

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-297

TITLE ARMCO, INC., Appellant v. DAVID C. HARDESTY, JR.,
STATE TAX COMMISSIONER OF WEST VIRGINIA

PLACE Washington, D. C.

DATE April 17, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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ARMCO, INC., :
:
Appellant :
:
v. : No. 83-297
:
DAVID C. HARDESTY, JR., STATE :
TAX COMMISSIONER OF WEST :
VIRGINIA :
:
- - - - -x

Washington, D.C.

Tuesday, April 17, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:42 a.m.

APPEARANCES:

RICHARD R. DAILEY, ESQ., New York, New York; on behalf
of the Appellant.

ROBERT DIGGES, JR., ESQ., Charleston, West Virginia;
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: Mr. Dailey, I think you
3 may proceed whenever you're ready.

4 ORAL ARGUMENT OF RICHARD R. DAILEY, ESQ.,
5 ON BEHALF OF THE APPELLANT

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

8 This is an appeal from a decision of the
9 Supreme Court of Appeals of West Virginia. It brings
10 into question the validity under the Constitution of a
11 gross receipts tax imposed by the State of West Virginia
12 upon the appellant Armco as a result of Armco's sale of
13 property to customers in West Virginia.

14 The issues presented are two. The first is
15 whether there was a sufficient nexus between the
16 transactions involved here and the State of West
17 Virginia; and the second is whether the tax involved
18 here is invalid because it discriminates against
19 interstate commerce.

20 Armco is an Ohio corporation which for many
21 years has been qualified to do business in West
22 Virginia. During the period 1970 through 1975, the
23 audit periods involved here, its connection with the
24 State of West Virginia was of three sorts. First, it
25 operated a substantial coal mining venture in West

1 Virginia. Second, it operated a small office in South
2 Charleston from which it sold construction and drainage
3 products. And third, it sold to customers in West
4 Virginia products manufactured outside of West Virginia.

5 The tax liabilities owed by Armco to West
6 Virginia from the operation of its coal mines and from
7 the operation of its Charleston office are not at issue
8 here. What is at issue here are sales of three products
9 manufactured by Armco outside the state. Those products
10 are metal buildings, steel and wire rope.

11 These sales have many characteristics in
12 common. Not only were the materials manufactured
13 outside of West Virginia, there was no sales office
14 involved in West Virginia, no resident salesman in West
15 Virginia, no inventory in West Virginia; orders were
16 accepted outside West Virginia, and the goods were
17 delivered to common carriers outside West Virginia.

18 The products themselves were marked in West
19 Virginia in two different ways. The metal buildings
20 were sold to two franchised dealers within West
21 Virginia. There was no solicitation of these sales in
22 West Virginia, simply franchise agreements pursuant to
23 which Armco agreed that the dealers could use the Armco
24 name, and Armco agreed to share advertising expenses.

25 The steel and wire rope products were

1 solicited, sales were solicited within West Virginia.
2 In connection with the steel products, four nonresident
3 salesmen visited West Virginia on an average of once
4 every four to six weeks. And with regard to the wire
5 rope, three nonresident salesmen visited West Virginia
6 every two to four weeks.

7 The tax involved here is an annual privilege
8 tax. It is imposed upon the gross receipts of those who
9 are engaged or continuing within West Virginia in the
10 selling of tangible property at wholesale.

11 The lower court in West Virginia held that the
12 transactions involved here did not have a sufficient
13 nexus to permit taxation under the Due Process Clause
14 and the Commerce Clause. The court of appeals or the
15 Supreme Court of Appeals of West Virginia reversed.

16 My remarks today will address three points.
17 The first point is the conclusion of the court below
18 that the unitary business theory should be applied to
19 find the appropriate nexus here.

20 The second point is the assertion that even if
21 the unitary business theory is not applicable here,
22 there was a sufficient nexus between these transactions
23 and the taxing jurisdiction.

24 And the third is Armco's claim that this tax
25 is unconstitutional because it discriminates against

1 interstate commerce.

2 QUESTION: Mr. Dailey, it would be helpful to
3 me if sometime in your argument you could describe with
4 perhaps some particularity exactly what transactions of
5 Armco West Virginia seeks to tax here. As I understand
6 it, they're not trying to level a gross receipts tax or
7 a privilege tax on all the income from Armco wherever
8 received. They're trying to levy a tax on transactions
9 which they claim, and you deny, have some nexus with
10 West Virginia.

11 MR. DAILEY: That's correct, Your Honor.

12 QUESTION: Just sales to West Virginia
13 customers, right?

14 MR. DAILEY: That's correct.

15 If the tax is imposed on the gross receipts
16 from sales of wire rope, steel and metal buildings only
17 to customers in West Virginia.

18 This Court has stated that a state tax on
19 income must be applied through an activity with a
20 substantial nexus with the taxing jurisdiction. The
21 court below concluded, on the other hand, that it did
22 not need to examine the connection between these
23 transactions and the State of West Virginia.

24 It reached that result because it applied a
25 unitary business theory. It said that Armco was a

1 unitary business operating under a single corporate
2 umbrella, and that since its activities in the area of
3 coal mining were substantial in West Virginia, that
4 justified them in taxing the gross receipts from these
5 sales without inquiry as to whether there was any nexus
6 between the sales and the State of West Virginia.

7 This is a rather dramatic departure from prior
8 decisions of this Court and, we submit, is wholly
9 inappropriate.

10 The unitary business theory arose in response
11 to a peculiar problem posed by net income taxes. The
12 problem is that it is difficult to figure out how much
13 of a corporation's net income might properly be said to
14 be attributable to any given taxing jurisdiction.
15 Accordingly, under the theory, with which this Court has
16 some familiarity, the total net income of a taxpayer
17 unitary business is peculiar, and then that income is
18 apportioned among the various taxing states on the basis
19 of formulas.

20 The problem of not being able to compute the
21 proper amount of income attributable to any state and
22 thus the occasion for the unitary business theory simply
23 is not present in the case of a gross receipts tax. We
24 know to a penny Armco's gross receipts from West
25 Virginia sales, and there is simply no occasion for the

1 theory.

