenue of the non-New York affiliates whose
16 shipments accounted for 20 to 25 percent of the DISC
17 income involved in this case.

18 QUESTION: Let me ask right there, the
19 shipments that originated in New York, were all of them
20 made in interstate commerce?

21 MR. DODYK: Yes, Your Honor.

22 QUESTION: So then it's really not a
23 discrimination against interstate commerce; it's a
24 discrimination between two kinds of interstate commerce.

25 MR. DODYK: In a sense that is true. And much

1 the same was the case, of course, in the Boston Stock
2 Exchange case where the Court observed, I guess for the
3 first time, that even if one is dealing with a
4 discrimination between two forms of interstate commerce,
5 that is still a form of discrimination which the
6 commerce clause proscribes.

7 Essentially, we believe that this case is
8 governed by the Boston Stock Exchange case and Maryland
9 v. Louisiana. In Boston Stock Exchange, New York
10 imposed a tax on any transfer of securities which had
11 certain defined connections or contacts with the State
12 of New York.

13 That tax scheme, however, included a deduction
14 or I should say a credit and a limitation which was
15 applicable if the transfer was executed on a New York
16 Stock Exchange, so that the effect was that a transfer
17 which was executed on the Boston Stock Exchange or some
18 other stock exchange would bear a higher rate of tax
19 than a transfer which was executed on the New York Stock
20 Exchange.

21 And we submit that this case is no different.
22 In the Boston Stock Exchange case if you executed that
23 transfer, you paid a higher rate of tax if that transfer
24 was executed in Boston as opposed to New York, so here,
25 if you ship the export from the port of Boston, you pay

1 a higher rate of tax than you do if you ship that export
2 from New York.

3 Similarly, in Maryland v. Louisiana, the State
4 of Louisiana imposed a tax on the first use of natural
5 gas coming into the state from wells located on the
6 federal offshore properties, and it then built into the
7 tax scheme a series of limitations in deductions which
8 effectively limited the incidence of that tax to gas
9 which was shipped out of Louisiana to out-of-state
10 users, and this Court held that set of limitations to
11 work an unconstitutional discrimination against
12 interstate commerce.

13 Although obviously Appellees do not accept our
14 characterization of their tax as discriminatory, they do
15 not deny, they have never denied and cannot deny that
16 the effect of that tax, economic effect, is to impose a
17 higher rate of tax if an export is shipped from a
18 non-New York facility as compared to one which is
19 shipped from a New York facility.

20 Appellees have not cited a single case in
21 which this Court has sustained a state tax which has
22 that differential geographical impact, and to our
23 knowledge there are no cases which do so.

24 Appellees' response really consists of two
25 basic arguments. One is justification by reference to

1 apportionment, and one is argument by analogy.

2 They say that the constitutionality of the
3 taxes was deemed because the tax is a properly
4 apportioned income tax. That argument, I submit, fails
5 for two reasons. First, as we have pointed out, the tax
6 is not properly apportioned; and second, and equally
7 important, apportionment is irrelevant to the reason why
8 we are urging that the tax is unconstitutional.

9 The reason that the New York tax is
10 unconstitutional is that it results in a higher tax rate
11 if property is shipped from a non-New York source than
12 if the property is shipped from a New York source.

13 QUESTION: Both owned by the same --

14 MR. DODYK: Pardon?

15 QUESTION: Both owned by the same entity?

16 MR. DODYK: Yes. Both owned by the same
17 entity.

18 So even if the base of the tax were proper --

19 QUESTION: Mr. Dodyk, does that always
20 follow? Your income tax might well go up if you ship
21 from New York, might it not?

22 MR. DODYK: Well, it might well go up in the
23 sense that you would have added payroll and property to
24 the numerator if you established the facility in New
25 York as opposed to having the facility established in

1 New Jersey.

2 But I submit, Your Honor, that effect is going
3 to be infinitesimal, because all you're talking about
4 here is establishing a warehouse and handling facility,
5 the property and payroll of which are but a small
6 fraction of the property and payroll which came together
7 into the manufacture and shipment of the product in
8 question.

