

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FORD MOTOR CREDIT COMPANY, INC., Appellant
v. DEPARTMENT OF REVENUE, STATE OF FLORIDA

CASE NO: 88-1847

PLACE: Washington, D.C.

DATE: November 6, 1990

PAGES: 1 - 41

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IN THE SUPREME COURT OF THE UNITED STATES

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FORD MOTOR CREDIT COMPANY, :
INC., :
Appellant :
v. : No. 88-1847
DEPARTMENT OF REVENUE, STATE :
OF FLORIDA :
- - - - - X

Washington, D.C.

Tuesday, November 6, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:51 a.m.

APPEARANCES:

MARK L. EVANS, ESQ., Washington, D.C.; on behalf of the
Appellant, appointed by this Court.

H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of
the Appellee.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

MARK L. EVANS, ESQ.

On behalf of the Appellant

3

H. BARTOW FARR, III, ESQ.

On behalf of the Appellee

20

REBUTTAL ARGUMENT OF

MARK L. EVANS, ESQ.

On behalf of the Appellant

33

1 mean that it arose out of a sale of property in Florida,
2 it too is subject to the tax, but only if it is owned by a
3 nondomiciliary.

4 There seems to be no dispute here that the tax
5 fails a straightforward application of the Court's
6 internal consistency test, and that is so because if every
7 State had the precise statute that Florida has, a
8 interstate company operating in interstate commerce,
9 domiciled in one State, selling -- financing sales in
10 another State, would pay two taxes. One tax to his
11 domiciliary State, under the domicile theory, another to
12 the business situs State under the business situs theory.

13 QUESTION: Have we previously extended the
14 internal consistency test to property taxes?

15 MR. EVANS: Well, the answer to that is slightly
16 involved in this sense. It has not been extended to
17 property taxes in the name of an internal consistency
18 test, but as we showed in our opening brief, the first
19 instance that we could find of the Court actually using an
20 internal consistency analysis was a century ago in a case
21 involving a tax, a property tax, on the value of capital
22 stock of a company that, that owned moving -- moving rail
23 cars. And to that extent we think, because we do think
24 that the test itself, the analysis that underlies it is so
25 deeply rooted, the answer to the question is, I think,

1 that the Court has applied it to a property tax and in
2 fact a tax in that case which was on intangible value.

3 Just let me spell out again why I think there is
4 a -- why I think there is an internal consistency problem.
5 If you're operating in two States -- domiciled in one and
6 financing in the other, you pay a domicile tax in effect
7 to your domicile State, a business situs tax to your
8 business situs State. But if you are operating in just
9 one State, you pay only a domiciliary tax to your home
10 State. The result is that an intrastate company who
11 confines its operations, its financing operations to just
12 its own State, pays one tax, while its competitors have to
13 pay two.

14 QUESTION: Mr. --

15 QUESTION: Suppose -- go on.

16 QUESTION: Mr. Evans, the thing that makes the
17 tax burdensome is the tax on the domiciliary, isn't it?

18 MR. EVANS: No, we don't see it that way. The
19 tax is identical in our view to the tax that was at issue
20 in Armco. Now, Armco had -- Armco also had tax on -- was
21 taxed on two bases. One on manufacturing and one on
22 wholesaling. Manufacturing tax applied to all
23 manufactured goods in West Virginia. The wholesaling tax
24 applied only to goods manufactured in another State. The
25 party challenging that tax was somebody who manufactured

1 in Ohio.

2 We are in the same posture. The domiciliary
3 portion of this tax applies to domiciliaries, regardless
4 of where the business situs is --

5 QUESTION: But you are not a domiciliary.

6 MR. EVANS: No, we're not. But we are, but we
7 are a nondomiciliary, and the business situs tax that
8 Florida --

9 QUESTION: And the --

10 MR. EVANS: -- imposes applies only to
11 nondomiciliaries, just like the West Virginia wholesaling
12 tax, but only --

13 QUESTION: But just focusing on this for a
14 moment, if they, if they collected -- what -- would it not
15 be complete relief here to say they cannot collect taxes
16 from domiciliaries except to the extent that the debts
17 have a situs in Florida?

18 MR. EVANS: I think, one, that would be one
19 solution to the --

20 QUESTION: And do you have standing to insist
21 that that be done?

22 MR. EVANS: We think we do.

23 QUESTION: Are you prejudiced at all by the fact
24 that domiciliaries may pay more taxes than you do?

25 MR. EVANS: The question, Justice Stevens, is

1 the interaction of this two elements of the tax. We're in
2 --

3 QUESTION: Well, I understand, but are you
4 prejudiced at all by the fact that Florida domiciliaries
5 may pay a higher tax than you do? That's the
6 discrimination caused by this tax.

7 MR. EVANS: Well, the discrimination as we see
8 it really isn't -- is really interstate commerce versus
9 intrastate commerce.

10 QUESTION: Well, but you are not prejudiced by
11 the fact that Florida domiciliaries must pay a higher tax
12 than you do, theoretically, are you?

13 MR. EVANS: Well, I -- I can't answer that
14 question no. We clearly are hurt by the system that's put
15 up, and we are hurt in exactly the same way that the Ohio
16 --

17 QUESTION: You're hurt by the possibility you
18 might be taxed in Michigan as a domiciliary.

19 MR. EVANS: No. We're hurt by the -- by the
20 prospect that we are -- and the fact that we are taxed in
21 Florida on the basis of the business situs of our
22 intangibles there, where our competing intrastate local
23 banks are not taxed on the basis of business situs. We
24 are in exactly the same posture for standing purposes,
25 Justice Stevens, as was the manufacturer in Ohio.