2 More important, the application here of the
3 unitary business theory would evidently remove all
4 constitutional restraints on the ability of West
5 Virginia to tax Armco sales.

6 Suppose, for example, that West Virginia
7 asserted the right to tax property manufactured by Armco
8 in Ohio and sold to customers in Indiana? Now, I think
9 we would all agree that West Virginia can't do that.
10 And I suspect the reason why we think West Virginia
11 can't do that is that such a transaction has absolutely
12 no connection to the State of West Virginia. But that
13 the connection with the State of West Virginia what the
14 court below said it didn't have to look at.

15 So on the whole, we suggest that the
16 traditional nexus rules which require a substantial
17 nexus to the activity being taxed has served us well.

18 QUESTION: Yet the Supreme Court of Appeals
19 didn't say that there need be, in this case, no nexus,
20 because it only allowed the taxation of transactions --
21 of sales to people in West Virginia.

22 MR. DAILEY: That's correct, Your Honor. And,
23 of course, there is also a state law problem. You must
24 be found, under the state statute, to be engaged in the
25 business of selling at wholesale in West Virginia. So

1 that my example of the sale from Ohio to Indiana is a
2 purely constitutional example, not -- not -- we would
3 still have to find the business in West Virginia as a
4 matter of state law.

5 QUESTION: But don't you think that perhaps
6 analysis under apportioned income tax may be somewhat
7 different than analysis under a privilege tax such as
8 this, or do you think they're the same?

9 MR. DAILEY: Oh, I think the analysis of the
10 income arising in a jurisdiction is -- is the amount of
11 income that's being taxed is quite different in a gross
12 receipts tax case and a net income tax case.

13 As I say, in a net income tax case, it is an
14 accounting impossibility to allocate properly the net
15 incomes of the various taxing jurisdictions, and thus
16 the birth of the unitary business theory. No such
17 problem is presented in the case of gross receipts.

18 QUESTION: If Armco had organized a West
19 Virginia corporation that owned and operated the mine,
20 would there be any basis for any analysis of the unitary
21 system or imposing any tax on the parent corporation?

22 MR. DAILEY: I think the question with regard
23 to the sales that are at issue here, Your Honor, would
24 be precisely the same. If a transaction --

25 QUESTION: It would be the same.

1 MR. DAILEY: I think so. If the transaction
2 -- if the transactions have a substantial --

3 QUESTION: Do you think West Virginia would
4 assert the same position it asserts here?

5 MR. DAILEY: Oh, I suspect they would.
6 Logically they would.

7 Assuming for a moment that the --

8 QUESTION: Would you -- let me pursue that a
9 little further? You think there's no difference in the
10 two situations?

11 MR. DAILEY: Not from the point of view of the
12 issue we're presenting.

13 QUESTION: Of what West Virginia's trying to
14 do here.

15 MR. DAILEY: Yes.

16 Assuming for the moment that the application
17 of the unitary business theory is improper, we turn to
18 the question of what else might constitute a sufficient
19 nexus here. One potential source is the very infrequent
20 solicitation of orders by nonresident salesmen who come
21 into West Virginia.

22 QUESTION: And here you'll comment on the
23 pressed steel case.

24 MR. DAILEY: Yes, I will comment on the
25 pressed steel case.

1 Standard Pressed Steel involved a Washington
2 tax on gross receipts from sales to a single customer in
3 Washington. Those sales were solicited by a resident of
4 Washington who operated fulltime in Washington as an
5 employee of the seller to solicit orders from Boeing, a
6 single customer.

7 The Standard Pressed Steel case involved a
8 continuous presence in the State of Washington, a
9 presence which the Court found contributed directly to
10 the sales in question.

11 We think the same thing was true in the
12 General Motors case; that there was a continuous and
13 important presence within the state that contributed to
14 the production of the sales in question.

15 Here there is no continuous presence at all in
16 the state. Armco's connection with the State of West
17 Virginia so far as these sales go is really flimsy.
18 There's not a great deal to it. And it seems to me that
19 those two cases support our view and carry out the
20 intent of the earlier decision of this Court in the
21 Norton case --

22 QUESTION: Well, that's the closest case in
23 your favor, isn't it?

24 MR. DAILEY: Yes, Your Honor. I believe it is.

25 QUESTION: Because there there was presence

1 for other purposes but not presence for these particular
2 -- for the particular sales involved.

3 MR. DAILEY: Precisely. Precisely. And this
4 Court held that you could not, in effect, borrow the
5 nexus from the activities that were clearly being
6 carried on within the state and attribute that nexus to
7 the sales in question.

8 QUESTION: What do you think the theory of
9 Norton was? Wasn't it -- it reads to me as though it
10 were a commerce theory rather than a due process theory.

11 MR. DAILEY: It's difficult --

12 QUESTION: Or a nexus theory.

13 MR. DAILEY: It -- well, it clearly is a nexus
14 theory. As to whether it should be thought of as a due
15 process case or a Commerce Clause case, it is difficult
16 to tell.

17 QUESTION: Well, if it were a Commerce Clause
18 case, you're kind of in trouble, aren't you? You would
19 rather read it as a due process case.

20 MR. DAILEY: We are content with reading it
21 either way.

22 QUESTION: Are you?

23 MR. DAILEY: Yes. Yes, we think it supports
24 us no matter which provision we're under.

25 QUESTION: Mr. Dailey, what economic

1 difference do you think there really is between a local
2 sales tax borne by local buyers and a business income
3 tax calculated on the basis of sales made to buyers in
4 the taxing state, which is the distinction Norton tried
5 to draw.

6 MR. DAILEY: Yes.

7 QUESTION: Do you think there's an economic
8 difference?

9 MR. DAILEY: Yes, Your Honor. We do think
10 there's an --

11 QUESTION: Well, what is it --

12 MR. DAILEY: -- Economic difference.

13 In order to conclude that, let us say, a use
14 tax imposed on a local purchaser is -- is comparable to
15 a gross receipts tax imposed on the seller, you have to
16 make a couple of assumptions. One is that it was sort
17 of -- it's a matter of indifference to a state
18 legislature whether they enact a use tax on the local
19 buyer or a gross receipts tax on the foreign seller. I
20 don't believe that assumption is warranted. I think
21 that legislatures find a use tax to be a very
22 politically responsive tax imposed on local residents.