9 So to the extent that the state relies on an
10 offsetting increase, I submit that the underlying
11 economics will not support the argument.

12 Now, the reason why the formula apportionment
13 defense I think fails is because we're not attacking at
14 this point the tax based on its basis. We're not saying
15 that formula apportionment is wrong; we're saying that
16 what's wrong is allowing a credit to a taxpayer which
17 turns on the locus from which the export is shipped.
18 And because that is the source of the
19 unconstitutionality, we submit that the basis of the tax
20 is simply irrelevant.

21 Or to put it another way, if you take a look
22 at the Boston Stock Exchange case, which to my mind
23 involved a very similar form of discrimination which was
24 struck down, there was no question but that the State of
25 New York could tax that stock transfer which was

1 executed on the Boston Stock Exchange. The Court
2 accepted that there were sufficient contacts with the
3 State of New York to permit the tax, but the
4 unconstitutionality arose from the difference in the
5 rate of tax applied because of where the transfer was
6 executed.

7 Similarly, in Maryland v. Louisiana, the
8 taxable incident was first use of natural gas within the
9 state. The federal government did argue that the first
10 use also made the tax unconstitutional, but this Court
11 rejected that argument and said for purposes of the
12 opinion it assumed that the State of Louisiana had
13 sufficient contact with the first use to permit it to
14 impose a tax.

15 So that in both Boston Stock Exchange and
16 Maryland v. Louisiana, the basis of the tax was a valid
17 basis, just as the Appellees here argue formula
18 apportionment constitutes a valid basis.

19 Now, the Appellees seek to avoid the governing
20 force of Maryland v. Louisiana and Boston Stock Exchange
21 by suggesting a distinction, and the distinction is that
22 in Boston Stock Exchange and Maryland v. Louisiana you
23 were dealing with a transactional tax in a sense,
24 whereas here we're not dealing with a transactional tax
25 but with a formula apportioned income tax.

1 It's true that distinction does exist in the
2 facts of the cases, but Appellees have never suggested
3 any reason why the difference in the tax base should
4 make any constitutional difference. And, again, I
5 submit that difference, the difference between formula
6 apportionment and transaction is irrelevant because the
7 source of the unconstitutionality is the discriminatory
8 impact which results from the application of the credit.

9 The argument by analogy, Appellees in amicus
10 argue that since they could constitutionally take a
11 variety of other steps to reduce the impact of state
12 taxation that they should likewise be permitted to
13 implement the credit scheme here at issue.

14 Appellees' only authority for that proposition
15 is an oft-repeated quotation which they take from the
16 Boston Stock Exchange case to the effect that states may
17 use their taxing power to compete with other states for
18 a share of interstate commerce. And then Appellees in
19 amicus go on to cite as alternative measures which they
20 might constitutionally take: providing police and fire
21 protection, providing investment subsidies, reduced
22 taxation of exports, abolition of DISC income taxation,
23 and indeed, abolition of the corporate income tax
24 altogether.

25 I submit that the phrase relied upon from

1 Boston Stock Exchange is far too vague to provide this
2 Court with informed guidance for the resolution of the
3 particular constitutional questions presented here.

4 To say that states may generally use their
5 taxing power to compete for interstate commerce is to
6 say nothing about the legality of a tax which results in
7 higher rates being imposed on out-of-state export
8 shipments as compared to in-state export shipments.

9 Moreover, that language appears only as a
10 general reservation in the context of an opinion in
11 which this Court struck down a taxing scheme which is
12 very similar to the one we have here at bar.

13 The various alternative tax and incentive
14 schemes which New York adduces as being -- justifying
15 analogy are all distinguishable in that none of them
16 involves a tax which weighs more heavily on out-of-state
17 shipments than in-state shipments. Of course, a state
18 may choose to abolish taxes on DISC income, on export
19 income or on corporate income altogether; but in none of
20 those cases does the state create a tax, the rate of
21 which differs depending on the location from which the
22 export is shipped.