1 QUESTION: I don't understand. Your intrastate
2 competitors are paying taxes on the same accounts
3 receivable, aren't they?

4 MR. EVANS: They are paying taxes, but only
5 under the -- only under the concept of a domiciliary tax.
6 The State applies, the State has a theory that both
7 domicile and business situs contribute to the value of
8 intangibles. And it -- but it only taxes one of those
9 things with respect to its own domiciliaries. It -- it --

10 QUESTION: But the tax is just the same as your
11 tax.

12 MR. EVANS: Well, let me try to -- let me just
13 try to draw the parallel to Armco, because we don't think
14 there is any distinction in principle. --

15 QUESTION: Well, I'd like to understand it
16 without reference to precedents, is just how this whole
17 thing hurts you. I just don't see it.

18 MR. EVANS: Well, let me -- let me present it
19 this way. We are subjected to a risk that -- that a local
20 Florida --

21 QUESTION: That you might be taxed in Michigan
22 as a domiciliary.

23 MR. EVANS: That is correct.

24 QUESTION: That's the whole case, isn't it?

25 MR. EVANS: Well, I think that's, that's a part

1 of it. And the risk itself is not, is not a cost-free
2 risk. We bear that risk every day when we compete in a
3 very competitive financial services market in Florida,
4 where the success or failure can turn on very small
5 margins. And the risk is something we have to take into
6 account when we, when we determine what our costs are. A
7 Florida domiciliary knows that under no circumstances when
8 he is competing against us for a Florida financing
9 opportunity, or a contract that is a financing contract,
10 he knows that he will never be taxed a second time on that
11 -- on that receivable, whereas we have to bear the risk
12 that it will be taxed a second time.

13 QUESTION: And you, I suppose you say that's a
14 -- you're permitted to raise this issue by the internal
15 consistency rule?

16 MR. EVANS: Precisely. And, Justice White, let
17 me just, recognizing that there is an issue beside
18 precedent, precedent does seem to us to be absolutely
19 controlling and indistinguishable in principle. The party
20 that sued in Armco was the Ohio manufacturer. The
21 argument could have been made precisely the same way to
22 him, that he is being discriminated against, or he has --
23 his only complaint is the way that the State treats its
24 own manufacturers. That was the internal consistency
25 problem.

1 QUESTION: The problem is that the whole, the
2 whole internal consistency test is based upon prospective
3 damage and not actual damage, isn't it?

4 MR. EVANS: It is. That's correct. The test is
5 --

6 QUESTION: Because it doesn't matter whether you
7 are actually being taxed twice, it's the theoretical
8 possibility of your being taxed twice that causes us to
9 apply the test.

10 MR. EVANS: That's correct.

11 QUESTION: So it's sort of hard to get upset
12 about potentiality as a basis for standing, if you are
13 going to apply that kind of a test.

14 MR. EVANS: Well, I think, Justice Scalia, there
15 is, although I know some members of the Court don't
16 necessarily agree, there is good reason for viewing the
17 test as a hypothetical test. The alternatives to an
18 internal consistency analysis are only two, as we see
19 them. One is to accept the reality of double taxation,
20 which would contradict the one bedrock principle, I think,
21 of the Commerce Clause. A second alternative would be to
22 require individualized, case-by-case showings of actual
23 double taxation in particular instances.

24 QUESTION: Which would suffice the Court for 180
25 years.

1 MR. EVANS: Well, I -- Justice, Mr. Chief
2 Justice, I'm not sure that's correct. Because, as I
3 indicate, I think that this kind of analysis, which
4 focuses on risks and focuses on the possibility of other
5 States doing something similar to what the challenge
6 statute does, has been with the Court for nearly a
7 century, so far as we can tell. It may have gone back
8 further. We couldn't find anything further back.

9 QUESTION: Well, I -- you certainly can cite
10 language in the Pullman Palace-Car, but to say that was
11 the precise rationale of the decision was the -- an
12 internal consistency -- I think pushes the language a
13 little far.

14 MR. EVANS: We don't say it was the whole
15 rationale of the case, Mr. Chief Justice. We do think
16 that it was an instance in which the Court found it useful
17 to look at what other States might -- what would happen if
18 other States used the same taxing mechanism.

19 Let me just run through why I think it would not
20 be a good idea to open up to actual double taxation
21 showings in every case. First of all, every -- every case
22 would produce a lawsuit. There would be no mechanism by
23 which these things would be resolved other than by
24 litigation. Second, you would have the anomaly of State
25 A, say Florida, adjudicating what Michigan in fact is

1 taxing. There may be an argument, for example, in a
2 lawsuit brought by Ford that it is fact being taxed by
3 Michigan on the basis of domicile, to which a State
4 counsel might respond well, we don't really see it that
5 way. Do you have any authority for that being the way
6 that the State court reads it? Well, we don't have any
7 definitive authority, but we paid our bill. Well, that is
8 not enough, we don't see it that way.

9 So the first issue in the State court is going
10 to be whether Michigan in fact taxes domicile. And if it
11 does, the second argument for the State's lawyer is, well,
12 it's not valid. And so you've got the bizarre situation
13 of the State of Florida having to adjudicate both the
14 meaning and the validity of a Michigan statute, taxing
15 statute.

16 Then you have the problem of, what if you prove
17 it? Which State -- which State's tax gets struck down?
18 Do you pick the one that you happen to sue? Does that one
19 go? Do you have to look to see whether there is an
20 internal consistency at that point? What if they are both
21 internally consistent? You may wind up with -- having --
22 allowing taxpayers to pick which statute -- which statute
23 must yield.