23 QUESTION: Well, I think the -- Norton talked
24 about either a sales tax or a business income tax.

25 MR. DAILEY: Yes. And in order -- it did,

1 you're correct. And in order to find those comparable,
2 you must also assume that in the case of a gross
3 receipts tax imposed on a seller, to make them
4 comparable you must assume that the seller is able to
5 pass on the burden of that tax.

6 QUESTION: Well, we know that he is, don't we?

7 MR. DAILEY: I don't know that we do know
8 that, Your Honor.

9 QUESTION: Well, as a matter of pure
10 economics, how could it be otherwise?

11 MR. DAILEY: Well, it could be otherwise if
12 the market -- the sales price is a price negotiated in
13 some sort of bargaining, and the extent to which a
14 seller is able to pass on a gross receipts tax and place
15 the burden of it on his buyer seems to me to be a factor
16 of a variety of economic considerations.

17 QUESTION: Well, most courts have just
18 recognized the ability to pass it on as a matter of
19 something you can take judicial notice of.

20 MR. DAILEY: Well, here I think it's
21 particularly important that we not assume that the tax
22 can be passed on to the purchasers, because the basis of
23 the discrimination argument, which is my final point, is
24 that local manufacturers in West Virginia are exempt
25 from this tax, which may make it a little bit --

1 QUESTION: On their wholesale sales.

2 MR. DAILEY: Yes, yes.

3 QUESTION: But, of course, Armco isn't
4 affected by that. Armco's just importing from out of
5 state and doesn't manufacture --

6 MR. DAILEY: That's correct.

7 QUESTION: -- The particular products at issue.

8 MR. DAILEY: That is correct. Armco does not
9 manufacture. But Armco is selling in competition with
10 those who do manufacture.

11 QUESTION: And they pay a higher tax?

12 MR. DAILEY: I beg your pardon?

13 QUESTION: And the people who manufacture
14 within West Virginia and sell their products are, in
15 effect, paying a higher tax than Armco who is importing
16 from out of state.

17 MR. DAILEY: Well, it's paying a higher tax on
18 a different activity. It is exempt --

19 QUESTION: Yeah. But they're paying more
20 money; therefore, they presumably have to charge their
21 customers more. So Armco has an advantage there,
22 doesn't it?

23 MR. DAILEY: I don't think so, Your Honor,
24 because -- I'm willing to assume that manufacturers in
25 West Virginia pay a variety of taxes, not only a tax on

1 the gross receipts from manufacturing but property taxes
2 and no doubt a variety of taxes to which Armco is not
3 subject at all because it manufactures --

4 QUESTION: But as far as the excise tax burden
5 that we know about from the briefs, it would appear that
6 manufacturers within West Virginia selling their
7 products there pay a higher tax than Armco.

8 MR. DAILEY: That is correct. Armco does not
9 pay any manufacturing tax in West Virginia.

10 QUESTION: Right.

11 QUESTION: Nor any real estate tax.

12 MR. DAILEY: No. Nor any sales tax. That's
13 correct. It does, I might say as an aside, pay a
14 considerable amount of tax in Ohio, but in West
15 Virginia, no, it does not.

16 CHIEF JUSTICE BURGER: We'll resume there at
17 1:00, counsel.

18 (Whereupon, at 12:00 p.m., the hearing was
19 recessed for lunch, to be reconvened at 1:00 p.m., the
20 same day.)
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1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: You may resume.

3 ORAL ARGUMENT OF RICHARD R. DAILEY, ESQ.,

4 ON BEHALF OF THE APPELLANT -- RESUMED

5 MR. DAILEY: Mr. Chief Justice, and may it
6 please the Court:

7 I would like to return for a moment to Armco's
8 claim that the West Virginia tax on wholesale sales is
9 unconstitutional because it discriminates against
10 interstate commerce.

11 The starting point here is the statute itself
12 . which imposes the wholesale tax on manufacturers
13 operating outside West Virginia, but exempts local
14 manufacturers from paying the tax. So far, the
15 discrimination seems clear.

16 Now, the saving grace is said to be the local
17 tax on manufacturing which is imposed on manufacturers
18 in West Virginia, but obviously not imposed on those
19 outside West Virginia. These are, however, entirely
20 different taxes imposed at different rates, and most
21 importantly, imposed upon different activities.

22 The manufacturing tax does not compensate for
23 the tax on wholesale sales in the same manner, for
24 example, that a use tax compensates for a sales tax.
25 And I think the decisions of this Court make it clear

1 that only in the case of taxes which complement or
2 compensate for each other are we to consider them
3 together in judging discrimination.

4 Mr. Chief Justice, I would like to reserve the
5 remainder of my time for rebuttal.

6 CHIEF JUSTICE BURGER: Very well.

7 Mr. Digges.

8 ORAL ARGUMENT OF ROBERT DIGGES, JR., ESQ.,
9 ON BEHALF OF THE APPELLEE

10 MR. DIGGES: Mr. Chief Justice, and may it
11 please the Court:

12 I believe a brief explanation of the nature of
13 West Virginia's business and occupation privilege tax
14 system will help clarify the issues raised in this
15 appeal.

16 West Virginia's tax is a typical privilege tax
17 levied upon engaging within the state in certain
18 business activities, and interstate when it is applied
19 to an interstate activity, the subject of the tax is the
20 in-state aspects of that activity. The measure of the
21 tax, however, is the full gross proceeds from the
22 completed business.

23 The subject of the tax at issue in this appeal
24 is the business of selling and not the sale itself.
25 Selling activities taking place within West Virginia are

1 the taxable incident. In form, the West Virginia
2 business and occupation selling tax is virtually
3 identical to the State of Washington's tax levied in
4 General Motors v. Washington and in the Standard Pressed
5 Steel case.