23 Were New York to exempt a certain category of
24 income such as DISC income or export income from tax,
25 that income would be exempt from New York State tax

1 whatever the point of origin. Here, however, the
2 undeniable and undenied effect of the New York credit
3 scheme is to impose a tax which is levied at a rate of 9
4 percent on DISC income derived from out-of-state
5 shipments and a rate of 2.7 percent on New York-based
6 shipments.

7 None of the hypothetical constitutionally
8 permissible analogies suggested by Appellees involve any
9 such discriminatory effect. None of the authorities
10 relied upon by Appellees sanction such discrimination.
11 To the contrary, as I have said, Boston Stock Exchange
12 and Maryland v. Louisiana, the principles of which are
13 governing here, mandate the invalidation of any tax
14 scheme which results in a state levying heavier taxes on
15 a transaction because of its out-of-state locale.

16 Thank you, Your Honor.

17 CHIEF JUSTICE BURGER: Mr. Schiff.

18 ORAL ARGUMENT OF PETER H. SCHIFF, ESQ.,

19 ON BEHALF OF THE APPELLEES

20 MR. SCHIFF: Mr. Chief Justice, and may it
21 please the Court:

22 My view of the case that Mr. Dodyk has argued
23 is very different from what I understand the case to be
24 and what the facts to be. As a matter of fact, it seems
25 to me a good part of what Mr. Dodyk has argued are the

1 issues on which you relate to the second issue in the
2 jurisdictional statement with respect to which you
3 dismissed it for being insubstantial.

4 It seems to me it's the law of the case that
5 the -- New York was perfectly proper in viewing
6 Westinghouse and the Westinghouse DISC on a unitary
7 basis. Nevertheless, a good part of the argument that
8 I've heard just now and in their briefs, seems to
9 challenge the application of the unitary principle.

10 Admittedly, it is done by the back door in
11 relation to the credit, but it seems to underlie the
12 claim that somehow New York is taxing out-of-state
13 income or is -- because they claim that we are -- about
14 the credit, that the measurement of the credit is wrong
15 because we base it on DISC income related to shipments
16 from a place of business in New York, but that we don't
17 give it credit if the shipments are from a place outside
18 New York, assumes that we are somehow taxing income that
19 is outside the state.

20 Now, what New York has done here in applying
21 the three-factor business allocation formula which this
22 Court so recently reaffirmed in the Container case, was
23 to only tax New York income.

24 Now, once it's determined what the overall
25 amount of New York income is, we submit that it was

1 reasonable for New York to apply a credit only to that
2 portion of the accumulated DISC income, and that's the
3 DISC income for which the federal government provides a
4 tax break, is to try to ascertain what of the total
5 amount of DISC income is reasonably attributable to New
6 York.

7 Because in the first place in applying the
8 business allocation formula, as our Court of Appeals has
9 said, New York is only taxing New York income. And I
10 think it would be a strange policy indeed, whether the
11 commerce clause or any other provision of the
12 Constitution, to say that we have to give a credit on
13 income that we have never taxed in the first place.

14 QUESTION: Well, isn't that upside down,
15 though, really? If -- if all of the DISC income had
16 arisen from shipments from New York, there had been the
17 same unitary income but the tax would -- you wouldn't
18 have had any tax on the DISC.

19 MR. SCHIFF: No. The -- the credit is only --

20 QUESTION: Well, anyway -- anyway your credit
21 would have applied to all the DISC income, wouldn't it?

22 MR. SCHIFF: Well, no, no. The credit applies
23 -- well, it might if everything is from New York and if
24 all the DISC income is --

25 QUESTION: That's what I said. That was my

1 hypothetical.