24 QUESTION: It sounds like a good argument
25 against the internal consistency rule.

1 MR. EVANS: No, it's a good argument in favor of
2 the internal consistency test, Justice White, because none
3 of this becomes necessary. As I say, if you don't have a
4 test that assumes that other States can do what this State
5 is doing, which in fact will happen, as the Court knows
6 from its long history in this area. Once it blesses a
7 tax, other States follow it because it has been, it has
8 been constitutionally blessed by the Court. And so that,
9 what you wind up with is either what I am describing, if
10 you don't have an internal consistency kind of test, or
11 you wind up with a -- with having to just suffer actual
12 double taxation.

13 The one other consequence of requiring case by
14 case showings is that you can wind up with a -- with a
15 patchwork. You've got different taxpayers being able to
16 establish that the tax is unconstitutional as to them,
17 because of the States they happen to be operating in at a
18 given time and the tax policies of that State at that
19 moment, and other taxpayers who are identically situated,
20 except that their State may have a slightly different
21 policy at that moment, have a different constitutional
22 rule. The result of all this would be, I think, a
23 litigation nightmare, and it's a good reason why the
24 Court, I think, has not followed that approach.

25 QUESTION: Well, it wasn't until the last decade

1 that we somehow found it necessary to explicitly adopt it
2 in order to prevent all of these horribles.

3 MR. EVANS: Well, I think it was --

4 QUESTION: Somehow we stumbled along for 190
5 years without -- without this great disaster.

6 MR. EVANS: Well, I think what the Court
7 stumbled along with was an internal consistency analysis
8 without the label on it, because the cases repeatedly
9 reflect the Court assuming, for the sake of consideration
10 of a tax, that other States might, in fact probably will,
11 adopt the same tax if it's approved.

12 QUESTION: You cited a few cases in which we had
13 language that could be interpreted to be the internal
14 consistencies test, but failed to cite dozens of cases in
15 which we make no mention of it, where it would have been
16 relevant to an analysis of the decision if -- if indeed we
17 thought it to be the law.

18 MR. EVANS: Well, there are very -- Justice
19 Scalia --

20 QUESTION: One swallow doesn't make a spring.
21 It's that kind of --

22 MR. EVANS: Well, that may be right, but there
23 -- there are no cases that the State has cited that took a
24 contrary position. We have not seen any case in which the
25 Court, with one exception, in which the Court refused to

1 examine a State statute on its own merits on the
2 assumption that it might well be replicated everywhere.
3 And that one exception was in the General Motors case
4 which was overruled in effect by Tyler Pipe. And I think
5 that case no longer stands. I think that was an exception
6 rather than the rule.

7 QUESTION: Mr. Evans, can we go back to the
8 Armco case? You responded to me before by saying this is
9 really just like Armco, but in Armco the taxpayer was
10 paying a wholesale tax, the Ohio company, that its West
11 Virginia manufacturing competitors did not have to pay.

12 MR. EVANS: That is right.

13 QUESTION: That's not like this.

14 MR. EVANS: We think it is, Justice Stevens.
15 Now, the argument --

16 QUESTION: What of -- which one of your
17 competitors does not have to pay a tax you have to pay?

18 MR. EVANS: Any one of our local Florida
19 competitors does not pay our tax. It pays the domiciliary
20 tax, just as -- just as the West Virginia manufacturer --

21 QUESTION: But it -- doesn't it pay the --
22 doesn't it pay a tax at the same rate on all its
23 commercial paper the way you do? It's -- may be given a
24 different label, but isn't it paying -- I don't -- I don't
25 understand how it can possibly be, have an advantage over

1 you, unless you look at the possibility of a tax against
2 you in Michigan.

3 MR. EVANS: Well, insofar as we're dealing with
4 intangibles that are -- that have a Florida business
5 situs, it looks like they are paying the same thing. It
6 looked in Armco as if the manufacturer paid more than his
7 out-of-state competitor, and in fact that was Chief
8 Justice Rehnquist's point in his dissent in that case.

9 QUESTION: Right.

10 MR. EVANS: That in fact they are paying the
11 same thing, on the same kind of basis. It was a sales
12 price kind of tax. And in fact the local manufacturer was
13 paying at a higher rate. But the --

14 QUESTION: One was paying on manufacture, and
15 the other was paying on wholesale receipts. But here they
16 are both paying on the value of the intangible paper.

17 MR. EVANS: Well, the --

18 QUESTION: Which has a situs in Florida.

19 MR. EVANS: Well, but the question is whether
20 domicile and business situs are the same thing. I mean,
21 the fact is that --

22 QUESTION: Well, but the tax -- the intangibles
23 being taxed are the same, aren't they? And from a
24 competitive market standpoint --

25 MR. EVANS: Well, the difference is, and this

1 may come back to your earlier point, the difference is
2 that in looking at a competitive market in Florida, Ford,
3 because it's an out-of-state domiciliary, carries baggage,
4 which is that risk that it might be subjected to another
5 -- another tax during the life of that receivable --

6 QUESTION: Yeah.

7 MR. EVANS: -- sometime by another State. Which
8 is something that the local competitor never has to face.

9 QUESTION: But in the -- but in this case your
10 concern would be satisfied if there was an injunction by
11 the district court in effect saying do not levy this tax
12 or a comparable tax against domiciliaries to the extent
13 they have out-of-state business. You see, the thing that
14 differs, it seems to me that the problem you identify
15 could completely solved without saving you a nickel -- in
16 short.