6 I would like to briefly review Armco's
7 in-state activities --

8 QUESTION: Were there differences for the
9 local taxpayers in those cases?

10 MR. DIGGES: Excuse me, Your Honor?

11 QUESTION: Were there differences, different
12 tax rates for the domestic corporations in those other
13 cases?

14 MR. DIGGES: I'm not sure about the rates or
15 the taxes involved. The tax was levied on engaging
16 within the business or within the state in the business
17 of selling in both -- in both instances.

18 I would like to review Armco's in-state
19 activity for a moment. Armco's, as discussed, business
20 activities are divided into -- on a divisional basis
21 with each division making products and selling only the
22 products made by that division.

23 Armco's Steel Division employed four salesmen
24 within West Virginia, two each from its Pittsburgh and
25 Cincinnati offices. Such salesmen systematically and

1 repetitively covered the State of West Virginia
2 soliciting business. The salesmen were within the state
3 on an average of once every four to six weeks with one
4 salesman making as much as two monthly visits. The
5 duration of the salesmen's in-state solicitation
6 activities is not in the record. It could have been
7 only one day, or it could have been as long as two
8 weeks. It's just simply not stated.

9 The in-state activities of the Steel Division
10 were described by Armcc's witness, Mr. Geary, the
11 Cincinnati district's sales -- the Cincinnati district
12 sales manager. I'd like to take this opportunity to
13 clear up a misunderstanding which has resulted from Mr.
14 Geary's testimony.

15 Mr. Geary stated that in 1976, 77 percent of
16 the sales to West Virginia customers from his office,
17 the Cincinnati district of the Steel Division, were
18 solicited outside of West Virginia. Mr. Geary did note
19 that even those sales did have some in-state aspects
20 such as coming in into the state to investigate
21 complaints associated with the sales and servicing of
22 the accounts.

23 The circuit court, which is not the finder of
24 fact in tax appeal cases in West Virginia,
25 misinterpreted Mr. Geary's testimony and concluded that

1 77 percent of all of Armco's sales at issue from all of
2 its divisions were solicited outside of the state. We
3 believe that conclusion to be clearly erroneous.

4 QUESTION: Well, it really doesn't make any
5 difference to your argument, though, does it?

6 MR. DIGGES: Yes, Your Honor. We -- we are
7 focusing upon the solicitation activities themselves
8 primarily as providing the nexus in this case.

9 QUESTION: And not just the sales, not just
10 the delivery of the goods.

11 MR. DIGGES: Oh, no, Your Honor. The -- the
12 activities associated with procuring the sales.

13 QUESTION: You mean you wouldn't be making
14 this argument about a gross receipts tax at all if there
15 were no solicitation within the State of West Virginia?

16 MR. DIGGES: No, Your Honor, I don't believe
17 we would. I believe in that circumstance if only all
18 there was in the State of West Virginia was delivery
19 that we would not tax it.

20 QUESTION: And you think constitutionally
21 you'd be forbidden to?

22 MR. DIGGES: I believe we would, Your Honor.
23 We --

24 QUESTION: Under Norton, is that it?

25 MR. DIGGES: No, Your Honor. We simply -- we

1 feel like Norton was -- was decided long enough -- along
2 those lines.

3 QUESTION: So you think that to hold for West
4 Virginia we must acknowledge, as you would put it, that
5 Norton is overruled.

6 MR. DIGGES: Oh, no, Your Honor.

7 QUESTION: No?

8 MR. DIGGES: I think Norton can be
9 distinguished in this matter. I think Norton dealt with
10 a situation of whether an interstate activity was
11 significantly or directly associated with an intrastate
12 activity, and at that point and at that time it had to
13 be in order to be taxable. However, now since
14 interstate commerce can be directly taxed, I feel that
15 that aspect of Norton is no longer practical. I feel
16 Norton --

17 QUESTION: Well, so it's just not good law any
18 more, Norton.

19 MR. DIGGES: No. I feel Norton is good law as
20 with respect to Mr. Dailey's hypothet in which West
21 Virginia would attempt to tax sales in the State of
22 Indiana. Certainly if there are no in-state selling
23 aspects, due process requirements of Norton would
24 preclude the taxing --

25 QUESTION: But Norton -- I take it that Norton

1 would not come out the same way today in your view.

2 MR. DIGGES: I don't think Norton would have
3 addressed the same issue. Norton -- the issue of
4 whether or not it was associated with an in-state
5 activity wouldn't have been relevant. If this Court --
6 this Court may look at it as to whether that -- the
7 activities in Norton were sufficient in and of
8 themselves.

9 QUESTION: Wouldn't you say that if you
10 applied Norton exactly the way it's written that you
11 would lose?

12 MR. DIGGES: No, Your Honor. I think that
13 there are factual distinctions between this instance and
14 Norton. Norton dealt with only mail order sales, in the
15 first order. They did, however, in the dicta of the
16 case discuss the McCloud case, and in that case McCloud
17 stated that purely itinerant drummers, if that was the
18 only activity within the state, would not afford the
19 jurisdiction to tax.

20 However, we feel that in this case there is
21 something above and beyond that; that this solicitation
22 is a repetitive, continuous type of solicitation. And
23 -- I'll get into it in a moment -- we also feel that
24 there is something above and beyond just pure
25 solicitation, and in that respect we do rely to some

1 extent on the full scope of Armco's activities within
2 West Virginia.

3 QUESTION: How many of these people were
4 residents of West Virginia?

5 MR. DIGGES: None, Your Honor. None of the
6 individuals involved in the solicitation of the sales at
7 issue. Armco did have resident salesmen but of another
8 division.

9 QUESTION: Well, I take it they're franchised
10 dealers in one -- at least one of these products could
11 put up -- could put up their name.

12 MR. DIGGES: Yes, Your Honor. Excuse me.
13 Those also were -- were involved in the state. However,
14 we --

15 QUESTION: And those local franchised dealers
16 who weren't agents, but nevertheless, they certainly
17 solicited the sales of Armco products, I suppose.

18 MR. DIGGES: They did, Your Honor, but of
19 course, their sales to ultimate customers would have
20 been independently taxed.