2 MR. SCHIFF: Well, that's --

3 QUESTION: So you would have collected less
4 tax if all of the DISC income had been from New York.

5 MR. SCHIFF: Well, the objective --

6 QUESTION: Wouldn't -- wouldn't you?

7 MR. SCHIFF: I think probably so. The
8 objective --

9 QUESTION: Well, probably. That's the whole
10 purpose of the credit.

11 MR. SCHIFF: The objective of the credit is to
12 some degree track the credit that's being given by the
13 federal government, but that --

14 QUESTION: It sounds peculiar -- it sounds
15 peculiar that your credit is trying to identify the
16 income attributable to New York so you can tax it, when
17 in fact you find out the income attributable to New
18 York, and you don't tax it. You give it a credit.

19 MR. SCHIFF: Well, we give it a lesser rate,
20 but I don't see what's peculiar about that. I mean we
21 can only -- we would only --

22 QUESTION: Well, usually when you identify
23 income as originating in the state, that's when you tax
24 it.

25 MR. SCHIFF: But we're only taxing income in

1 the state in the first place, Your Honor.

2 QUESTION: Oh, I understand that.

3 MR. SCHIFF: And the question then is do we
4 have to tax the DISC income at the same rate as all
5 other New York income, and that's all that the division
6 here involves. Other business income which -- that's
7 related to New York which isn't DISC income we rate --
8 we tax at the 9 percent level. If it is DISC income or
9 if we have an investment tax credit or some other
10 credit, it is a somewhat lesser rate.

11 Now, let me also point out that the credit
12 here -- Mr. Dodyk keeps talking about we tax it at 2.7
13 percent. If he had used the figures in the record as
14 applied to Westinghouse rather than deriving
15 hypothetical examples throughout his brief, the
16 effective tax rate on the accumulated DISC income which
17 is derivable from the record in 1972, one of the years
18 in question here, was approximately 8.69 percent; in
19 1973 it was about 8.65 percent -- the fact reflected by
20 the actual size of the credit here. The size of the
21 credit in 1975 that they are objecting to and apparently
22 they want to pay more is about \$2,500. In 1973 it was
23 about \$6,000, even though Westinghouse was paying an
24 overall corporate income tax in New York of about a
25 million dollars for the two years combined.

1 And I suggest in response to a question that
2 Justice Rehnquist asked that the -- that if Westinghouse
3 were to win in this case, that it would be, in terms of
4 the questions that have been left open by this Court, an
5 invalidation of a DISC credit in its entirety with the
6 result that yes, indeed, Mr. Dodyk would be shooting
7 himself in the foot because his client would be paying
8 about \$10,000 more for the two years here in question.

9 Whether he could then change the New York
10 legislature's way of determining the credit I do not
11 know, but I don't think it is a legislative question.
12 The issue here is whether the DISC credit is invalid or
13 not and not how it was computed. They did not preserve
14 any arguments, as far as I can see, in this Court or
15 even in the court below.

16 QUESTION: While you're pausing, is it correct
17 that the purpose of the credit is to make the -- or to
18 provide a motive for these special export companies to
19 have as much business originate in New York as possible?

20 MR. SCHIFF: Yes, absolutely.

21 QUESTION: In other words, the purpose --

22 MR. SCHIFF: Or at least to not lose any more
23 business than necessary.

24 QUESTION: The purpose is to have a direct
25 impact on the way goods are shipped overseas.

1 MR. SCHIFF: Well, in terms of the goods that
2 are shipped, Your Honor --

3 QUESTION: Well, at least that the business
4 transactions --

5 MR. SCHIFF: It's a question of really of
6 where -- I would say it's a question of where
7 Westinghouse does its business, because the question
8 isn't really where it is shipped.