17 MR. EVANS: That was true, I think, in Tyler
18 Pipe, and it was also true in Armco. There was that,
19 there is a risk --

20 QUESTION: Well, I'm not sure.

21 MR. EVANS: -- that one of the choices that the
22 Florida legislature could make in order to make its
23 statute internally consistent is that it would still wind
24 up taxing us the way it does now. But that is not the
25 only choice it has. It might, for example, take away the

1 exemption that we -- that we think effectively operates in
2 Florida, which gives Florida domiciliaries an exemption
3 from the business situs portion of the tax. If it did
4 that, then our competitors would pay, we think, equally on
5 that -- on that ground in Florida. Or it could wind up
6 apportioning, which we think in some respects is the
7 proper solution. Which -- which is to say that if
8 Florida's logic, the logic of its own tax, and we think,
9 this is a point we think is very effectively made in our
10 -- in Florida's brief, that the underlying theory of the
11 internal consistency test is that a State ought to be
12 required to adhere to the logic of its own tax.

13 Now, it has in its very basis an assumption that
14 both domicile and business situs are contributing factors
15 in the benefits and protections that a State can provide.
16 What it does, however, is it -- it doesn't operate in
17 consistency with that, with that theory. To the extent it
18 taxes all of a domicile, all intangibles owned by a
19 domicile, its theory is the domicile is the entire
20 contributing factor.

21 At the same time it is taxing some other
22 domiciles, some other -- a person domiciled in another
23 State, based on business situs, which contradicts the very
24 theory of the domicile tax. So either it's -- either it's
25 domicile contributing everything, or they both contribute

1 something. If they both contribute something, then the
2 State ought not be allowed to tax business situs, on a
3 business situs basis, in full. It ought to recognize that
4 there is somebody else contributing to the value of that
5 intangible. So we think that the statute is inherently
6 defective for exactly the same reasons that the Armco
7 statute was defective and that the Tyler Pipe statute was
8 defective.

9 The State argues -- we think, Justice Stevens,
10 that our situation is utterly indistinguishable from that
11 in Armco. The fact that there were slightly different
12 labels on the tax -- that is, there is a manufacturing tax
13 and a, and a wholesaling tax -- made no difference,
14 because the taxes were basically the same -- operated the
15 same way. And for the out-of-state manufacturer, he faced
16 a wholesaling tax from which his local competitor was
17 exempt.

18 Now, the answer to that during the debate in the
19 Court, presumably, and certainly the arguments in brief,
20 was that well, that's true, but the manufacturer -- the
21 local manufacturer's paying a higher tax. And it's really
22 the same tax for the goods sold in West Virginia, the
23 local manufacturer is paying not only what the outsider
24 is, but actually more. And the Court said that was not an
25 answer to that, that in effect there was an internal

1 inconsistency that required -- that required or subjected
2 the out-of-state manufacturers to risks of double taxation
3 that the local manufacturer did not have.

4 That problem could have been solved in some
5 respects the same way that your question suggested
6 earlier. That is West Virginia could have said we are
7 going to abandon our local manufacturing tax and we're
8 going to subject our local manufacturers to the same tax
9 that the out-of-staters are subjected to, and the out-of-
10 state manufacturer would have been left in the same
11 position.

12 Those are just options for solution. But the
13 fact is that right now we are faced with a statute that
14 leaves us exposed to risks that local companies are not
15 exposed to, and that is, for reasons that we think are
16 sound, incompatible with the -- at least the recent
17 Court's decisions on internal consistency.

18 I'd like to reserve the balance of my time.

19 QUESTION: Very well, Mr. Evans.

20 Mr. Farr, we'll hear now from you.

21 ORAL ARGUMENT OF H. BARTOW FARR, III

22 ON BEHALF OF THE APPELLEE

23 MR. FARR: Mr. Chief Justice, and may it please
24 the Court:

25 Ford in this case has used the internal

1 consistency test to make two challenges in its brief to
2 Florida's intangible taxes, one based on the situs tax
3 alone, and one to the situs tax combined with the
4 domiciliary tax. Ford has not pressed the first argument
5 here this morning, and we, I believe, have answered it
6 fully in our brief by pointing out that there is no
7 internal consistency problem resulting from the situs test
8 itself.

9 So I would like to move directly to the second
10 point, which is the combination of the situs and the
11 domiciliary tax, and set out, if I may, just briefly at
12 the beginning, what our position is on that. Simply put,
13 it is this. That the Court shouldn't use the internal
14 consistency test to strike down a taxing scheme when the
15 hypothetical tax is based on domicile, and so the taxes of
16 only one other State are likely to be at issue, and when a
17 relatively simply factual inquiry shows that the taxpayer
18 in fact paid only one tax on its property, just like its
19 local competitors.

20 The situation typically in which the Court has
21 used the internal consistency test, as the Court has noted
22 in using it, have been cases where when one hypothesizes
23 the use of the -- of a particular tax, one might
24 conceivably be looking to cumulative taxation by 49 other
25 States on the same basis. That is simply not a situation

1 that arises in the case of the tax based on domicile. In
2 that kind of situation we know in advance that there is
3 likely to be only one other State that is asserting taxing
4 jurisdiction, and you do not have the same kind of
5 impractical inquiry that you would have with manufacturing
6 taxes and selling taxes, which could be levied for a
7 particular taxpayer by a number of different States, when
8 the basis of the hypothetical tax is, as it is in this
9 case, simply domicile.

10 QUESTION: Well, I think -- I suppose you would
11 argue then if Michigan had exactly the same scheme as
12 Florida, that both -- both States' tax laws would be
13 valid?