21 QUESTION: Exactly.

22 MR. DIGGES: So that's not -- we're not
23 concerned with that.

24 But to review again on the 77 percent basis,
25 as I said, we feel that the solicitation aspects are a

1 significant part of the business of selling in this
2 case. And we feel the record plainly demonstrates that
3 that 77 percent figure which has been presented to this
4 Court is inaccurate; that it only applied to the sales
5 of the Cincinnati office, and it only applied to the
6 1976 year. And since 1976 was outside the audit period,
7 that estimation isn't relevant to this case.

8 QUESTION: Well, are we supposed to engage in
9 some independent factfinding here based on testimony in
10 the record?

11 MR. DIGGES: No, Your Honor. I believe that
12 the administrative decision is the proper factfinder and
13 that the decision found simply that Armco did not offer
14 any evidence to support any conclusion other than that
15 the sales at issue were prompted by in-state
16 solicitation.

17 QUESTION: Well, we should -- we should not
18 accept what -- what one of your courts said the record
19 showed?

20 MR. DIGGES: Yes, Your Honor. You should not
21 accept what the circuit court -- I think it was a clear
22 misinterpretation of the facts at hand. And by
23 examination of the joint appendix, I believe that that
24 will clearly come out.

25 Mr. Geary also testified regarding Union Wire

1 Rope Divisions of Armco's and their activities within
2 the state. They were again similar to the Steel
3 Divisions. Three salesmen operating from Pittsburgh,
4 Ashland and Greensboro, North Carolina solicited
5 business within the state on an average of once or twice
6 a month. Again, the duration of their visits is omitted
7 from the record.

8 Armco's Metal Products Division during the
9 audit period maintained an office in South Charleston,
10 West Virginia from which two salesman conducted selling
11 activities statewide. They sold all of the products of
12 the Metal Products Division except metal buildings,
13 which were handled by franchise agents.

14 Mr. Geary's testimony plainly establishes that
15 with regard to all of the salesmen of all of the
16 divisions sent into West Virginia, they were sent in for
17 the purpose of getting business. And we contend that
18 that would necessarily include determination of a
19 customer's wants and needs, to some extent were
20 customized products made for special uses for the
21 customers, checking customer satisfaction with previous
22 orders, and soliciting future business.

23 The State of West Virginia submits that Armco,
24 pursuant to such activities, clearly was engaging in the
25 business of selling in West Virginia, and that such

1 activities furnished the state sufficient nexus for
2 their taxation.

3 Armco does not contend that its business
4 activities do not constitute engaging in the business of
5 selling. However, they feel that those activities, like
6 in Standard Pressed Steel, are too thin and
7 inconsequential to satisfy constitutional nexus tests.

8 Naturally, the State of West Virginia
9 disagrees with that proposition. We feel that this
10 Court's decisions have clearly held that the business of
11 selling's taxable event to be those activities resulting
12 in the establishment and maintenance of the sales taxed.

13 In the General Motors case versus Washington,
14 the operating incidence of the selling privilege was
15 held to be taxable activities resulting in the
16 establishment and maintenance of sales and those which
17 make possible the continuance of valuable contractual
18 relations.

19 Similarly, in Standard Pressed Steel, the
20 business of selling was viewed as those activities which
21 make possible the realization and continuance of
22 valuable contractual relationships.

23 We, therefore, conclude that in both instances
24 solicitation activities were the most significant aspect
25 of the business of selling, and where they occurred

1 evidenced where the location or where the state that had
2 the jurisdiction to tax.

3 The State of West Virginia submits that Armco
4 solicitation activities were the taxable event of their
5 selling operations, and since such solicitation
6 activities occurred in West Virginia, nexus is clearly
7 supplied.

8 QUESTION: Why shouldn't just the sale to
9 people in West Virginia be enough of a nexus?

10 MR. DIGGES: We feel like -- we feel, Your
11 Honor, that -- that there has to be some activity. This
12 is a privilege tax on the business of selling and not on
13 the sale itself.

14 QUESTION: And why do you feel there has to be
15 more than the sale in West Virginia, to a West Virginia
16 customer, that is?

17 MR. DIGGES: We feel that due process requires
18 some minimal activity relating to the taxable --

19 QUESTION: And that's based on -- and you
20 think that the minimal activity cannot be the sale in
21 West Virginia. Is that because of Norton?

22 MR. DIGGES: Well, the sale, Your Honor,
23 technically could occur outside of the state, transfer
24 of title could occur outside of the state, acceptance of
25 the order could occur outside of the state. So just

1 simply the fact that a West Virginia resident consumed
2 the product I don't think would be sufficient. I think
3 --

4 QUESTION: You're basing that on Norton or
5 what?

6 MR. DIGGES: Just on general due process laws,
7 Your Honor. I just -- our concept of what the
8 constitutional nexus requirements are. We feel that the
9 activity must be --

10 QUESTION: I take it you don't have much
11 confidence in Norton. You seem to evade it all the time.

12 MR. DIGGES: I think, as I set out in my
13 brief, that I, at least personally, believe that Norton
14 was -- was designed for a different question than is
15 involved here. And still, though, I believe that Norton
16 can be -- can be distinguished from this case; and to
17 find that West -- that the appellant -- or Armco's
18 activities within West Virginia are sufficient for their
19 taxation I think can be done without overruling Norton.

20 QUESTION: Are you in any way defending your
21 highest court's application of the unitary business
22 principle?

23 MR. DIGGES: Yes, Your Honor. I'll address
24 that in full in a moment. But in basically one of two
25 ways we feel that our court was -- was correct or

1 justifiable in -- in looking at least -- I don't know if
2 you want to term it the unitary concept, at least
3 possibly a form of the unitary concept, at the full
4 scope of Armco's activities within West Virginia.