9 QUESTION: Your purpose is to --

10 MR. SCHIFF: We are -- obviously, the purpose
11 of the credit.

12 QUESTION: Are you trying to escape the word
13 "commerce?"

14 MR. SCHIFF: No. I think I'm trying --

15 QUESTION: That it would affect commerce?

16 MR. SCHIFF: Well, it may affect commerce. I
17 think any credit does. And the differentiation between
18 state taxes in one state and another always is liable to
19 affect commerce. New York, unfortunately, is a state
20 which has some of the highest taxes in the country, and
21 recognizing that the --

22 QUESTION: But at least those high taxes
23 normally affect everybody the same.

24 MR. SCHIFF: Well, I think they affect
25 everybody the same.

1 QUESTION: But this one doesn't.

2 MR. SCHIFF: Oh, yes, it does. It does.

3 QUESTION: Well, I don't know --

4 MR. SCHIFF: Everybody who is doing business --

5 QUESTION: I know you pay more taxes if you

6 ship from New Jersey than you do if you ship from New

7 York.

8 MR. SCHIFF: No, not to New York. You don't

9 pay it to New York, because you're not paying any taxes

10 on what is being shipped from New Jersey. That would be

11 an incident of the New Jersey taxation, not an incident

12 of New York taxation.

13 Now, this is -- could I --

14 QUESTION: That -- that -- but in your unitary

15 scheme you attribute all that income to the parent, and

16 you take all that DISC income into --

17 MR. SCHIFF: We're applying the unitary

18 principle just the way it's been applied regularly.

19 QUESTION: So you're taxing the DISC income

20 that originates in New Jersey at a higher rate than if

21 it originated in New York.

22 MR. SCHIFF: Well, Justice White, if --

23 QUESTION: Well, isn't that so?

24 MR. SCHIFF: No, no. Not --

25 QUESTION: Why isn't it?

1 MR. SCHIFF: I mean I think -- I think that
2 the --

3 QUESTION: Well, you give a credit to one and
4 not another.

5 MR. SCHIFF: Well, if I understood what you
6 were just saying, when you apply the apportionment
7 principle, of course, in some sense, as Mr. Dodyk points
8 out in his reply brief, if the 5 percent business
9 allocation formula is applied, you could say your taxing
10 some New Jersey income, some California income.

11 QUESTION: Well, that isn't the point.

12 MR. SCHIFF: But that's -- that's not the
13 point.

14 QUESTION: No. I wasn't trying to make that
15 point. Wouldn't -- wouldn't Westinghouse have paid less
16 tax to New York if all of its shipments, all of its DISC
17 shipments had been from New York?

18 MR. SCHIFF: If all of its DISC income and all
19 of its --

20 QUESTION: All of the -- all of the -- all of
21 the -- all of the shipments in international trade had
22 been made from New York.

23 MR. SCHIFF: If the -- there had been a place
24 of business -- that is, a manufacturing company or a
25 warehouse that Westinghouse was -- through which it was

1 generating its income, if that is where the exports are
2 coming from, yes.

3 QUESTION: If they -- if they ship --

4 MR. SCHIFF: But it's not a question of where
5 the port of embarkation is.

6 QUESTION: No. If they ship -- if they -- if
7 instead of having a warehouse in Delaware they had one
8 in New York and made the shipments from there, they
9 would have paid less tax.

10 MR. SCHIFF: If all the incidents were in New
11 York, I think as we point out in our brief, it is likely
12 that there would be more income to New York. There
13 would also be more cost. New York might or might not
14 make more or less tax.

15 And one of the problems we have with
16 Westinghouse's presentation is they have made absolutely
17 no factual showing on this record. They've been purely
18 hypothetical.

19 Now, I think the teaching of this Court --

20 QUESTION: Yes, but, Mr. Schiff, can I
21 interrupt you again?

22 At page 26 of your brief you say, "The purpose
23 of giving the tax credit is to prevent export business
24 being driven out of New York." You say, "The credit is
25 designed to maintain export business in New York."