14 MR. FARR: Well, we would in fact make such an
15 argument based on the Due Process Clause cases. But
16 there, what I am saying here --

17 QUESTION: Because you think the domiciliary
18 basis for taxation is perfectly valid.

19 MR. FARR: That there is an additional basis for
20 taxation provided by domicile, as the Court has
21 recognized, that goes beyond the usual situs basis. But
22 that is not the necessary part of the argument I'm making
23 here. What I'm saying here is that it is a very simple
24 question to look and see whether in fact Michigan had this
25 tax, and very easy to see that it did not. So in fact,

1 when we move away from the hypothetical and move to actual
2 practical considerations, it is absolutely clear that Ford
3 paid only one tax on its Florida intangibles.

4 QUESTION: But, Mr. Farr, why can't we do that
5 with companies, like in Armco, that have only one
6 manufacturing plant?

7 MR. FARR: What I am looking at, I think,
8 Justice Stevens, is the general run of cases. I think
9 there would be exceptions in any particular setting of the
10 internal consistency test.

11 QUESTION: Yeah, but most taxpayers don't have
12 plants in 49 States, and if you look at the general run of
13 Florida out-of-state companies, presumably there is one
14 from each of the 49 other States. So that to really
15 survey the tax you would have to look at all the home
16 States, wouldn't you?

17 MR. FARR: But you can be assured --

18 QUESTION: You can do it for each one, one at a
19 time.

20 MR. FARR: Right. When you are looking at any,
21 a challenge by any particular taxpayer. And I think,
22 though, that goes to the very heart of what we're talking
23 about. It may be possible for using the internal
24 consistency test to essentially litigate the double
25 taxation or discrimination against another taxpayer from

1 another State, which is what Ford is trying to do. What
2 we're saying is that where you don't have the kind of
3 difficult factual inquiry that is likely to arise in other
4 settings, there is no reason to move past Ford's
5 particular situation, which shows that it did not pay a
6 domiciliary tax, and thus paid a single tax only.

7 QUESTION: Is it perfectly clear that the
8 domiciliary State would be Michigan and not Delaware?

9 MR. FARR: There has been no argument about it
10 in this particular case, Your Honor, and I don't think it
11 would make any difference. Delaware has not --

12 QUESTION: Except it makes it two you have to
13 look at instead of one.

14 MR. FARR: It might in a possible case.

15 QUESTION: Yeah.

16 MR. FARR: I mean there is, frankly, I think
17 there's a question after Wheeling Steel v. Fox whether a
18 domiciliary State which bases its claim to domicile solely
19 on incorporation would in fact be able to tax. So I doubt
20 that would arise, but that is at least a possible
21 consideration.

22 QUESTION: Under your view, Mr. Farr, if
23 Michigan had a tax and Ford could show double taxation in
24 this case, and if the Court, when it went on to say that
25 this was a violation of the Commerce Clause, would the tax

1 then be invalid just as Ford, so that companies that came
2 from States that did not have the domiciliary tax would
3 still have to pay the tax? Or is the tax struck down in
4 its face? Or -- I don't know how it would, how your
5 theory would work.

6 MR. FARR: The suggestion I am making, I
7 believe, Justice Kennedy, is that in this kind of
8 situation for this type of claim, that really the tax
9 should be looked at as applied to a particular taxpayer.
10 So that a statute that has essentially what might be
11 argued to be a logical inconsistency but causes no harm to
12 a particular taxpayer should not be struck down with
13 regard to that taxpayer.

14 QUESTION: Do we have examples in our
15 jurisprudence where this approach has been followed?

16 MR. FARR: Well, there are certainly examples
17 where the Court has said, for example in Northwestern
18 States Cement, which is 358 U.S., the Court says we are
19 not going to look at a hypothetical claim. There is no
20 actual double taxation in this case, therefore we will no
21 go on and address the question of whether there is a
22 hypothetical problem with the statute itself. It seems to
23 me that is a perfectly sound basis where the inquiry as to
24 the particular taxpayer can be made relatively
25 straightforwardly. And I think this is an obvious example

1 of that kind of case.

2 Taking for a moment the inquiry that I am
3 proposing, which, as I say, departs somewhat from the idea
4 of using hypothetical taxing burdens and looking at actual
5 burdens, what -- what do we see in this case? As I have
6 said, we see that Ford has not paid a domiciliary tax to
7 Michigan, and indeed hasn't paid one to Delaware either,
8 should that be the possible alternative. When you look at
9 what Ford really puts most of its emphasis on, you turn to
10 the question of what are the risks of double taxation.
11 And there concededly is language in the Court's opinion
12 that talk about risk as part of Commerce Clause analysis.

13 But I would like to suggest that it's worth
14 taking a hard look in a case like this at what the risks
15 really are, because risks are very easy to exaggerate.
16 What do we know about the risk that Ford faced in
17 Michigan, its domicile State, in 1980, 1981, and 1982,
18 which are the years, the taxing years that are in question
19 here? The first thing we know about them is that in fact
20 the risk of a domiciliary tax didn't materialize.
21 Michigan did not impose the tax during those years in
22 question.

23 Second, and more importantly, we know that the
24 risk, at best, because of the nature of Ford's argument,
25 is simply a marginal risk. Ford has based its argument

1 here solely on the internal consistency clause. Yet Ford
2 concedes, as it has to, that if in those years Michigan
3 had had a domiciliary tax and Ford -- excuse me, and
4 Florida had had a situs tax, so long as Florida didn't
5 itself have a domiciliary tax, the two statutes together
6 would meet the internal consistency test.