5 First of all, we feel like the full scope of
6 activities within the state meets certain compliance
7 problems that may have been the basis of the requirement
8 of a fixed presence. And secondly, we feel that nexus
9 is a fact-bound or -- is a fact-bound problem, and we
10 believe that in certain factual circumstances such as
11 the General Motors case where activities of the taxpayer
12 are so mingled that it's impossible to determine which
13 activity did result in that sale, then only by looking
14 at the bundle of corporate activity can -- can you
15 determine whether there is sufficient nexus. However --

16 QUESTION: Do you think you need to rely on
17 the unitary concept to get the result you want in this
18 case?

19 MR. DIGGES: No, Your Honor, I don't believe
20 we do. I believe that the solicitation activities in
21 and of themselves more than satisfy the nexus
22 requirement.

23 QUESTION: I mean why should we muddy up what
24 is apparently a fairly simple concept by trying to
25 import a concept developed by the courts for an income

1 tax?

2 MR. DIGGES: I -- I -- I don't believe that
3 you should, Your Honor. And as I said in this, I don't
4 feel that it's necessary. The --

5 QUESTION: Has this Court ever done it in a
6 non-income tax case before?

7 MR. DIGGES: I believe -- the -- the General
8 Motors case has been analyzed in terms of the unitary
9 concept in other cases. I don't quite to this point
10 understand exactly in what context that was used.
11 However, I feel like that the entire business activities
12 of the taxpayer in -- in General Motors were looked at
13 in order to -- in order to determine whether the
14 sufficient nexus existed, and as such, more than just
15 the activities associated with specific sales was held
16 to be the taxable -- to -- to provide taxable nexus.

17 QUESTION: Well, what if there were no
18 physical solicitation activities in West Virginia but
19 there were newspaper ads, television ads, and they just
20 answered -- they just answered the mail and the
21 telephone calls and filled those orders and shipped in
22 the goods? Why wouldn't that be enough under your
23 theory? The solicitation is certainly within West
24 Virginia. The West Virginians read it in the paper, saw
25 it on television in West Virginia.

1 MR. DIGGES: Well, that may be an extension of
2 this, Your Honor. I don't think it would be
3 particularly warranted in this case. I believe the
4 physical presence, the face-to-face relationship that's
5 been evidenced, this continuous, repetitive solicitation
6 is far different than placing an ad. And it satisfies
7 the -- the minimal process that the person, property or
8 activity, at least a portion thereof, occur in the state.

9 QUESTION: You don't think -- you don't think
10 the legality of a compensating use tax has anything to
11 do with this case?

12 MR. DIGGES: Yes, Your Honor. I feel that it
13 has something to do with the discrimination portion of
14 the -- of the case.

15 QUESTION: But not -- not this -- not this
16 part of the case.

17 MR. DIGGES: As to whether or not nexus is
18 supplied? No, Your Honor, I -- it's not within --

19 QUESTION: Because you do collect out of the
20 wholesale transaction the compensating use tax, an
21 amount of money from a sale that would involve only
22 delivery and no solicitation, only delivery in West
23 Virginia.

24 MR. DIGGES: Yes, Your Honor. Well, I believe
25 in the National Geographic case that this Court perhaps

1 has stated that -- that was is right in a -- in a sales
2 and use tax setting may not be correct in a gross
3 proceeds privilege tax. If the Court would want to
4 extend that principle, certainly the State of West
5 Virginia would be in favor of it.

6 QUESTION: You're very welcome, very welcome.

7 QUESTION: Mr. Digges, do I correctly
8 understand that if you had the facts such as Justice
9 White described with nobody actually in the state but
10 advertising across the borders and so forth, just as a
11 matter of interpreting your own statute, it wouldn't
12 apply, would it?

13 MR. DIGGES: Yes, Your Honor. It would not
14 apply. They would not be engaging within the business
15 of selling in the state.

16 QUESTION: But the question would be whether
17 there'd be a constitutional difference in the event your
18 statute did cover it.

19 MR. DIGGES: Yes, Your Honor. It --

20 QUESTION: And you --

21 MR. DIGGES: I feel that there might be a due
22 process constitutional nexus difference.

23 To sum up, I believe that Armco's systematic
24 and repetitive solicitation activities were essential to
25 the establishment and maintenance of its sales to West

1 Virginia customers, and the sales at issue, at least at
2 the levels made, would not have existed but for Armco's
3 activities within West Virginia.

4 I believe the only difference between this
5 case and the factual circumstances of the Standard
6 Pressed Steel case is the lack of a fixed, purely local
7 aspect of the sales upon which to base the tax. The
8 State of West Virginia believes that the lack of such a
9 permanent local activity should not be controlling in
10 this case.

11 The local activity requirement can be traced
12 to the Norton and McCloud cases, as -- as we discussed.
13 Such cases held that solicitation activities by
14 themselves did not provide the local grip on the seller
15 sufficient to bring the taxation within the state's
16 power -- bring the activity within the state's taxing
17 power.

18 The State of West Virginia submits that a
19 re-evaluation of this fixed presence principle is called
20 for in light of intervening decisions.

21 Complete Auto Transit v. Brady announced this
22 Court's intention to judge state taxes' validity
23 according to their practical economic effects, and the
24 Appellee submits that in practical terms solicitation
25 activities supply the same nexus as does an in-state

1 sales operation.

2 In his dissent in the McCloud case, Justice
3 Rutledge stated that "Regular, continuous, persistent
4 solicitation has the same economic and should have the
5 same legal consequences as does maintaining an office
6 for soliciting or even maintaining a place of business
7 where goods are shipped for delivery to the buyer.

8 West Virginia believes that Justice Rutledge's
9 observation is consistent and accurate with modern
10 economic realities. This Court should examine the
11 results of Armco's in-state sales activities and not
12 where their personnel reside.

13 West Virginia also believes that this Court's
14 elimination of the direct versus indirect distinction
15 with regard to privileged taxation of interstate
16 commerce also plainly supports their position that the
17 solicitation activities by themselves can supply the
18 nexus necessary to tax.

19 In the Washington Stevedoring case, this Court
20 held that since interstate commerce was subject to
21 direct taxation, an activity which was essentially a
22 part of interstate commerce could supply the nexus
23 necessary for its taxation.

24 We believe that the same logic is equally
25 applicable to solicitation activities. Those such

1 activities are essentially a part of interstate
2 commerce. Their local aspects should be viewed to
3 determine whether the nexus necessary is supplied.