1 MR. SCHIFF: Absolutely. It's totally --

2 QUESTION: Well, then, it must -- it must make
3 a difference where the export business is.

4 MR. SCHIFF: Well, the hope is -- well, if
5 they do some New York export --

6 QUESTION: You stand by those statements, I
7 take it.

8 MR. SCHIFF: Of course. If they do some New
9 York export business, if they are generating some of
10 their income from New York business, and that's being
11 exported -- because that's the only thing that the DISC
12 credit relates to -- we will then apply a lower tax rate
13 to that income, which we think is totally consistent
14 with this Court's language in the Boston Stock Exchange
15 case and other cases like the Bowers case which permit
16 states to give credit to try to compete.

17 Now, there is a major difference between our
18 tax and the credit in this case and the Boston Stock
19 case and the Maryland against Louisiana case. In those
20 cases -- in the Boston case it was clear that New York
21 was -- while it was -- it was attempting to tax
22 extraterritorially, I think.

23 We are imposing a tax on the stock transfer,
24 but we oppose the full tax, but it varied depending on
25 whether the transfer was being accomplished through an

1 out-of-state stock exchange or a -- the New York Stock
2 Exchange.

3 There was, however, enough incidents to tax it
4 in New York because the transfer of the stock
5 certificate, I think, was happening there, so that we
6 were discriminating depending on where part of the
7 transaction happened.

8 In this case the only thing that we tax in
9 applying the unitary principle is New York income, and
10 then we only apply credit to the New York income. As a
11 matter of fact, it's a very, very conservative credit
12 because we use these two percentages, which means that
13 the credit boils down to something like a quarter of one
14 percent.

15 QUESTION: Of course, that doesn't make it
16 valid or invalid, does it?

17 MR. SCHIFF: No, it doesn't, except that in
18 terms of the effect on commerce, the degree of it is
19 also relevant. It's not done in pure abstract terms,
20 Your Honor. It is done in practical terms.

21 But in any event, we are not taxing
22 extraterritorially, and the same thing was true in
23 Maryland against Louisiana. There, Louisiana --

24 QUESTION: I didn't think that was the issue
25 in the case. I thought --

1 MR. SCHIFF: In which case?

2 QUESTION: This one. About whether you're
3 taxing extraterritorially.

4 MR. SCHIFF: I think -- I think -- well, I
5 have to --

6 QUESTION: If you want to get an -- you might
7 have something if you want to set up that straw man, but
8 I thought it was a case of discrimination.

9 MR. SCHIFF: Well, but I -- I, with all due
10 respect, I do not see how we get to discrimination in
11 this case if we are not taxing, as they suggest,
12 extraterritorial values in the first place, or giving a
13 credit extraterritorially.

14 The statement made is that we should not be
15 giving a credit to New York DISC income because we are
16 taxing -- would be taxing out-of-state DISC income at a
17 higher level.

18 Now, that seems to me to assume that we are
19 taxing something out of state in the first place, and we
20 are definitely not doing that. I must admit, and this
21 may be my problem, I have had difficulty in
22 understanding what the issue in this case is, because
23 from our perspective the formula applied after -- to the
24 total income means that we are only taxing New York
25 income.

1 QUESTION: What is -- what is the formula upon
2 which you include the income of the DISC within your tax?

3 MR. SCHIFF: It's the three factor business
4 allocation formula, Your Honor.

5 QUESTION: And it -- but it -- it's treated as
6 being -- the whole outfit is unitary, isn't it?

7 MR. SCHIFF: It's treated as if the -- it's
8 really combined, I guess, but it's the Westinghouse
9 Electric and Westinghouse DISC are treated as being
10 unitary.

11 QUESTION: Except you don't include -- does
12 that include DISC?

13 MR. SCHIFF: Well, we include everything, all
14 the income and all of the property, receipts and payroll
15 of those companies. What Westinghouse would have us do
16 is to go behind the companies that are being treated in
17 the combined income, which is something that is not done
18 in application of the business allocation formula.

19 Now, we do, if Westinghouse claims that by not
20 going behind it there is something unfair in the
21 application of the business allocation formula, which
22 is, I think, truly what they are arguing here.