7 So what that leaves Ford with when it talks
8 about risks is essentially an incremental risk, the idea
9 that Michigan wouldn't tax its domiciliary corporations on
10 its own. It would only do so essentially in sort of a
11 copy cat fashion, because Florida has done so. And even
12 there, I might suggest, that if Michigan were to consider
13 a domiciliary tax, what you don't have in this case is
14 what you have in so many Commerce Clause cases, the
15 difficulty of an out-of-state corporation facing taxing
16 decisions by a State in which it's not located. We are
17 talking about the possibility of a tax imposed by Ford's
18 own domicile, where Ford presumably has substantial
19 political power.

20 QUESTION: Mr. Farr, the test you propose really
21 ends up, doesn't it, to create all sorts of odd incentives
22 for companies to do business in some States or not? For
23 example, if Michigan should impose a domiciliary tax, it
24 would then be cost free, in effect, since there would be
25 the kind of conflict you acknowledge would have to --

1 would have to disallow -- would it be the Florida law that
2 is disallowed in the event of that conflict, or both of
3 them, by the way?

4 MR. FARR: Your Honor, I hate to interrupt your
5 question, but I don't concede that one or the other would
6 have to be disallowed. I would suggest that under the due
7 process cases they both could stand compatibly. I am
8 saying the Court need not reach that issue in this case,
9 because there in fact are not two taxes being levied.

10 QUESTION: Oh, you're not even acknowledging
11 that when there are two taxes levied it would be invalid?
12 I thought you said that we would do it on a case-by-case
13 basis, and that is you showed an actual conflict --

14 MR. FARR: Then you would have to decide the
15 issue as to whether both taxes could legitimately be
16 sustained.

17 QUESTION: Oh, I see.

18 MR. FARR: That, that is the approach the Court
19 took in cases like Curry v. McCanless.

20 QUESTION: Oh, I see.

21 QUESTION: If Florida and Michigan had exactly
22 the same scheme, you would argue that both are valid?

23 MR. FARR: I would argue that both are valid.

24 QUESTION: That's what I thought you said a
25 while ago.

1 MR. FARR: That's correct, Justice White.
2 Following the due process cases from the late 1930's and
3 1940's, I would argue that because of the special nature
4 of a domiciliary corporation and the --

5 QUESTION: I see.

6 MR. FARR: -- benefits that the Court has
7 recognized the State gives, that it could indeed have
8 extra taxing power. But I want to make clear the point I
9 am making here is I do not believe it makes sense to
10 decide that issue in a case where no domiciliary tax on
11 Ford has been imposed. And that is, I think, the point
12 that Ford is raising.

13 QUESTION: Well, I suppose that if Michigan had
14 a tax like Florida's on domiciliaries, it would certainly
15 be -- it certainly would put a -- it certainly would
16 deter, I suppose, a domiciliary in Michigan from doing
17 business in Florida or any other State that had a tax like
18 that.

19 MR. FARR: In the sense that it would then be
20 subject to double taxation.

21 QUESTION: Why, yes, yes. And if you are going
22 to pay, if you would have to pay two taxes on your
23 intangibles if you went to Florida, you'd stay out of
24 Florida.

25 MR. FARR: Your Honor, I think that is a

1 possibility. I would say that the issues of double
2 taxation, precisely the point that you are making though,
3 is what the Court spent really a decade and a half
4 wrestling with from about 1930 until the early 1940's,
5 exactly trying to draw the kinds of distinctions that you
6 are making --

7 QUESTION: And never got a fall.

8 MR. FARR: I'm sorry?

9 QUESTION: And never pinned. Never, never got
10 -- and it never pinned anybody.

11 MR. FARR: Well, it came closer to pinning at
12 the end, I think, when it made its second reversal, if I
13 can continue the wrestling metaphor, to say that in fact
14 there was a legitimacy to double taxation of intangibles
15 by both the domiciliary State and the situs State.

16 QUESTION: Mr. Farr, can I suggest a problem
17 with your approach? Supposing this challenge had been
18 brought not by Ford challenging the situs aspect of the
19 tax, but by a Florida domiciliary, making precisely the
20 same argument? And they would say we are subject to a
21 situs -- potential situs tax in 49 other States because we
22 are a nationwide credit company. Would you say they
23 didn't -- would you make the same argument to them?

24 MR. FARR: No, I would not make the same
25 argument. As I said, I think even -- if the basis of the

1 hypothetical tax is situs, that, it seems to me, is a
2 basis that maybe is sort of --

3 QUESTION: I see. It's the fact that the
4 hypothetical tax is the burden on the domiciliary that is
5 what you --

6 MR. FARR: That's correct. I mean, as I -- to
7 me, and perhaps this is a misstatement, but as I see the
8 internal consistency test, it essentially carves out an
9 exception to general constitutional principles of how you
10 approach an attack under -- on constitutional ground State
11 statutes. And it seems to me where there are practical
12 reasons for essentially allowing the tax -- the to be
13 based on hypothetical grounds, that maybe the usual
14 practice should yield. But I don't see it in the case
15 where the hypothetical tax is the domicile.

16 I would like to just say one more thing about
17 the subject of risk, again because I think Ford has given
18 it considerable emphasis. The -- you know, we certainly
19 don't disagree that there was this marginal risk that I
20 mentioned before, this incremental risk that Ford might be
21 subject to tax by Michigan. But when we are talking about
22 that as a basis for challenging the Florida statute, it
23 does seem appropriate to remember that the Florida
24 companies, the competitors that Ford keeps talking about,
25 not only pay tax on exactly the same intangibles in

1 Florida as did Ford, but in fact were subject to a real
2 tax, not a hypothetical tax, on their intangibles in 49
3 other States.