4 It is, therefore, Appellee's position that
5 Armco's in-state solicitation activities, which are
6 essential to the establishment and maintenance of its
7 sales to West Virginia customers, furnish the
8 constitutional nexus to justify the State of West
9 Virginia's taxation.

10 If, however, this Court feels that in addition
11 to solicitation activities a fixed local presence is
12 required, the Appellee believes that such requirement is
13 met in this case. West Virginia contends that the local
14 presence requirement was based upon the Court's
15 recognition of possible compliance costs burdens which
16 could discourage interstate commerce. Small businesses
17 who only solicit within a state might withdraw such
18 solicitation if compliance costs outweighed potential
19 profits.

20 QUESTION: Mr. Digges, if other states had a
21 similar tax scheme, I assume what would happen is that a
22 manufacturer, a local manufacturer selling in West
23 Virginia would pay only the manufacturing tax, is that
24 right? But if he wanted to sell out of state, he --
25 he'd be subject to the manufacturing tax and a sales tax.

1 MR. DIGGES: The local manufacturer in West
2 Virginia would only pay the manufacturing tax, and if he
3 sold out of state, he would be subject to whatever tax
4 the other states --

5 QUESTION: Right. Assuming other states had a
6 similar tax.

7 MR. DIGGES: Similar system. Yes, Your Honor.

8 QUESTION: So wouldn't West Virginia, if
9 that's true, really be taxing exports, and would that
10 violate the Commerce Clause?

11 MR. DIGGES: I don't -- I don't follow Your
12 Honor's question too well. I think that West Virginia's
13 only trying to tax the manufacturing activity within
14 their state. I don't believe that the --

15 QUESTION: Well, but there's a difference.
16 Now, a manufacturer who wants to ship goods across state
17 lines would end up paying two taxes presumably, and the
18 one who just manufactured locally would pay one. So
19 under that scheme would West Virginia be taxing the
20 exports?

21 MR. DIGGES: I don't believe, Your Honor, I
22 don't believe they would be. I -- I think --

23 QUESTION: Discriminating?

24 MR. DIGGES: No, Your Honor. I don't believe
25 that's a type of discrimination that this Court has

1 determined to be -- to be a violation of the
2 Constitution. I think that that is only potential. We
3 -- we don't know -- very few states have a gross
4 receipts tax system such as West Virginia's. The fact
5 that they may possibly be subject to a -- to a selling
6 tax in another state is beyond the control of the State
7 of West Virginia. And I think this Court's decision in
8 the Henneford case long ago established that we didn't
9 have to establish our tax system in response to the
10 possibilities of other tax systems.

11 QUESTION: Mr. Digges, let me follow through
12 on that general area. Viewed in isolation, the West
13 Virginia tax is discriminatory, isn't it, because the --
14 the local manufacturer is exempt from the tax that Armco
15 has to pay?

16 MR. DIGGES: Well, I'm not certain that --
17 that again that's the type of discrimination that this
18 Court -- this Court has found to be improper under the
19 Commerce Clause. In the Henneford case again --

20 QUESTION: But it is discriminatory.

21 MR. DIGGES: In effect, if that hypothetical
22 situation existed, then an in-state --

23 QUESTION: Well, it does exist.

24 MR. DIGGES: Excuse me?

25 QUESTION: It does exist, doesn't it? One

1 local manufacturer doesn't pay a tax that Armco does.

2 Now, that's a difference in --

3 MR. DIGGES: A different treatment -- to the
4 extent that any different treatment is discriminatory, I
5 agree it's discriminatory.

6 QUESTION: How do you justify it?

7 MR. DIGGES: First of all, as I said, in the
8 Henneford case there the same situation was presented in
9 which one commodity could be subject to both a sales and
10 use tax. Since it wasn't, this Court refrained from
11 determining whether or not that multiple taxation would
12 be discriminatory. However, the language clearly said
13 that -- that this Court was not sure that that type of
14 activity would be discriminatory, but it was going to
15 wait until that -- that situation presented itself
16 actually before it was going to make that -- make that
17 determination.

18 I think that that's what's called for in this
19 case. The State of Washington has, as I stated, a
20 privilege tax system virtually identical to West
21 Virginia's, and its system of credits in that state
22 brings about a practical effect which is virtually
23 identical to the -- to the effect discussed in the State
24 of West Virginia system.

25 QUESTION: Well, suppose your -- your

1 manufacturer's tax were 1 percent instead of, what is
2 it, 88 percent?

3 MR. DIGGES: Yes, Your Honor.

4 QUESTION: Would the case be any different?

5 MR. DIGGES: Certainly it would. We would
6 then be enticing people to come into the state to
7 perform a manufacturing activity and, in effect,
8 lowering their total tax burden. We're not doing that.

9 QUESTION: Well, are we to decide cases up
10 here according to the rate that West Virginia imposes?

11 MR. DIGGES: I believe that in cases such as
12 the Boston Stock Exchange case and the Maryland v.
13 Louisiana case that, in effect, the -- the total tax
14 burden in a dollars and cents fashion was -- was the
15 controlling aspect of the case.

16 QUESTION: I think this gets you into the
17 situation that Justice O'Connor proposed, that when you
18 take the other states' taxes into consideration, you're
19 almost bound to end up with discrimination.

20 MR. DIGGES: Yes, Your Honor. And that was my
21 -- my point about the Washington State tax. Their
22 practical effect of their tax is the same as West
23 Virginia's. Rather than exempting the wholesale sale of
24 taxes that have already been paid under manufacturing,
25 the --

1 QUESTION: Well, suppose -- suppose the
2 practical effect weren't the same? And wouldn't --
3 doesn't the practical effect depend on rates,
4 comparative rates? And again I get back to suppose your
5 tax were 1 percent instead of 88 percent?