23 New York tax laws, we have pointed out in our
24 brief, would have permitted them to try to show some
25 unfairness as it relates to the facts of this case.

1 They haven't made any effort to do that. They --

2 QUESTION: Well, is your position basically
3 that your formula that includes the DISC within the
4 income that's taxed to Westinghouse is supposed to
5 compute out only New York income?

6 MR. SCHIFF: That is exactly our position.

7 QUESTION: And, therefore, when you're giving
8 credit, you ought to be able to credit only on the basis
9 of New York income.

10 MR. SCHIFF: That is exactly our position.
11 You said it much better than I. But that is our -- our
12 position in a nutshell. And --

13 QUESTION: But isn't New York in fact, even
14 though it's calculating a total tax on all the company's
15 business in New York, isn't New York multiplying that by
16 the fraction of the company's total export business
17 that's conducted in New York rather than simply the
18 fraction of the company's New York business that's
19 export-related?

20 MR. SCHIFF: Well, in terms of the original
21 allocation, the only formula that's used to determine
22 what income is taxable is the business allocation
23 formula, and then in determining the DISC credit, we
24 multiply it by both fractions. It's a very conservative
25 way of doing it, but as far as I have been able to

1 figure it out is that we want to make sure that, a)
2 we're only taxing New York income, and that we're only
3 applying the credit to New York income; and b) that the
4 income with respect to which we give a credit is only
5 DISC income as opposed to income generated from other
6 sources.

7 Now, I have to tell you that the net result is
8 a very small credit. I think we could have given a
9 larger credit. And I think that's what Westinghouse
10 wants, but frankly, that doesn't amount to any
11 constitutional infirmity. But that's exactly what we
12 do, Justice O'Connor.

13 I did want to distinguish the
14 Maryland-Louisiana case because there, too, Louisiana
15 was taxing extraterritorially and giving a credit solely
16 to Louisiana so that the tax really wasn't being paid in
17 Louisiana but was paid on the same gas every place
18 else. But there was no question that there was an
19 extraterritorial tax which could only be done if it was
20 in a nondiscriminatory fashion.

21 Here, as I have said, there is no
22 extraterritorial tax. The credit is -- I think the
23 concept of it is perfectly reasonable as well as its
24 application.

25 For these reasons I ask for an affirmance of

1 the court below.

2 CHIEF JUSTICE BURGER: Do you have anything
3 further, Mr. Dodyk?

4 ORAL ARGUMENT OF PAUL M. DODYK, ESQ.,
5 ON BEHALF OF THE APPELLANT -- REBUTTAL

6 MR. DODYK: Just a moment, Your Honor.

7 I think the central thrust of Appellees'
8 argument is that because the income which is being taxed
9 here is in some sense New York income as determined by
10 formula apportionment, they can proceed from that basis
11 to structure credit which clearly discriminates against
12 non-New York shipments.

13 I submit to the Court that the transaction in
14 Boston Stock Exchange was accepted by the Court as a New
15 York transaction; that the first use tax in Maryland v.
16 Louisiana was accepted by the Court as a Louisiana
17 transaction, but that did not justify in grafting on to
18 that properly based tax a set of limitations which had a
19 geographically discriminatory effect.

20 Thank you, Your Honor.

21 CHIEF JUSTICE BURGER: Thank you, gentlemen.

22 The case is submitted.

23 We will hear arguments next in Minnesota State
24 Board against Knight.

25 (Whereupon, at 1:54 p.m., the case in the

1 above-entitled matter was submitted.)

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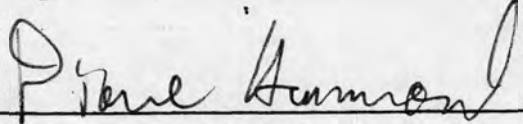
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#81-2394 - WESTINGHOUSE ELECTRIC CORPORATION, Appellant v.
JAMES H. TULLY, JR., et al.

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