4 And one question I suppose I would raise here
5 is, for all their talk about multiple burdens and
6 discrimination and lack of allocation, is there any
7 reasonable likelihood that in 1980, 1981, or 1982 Ford
8 would have changed places with the Florida domiciliary
9 corporations insofar as taxes on intangibles were
10 concerned? That is usually the question that comes up in
11 any Commerce Clause case, or at least something that
12 underlies it, when you say that our competitors are being
13 advantaged here. But we submit that there is no way that
14 Ford would have said we would rather be treated as a
15 Florida domiciliary, in fact, and we were treated as we
16 were.

17 QUESTION: Mr. Farr, are there any Florida cases
18 pending in which a Florida domiciliary has challenged this
19 tax?

20 MR. FARR: Not to my knowledge, Justice Stevens.

21 I would like to make one final point on the
22 question of the particular type of inquiry here. Ford
23 again concedes, as I think it must, that so long as
24 Florida took action that met internal consistency, it
25 would not be necessarily entitled to a refund. In Tyler

1 Pipe this Court pointed out that any problem with internal
2 consistency in that case could be solved for out-of-state
3 manufacturers by providing a credit against the out-of-
4 state tax on the tax levied by the State of Washington in
5 that case.

6 Assuming that Florida could do the same thing
7 here, and we don't see any reason why they couldn't simply
8 to achieve the consistency that Florida is talking about,
9 ultimately that credit would do Ford no good whatsoever.
10 It has nothing in fact to credit from its domiciliary
11 State. So to the extent that there is a superficial
12 difference because a Florida corporation arguably gets a
13 credit against one tax and only has to pay once, even if
14 Florida applied exactly the same rule to Ford, there would
15 be no difference whatsoever in the judgment that is in
16 front of the Court at this point, the judgment that says
17 they owe the taxes for 1980, 1981, and 1982.

18 If the Court has nothing further, thank you.

19 QUESTION: Very well, Mr. Farr.

20 Mr. Evans, do you have rebuttal?

21 REBUTTAL ARGUMENT OF MARK L. EVANS

22 ON BEHALF OF THE APPELLANT

23 MR. EVANS: Let me just start where Mr. Farr
24 left off on credits. This is an issue that was discussed
25 as well in Tyler Pipe, in which the Court specifically

1 said that credits might be a solution. And in fact the --
2 the complaining parties in Tyler Pipe, if a credit had
3 been provided, would have likewise, at least
4 prospectively, been arguably no better off than they were
5 before they came to Court.

6 On the question of refunds, we have not conceded
7 anything. That's not an issue that's here at this point.
8 It's a matter for remedy that the Court has spelled out,
9 and the contours of which from a constitutional standpoint
10 the Court has spelled out recently in McKesson. We are
11 not in a refund posture. We're here under an assessment.
12 We have not paid the tax, we have posted a bond for it.
13 We have paid a portion of the tax, and we are not suing
14 for refund of that. So we are not even in a refund
15 posture. Insofar as a retroactive or retrospective
16 remedy, we think it's something that ought to be dealt
17 with by the Florida courts, and in fact the Florida courts
18 have at least some cases suggesting that a taxpayer is not
19 required to pay a tax under a statute declared
20 unconstitutional.

21 QUESTION: Counsel, is it possible to speculate
22 that these intangibles are included in some overall tax
23 schemes of other States, general property tax?

24 MR. EVANS: Well, I think there --

25 QUESTION: And so that it would follow from that

1 that Michigan has foregone -- has foregone to levy on
2 these in lieu of its tax?

3 MR. EVANS: Well, I think to a certain extent
4 that may be, that may be right. And it, it reminds me,
5 Justice Kennedy, of a point that I believe was in Justice
6 Stevens' concurring opinion in the Goldberg case, which is
7 that the fact that one State cedes or declines to adopt a
8 tax doesn't mean that somebody else can take that State's
9 share.

10 I think that in -- there are about half of the
11 States that, at least as we have identified in a rough
12 survey, that have some form of intangible taxation. About
13 five or six of them, or so, look pretty much like
14 Florida's. They have a -- looks on the face of it at
15 least to be an internal inconsistency, taxing both on the
16 basis of domicile and on the basis of -- or alternatively
17 on the basis of business situs. A couple of them choose
18 one or the other, and then there are a large category that
19 is just not decipherable in the face of the statute what
20 they do.

21 But clearly, intangible values are taxed
22 elsewhere, and it may be that Michigan chooses to require
23 its domiciliaries to pay their share of State and local
24 services that are provided within the State to
25 domiciliaries in some other form, rather than an

1 intangible property tax. Clearly this is not a free ride
2 for Ford Motor Credit Company, and it ought not to be a --
3 an opening, in effect, in the line for Florida.

4 I -- now -- Mr. Farr seems to have said
5 something that was also in the brief that I just want to
6 address briefly. The notion that the Court's decisions in
7 the 1940's, late 1930's and 1940's, on due process grounds
8 bear on the issue here, we think is really quite far
9 fetched. Those cases were due process cases where the
10 issue was one issue only, namely did a nondomiciliary
11 State have the jurisdiction to tax property owned by --
12 that was in the State but that was not owned by one of its
13 own domiciliaries, and the answer to that question was
14 yes. There was never any consideration in those cases
15 about multiple taxation, because the issue was a due
16 process issue, and not an interstate -- impeding of
17 interstate commerce issue.