6 MR. DIGGES: Again, I believe that that would
7 be a discriminatory pattern, because we would entice
8 people to come into -- through the use of the wholesale
9 sales exemption we would entice people to come in the
10 state and perform more business activities and, in
11 effect --

12 QUESTION: Then where -- where is the dividing
13 line between 1 percent and 88 percent? Forty percent?

14 MR. DIGGES: Twenty-one percent I would -- 26
15 percent in this.

16 No, Your Honor, I -- I think that's -- that as
17 long as they could come into the state and receive no
18 less of a tax burden, then I don't believe that that
19 would be any -- any influence upon them to withdraw an
20 interstate activity and make it a purely intrastate
21 activity.

22 QUESTION: Well, doesn't the problem come from
23 the interaction of the manufacturing tax and the -- the
24 tax on the sale price?

25 MR. DIGGES: Yes, Your Honor. Exactly.

1 QUESTION: And that's the difficulty. West
2 Virginia could eliminate the problem by reducing its
3 manufacturing tax on those who sell out of state or by
4 eliminating the tax on the sale in-state, but it wants
5 both. And so that leaves you with some kind of an
6 interaction sort of a problem, doesn't it?

7 MR. DIGGES: Well, I believe that the state
8 should be allowed to compensate in the manner it wishes
9 and to compensate for sales actually made in West
10 Virginia, to note that that is part of the manufacturing
11 process is the sale of the product, and to compensate
12 for an actual burden imposed by West Virginia law and
13 choose not to compensate for a potential burden out of
14 state. And I don't think that that -- that's an
15 improper handling of the situation.

16 However, again back to the State of
17 Washington, as -- as you said, it's the interaction
18 between the two taxes. In the State of Washington you
19 would have the exact same interaction. A person who
20 manufactures in Washington does not have to pay a
21 manufacturing tax if he pays the wholesale sales tax.
22 So, in effect, in a hypothetical situation described by
23 Armco, if an individual was paying an out-of-state
24 manufacturing tax and then was -- and sold his goods in
25 either the State of Washington or the State of West

1 Virginia, he would be subject to tax under two
2 privileges, whereas the in-state manufacturer-wholesaler
3 would only be subject to tax under one privilege.

4 It's the exact same question. This Court
5 examined that situation in both the Standard Pressed
6 Steel and the General Motors cases and determined that
7 no multiple burden actually did exist, and therefore,
8 that this Court was not going to -- not going to examine
9 that issue until an actual multiple burden was -- was
10 shown.

11 And, again, Armco's situation is entirely
12 hypothetical. They -- they don't pay any taxes in the
13 State of Ohio on the manufacture of this product; and so
14 their situation is just hypothetical and one that this
15 Court should not address at this time to --

16 QUESTION: Well, we're certainly going to have
17 to address the issue, and to arrive at your result, it
18 seems to me like you have to do away with the
19 discrimination in some manner. And you say well, it's
20 because the local manufacturer pays a manufacturing tax.

21 MR. DIGGES: I think that that's -- under --
22 under the Caskey case it's a type of compensating tax,
23 and I don't believe that the compensation, again, could
24 be upset by the fact that hypothetically someone outside
25 the state may have to pay another case on it. But,

1 again, I don't -- I don't see -- see the relevance of
2 this under this Court's decisions.

3 QUESTION: I'm not sure I understand you. Are
4 you saying it's totally irrelevant whether there's a
5 manufacturing tax imposed in Ohio, for example? Assume
6 that's where its plants are.

7 MR. DIGGES: If it -- if -- if that was --
8 were the case and that was shown, no, then that would
9 not be irrelevant.

10 QUESTION: So the constitutionality of the
11 West Virginia tax depends on what Ohio does?

12 MR. DIGGES: It depends on whether the
13 taxpayer before this Court can show an actual multiple
14 burden.

15 QUESTION: Right. But I mean assuming he
16 proved all the relevant facts, then the critical fact
17 then would be what the Ohio legislature decided to do
18 with respect to the manufacturing tax --

19 MR. DIGGES: Well, again, Your Honor, I -- I
20 -- I don't know that that would be the type of
21 discrimination that this Court -- this Court has -- has
22 outlawed. As I said in the Henneford case, the sales
23 versus use distinction was that -- that possibly because
24 it would be subject to two taxes, whereas a purely
25 in-state activity would only be subject to one, the

1 Court said that that necessarily wasn't a type of
2 discrimination.

3 In several of this Court's decisions they've
4 said that the vagaries of one state's taxing scheme will
5 not be forced to concede to another's, such as the -- I
6 believe the Mobil Oil case in which it was whether or
7 not the State of New York had the right to tax the
8 dividends, all of the dividends, whereas there was an
9 apportionment problem.

10 Again, this Court said well, that may be the
11 case, but it's not shown here, and one system shouldn't
12 necessarily have to -- have to -- have to take into
13 recognition what other states are doing.

14 Thank you, Your Honor.

15 CHIEF JUSTICE BURGER: Do you have anything
16 further, Mr. Dailey?

17 ORAL ARGUMENT OF RICHARD R. DAILEY, ESQ.,

18 ON BEHALF OF THE APPELLANT -- REBUTTAL

19 MR. DAILEY: May it please the Court:

20 What the nexus issue I think comes down to
21 here is this: We have only the most tenuous connection
22 between the transactions being taxed and the State of
23 West Virginia. A handful of salesmen without authority
24 to enter into any contractual relationships visiting
25 West Virginia on a very infrequent basis, to tax these

1 sales comes perilously close, I suggest, to the
2 imposition of a state import duty.

3 West Virginia is attempting to charge for
4 access to its market and so is trying to tax values
5 realized outside the state. This is precisely the type
6 of trade barrier that the Commerce Clause was designed
7 to prevent.

8 Armco submits that the traditional nexus rules
9 have served us well and should be retained. We should
10 require a continuous local presence within the taxing
11 jurisdiction to support the imposition of an
12 unapportioned gross receipts tax on sales.

13 Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.

15 The case is submitted.

16 We'll hear arguments next in Franchise Tax
17 Board against the United States Postal Service.

18 (Whereupon, at 1:32 p.m., the case in the
19 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:

#83-297 - ARMCO, INC., Appellant v. DAVID C. HARDESTY, JR., STATE TAX
COMMISSIONER OF WEST VIRGINIA

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

BY

Kenneth H. Green

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