18 The fact is that the one time when the author of
19 the key opinion, Chief Justice Stone, addressed the issue,
20 he specifically said, and we quoted this in our reply
21 brief, which I am not finding right now, this was in his
22 dissenting opinion in Northwest Airlines at 332 U.S. He
23 said, in response really to an argument that Mr. Farr has
24 made, that yes, domicile can be important and it can give
25 a basis for State taxation of intangibles that might

1 otherwise not be available in the case of tangible
2 property. But then he goes on to say that the taxation of
3 intangibles of interstate companies is subject to the rule
4 of apportionment, wherever the tax --

5 QUESTION: Where is this?

6 MR. EVANS: I'm --

7 QUESTION: Where is this from?

8 MR. EVANS: I'm sorry. This is on page 15 of
9 our reply brief. He is saying that the taxation of
10 intangibles, when it's -- when they are owned by
11 interstate companies, is subject to the rule of
12 apportionment, wherever the tax without it would subject
13 the commerce to the burden of multiple State taxation.
14 And to suggest that double taxation is permissible on some
15 domiciliary hearing when you are talking about interstate
16 commerce strikes me as quite -- quite bizarre in the
17 current --

18 QUESTION: Let me, let me ask you, supposing
19 we're talking about tangibles instead of intangibles --

20 MR. EVANS: Yes.

21 QUESTION: -- talking about real estate. Could
22 a Florida resident be taxed on real estate owned in
23 Illinois or Michigan?

24 MR. EVANS: No.

25 QUESTION: He could not?

1 MR. EVANS: Oh -- by Florida.

2 QUESTION: By Florida.

3 MR. EVANS: No. It could not.

4 QUESTION: It could not be taxed on its out-of-
5 state wealth.

6 MR. EVANS: That would be -- I mean, I think
7 that's pretty settled in the Court's decisions. In the
8 area of real property you can only tax what is within your
9 borders.

10 QUESTION: Mr. Evans, several of us don't seem
11 to have the reply brief here on the bench. What was the
12 case you were reading from?

13 MR. EVANS: This was Chief Justice Stone's
14 dissenting opinion in Northwest Airlines, which is in 332
15 U.S., and the quote I was reading to you was at page 318.
16 It was in response to an argument that, very much like Mr.
17 Farr's, that multiple taxation is all right when you are
18 dealing with taxation by domicile States, and we're
19 talking about -- in that case we're talking about airlines
20 and tangible property. But there was reference made to
21 intangibles in his response.

22 QUESTION: This was 332 U.S.?

23 MR. EVANS: 332 U.S., and this was at page --

24 QUESTION: Chief Justice Stone?

25 MR. EVANS: Chief Justice Stone.

1 QUESTION: I thought he was dead by then.

2 MR. EVANS: Well, I think the citation is --

3 QUESTION: Okay -- we can check it out.

4 MR. EVANS: I will double check it. My mistake.
5 323. We missed -- cite checkers missed it.

6 In response to the argument he also cited a
7 number of other cases dealing with, and these are also
8 cited at page 15 of the reply brief, a number of other
9 cases that did deal with the possible problem of multiple
10 taxation of intangible property, going back -- back again
11 into the 19th century.

12 Now, Mr. Farr said that the risk that we face
13 would -- we would still face even if, even if the State
14 abandoned its domicile tax, as he suggested, and left in
15 place simply a business situs tax applicable to everybody.
16 And that's true. We would face a risk. It would be a
17 slightly different risk, and while it would look the same,
18 it would offer different opportunities. At least we would
19 have an opportunity, or a company with a domicile outside
20 the State would have an opportunity to change domiciles if
21 its own domicile State adopted a domiciliary tax. In that
22 event it would pay no tax in Florida, because Florida
23 doesn't have a domicile tax, and it would pay no tax in
24 the State it used to be domiciled in because it has no
25 business situs tax.

1 Furthermore, firms generally, although
2 individual firms might face risks and might be hurt, firms
3 generally, on balance, operating in interstate commerce
4 would fare about as well as those operating in intrastate
5 commerce. Because, as I say, while some might ultimately
6 have to pay two taxes, others will get away with paying
7 none.

8 And finally, while there -- it is true that
9 there is a limit beyond which the Court can't go,
10 consistent with principles of federalism, we cannot tell
11 Florida that it cannot adopt a -- an internally consistent
12 tax on the basis of business situs or domicile simply
13 because Michigan chooses to adopt a different internally
14 consistent tax on a different basis. That's the
15 irreducible minimum required by principles of federalism.
16 But we can tell Florida that it cannot adopt an internally
17 inconsistent statute that enhances the risks beyond those
18 that are the minimum necessary to preserve federalist
19 principles.

20 One final comment. We have been -- the Court
21 has been debating questions of internal consistency now
22 actively for almost a decade. Almost every argument that
23 has been presented in the briefs here has been thoroughly
24 debated in the prior decisions of the Court. There is no
25 distinction, no distinction that we can see in principle

1 between applying the test here and applying the test in
2 the cases that have already been decided. To whatever
3 extent there is any difference, we think it's an easier
4 case here, because we are dealing with a property tax,
5 where assets have one value, much like income does.

6 But in any event, it's time for some stability
7 in the law. It's an issue that is constantly in play.
8 And the Court has now decided five cases since 1983 in
9 which it has indicated that internal consistency is a
10 special test to screen for defective State taxes. It has
11 been a hotly debated issue, but it is now, I think, time
12 to settle it and leave it in place. States ought to begin
13 to deal with this test, which is not difficult for them to
14 apply, is not onerous with respect to their options, and
15 which ought to be dealt with by the States that way rather
16 than as another opportunity for litigating Commerce Clause
17 issues.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Evans.

20 The case is submitted.

21 (Whereupon, at 11:37 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

CERTIFICATION

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

#88-1847 - FORD MOTOR CREDIT COMPANY, INC., Appellant v. DEPARTMENT OF

REVENUE, STATE OF FLORIDA

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