

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: ALLIED-SIGNAL, INC., AS SUCCESSOR-IN-  
INTEREST TO THE BENDIX CORPORATION,  
Petitioner v. DIRECTOR, DIVISION OF TAXATION

CASE NO: 91-615

PLACE: Washington, D.C.

DATE: March 4, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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ALLIED-SIGNAL, INC., AS :  
SUCCESSOR-IN-INTEREST TO :  
THE BENDIX CORPORATION, :  
Petitioner :  
v. : No. 91-615  
DIRECTOR, DIVISION OF TAXATION :

- - - - - X

Washington, D.C.

Wednesday, March 4, 1992

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:47 a.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Washington, D.C.; on behalf of the  
Petitioner.

MARY R. HAMILL, ESQ., Deputy Attorney General of New  
Jersey, Trenton, New Jersey; on behalf of the  
Respondent.

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

2 (10:47 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 91-615, Allied-Signal, Inc., v. the Director  
5 of the Division of Taxation.

6 Mr. Frey, you may proceed.

7 ORAL ARGUMENT OF ANDREW L. FREY

8 ON BEHALF OF THE PETITIONER

9 MR. FREY: Thank you, Mr. Chief Justice, and may  
10 it please the Court:

11 This case is here on petition for writ of  
12 certiorari to the Supreme Court of New Jersey to decide  
13 the question whether New Jersey has the constitutional  
14 right to tax an apportioned share of the capital gain  
15 earned by the Bendix Corporation from an investment that  
16 it had in a company called ASARCO between 1978 and 1981.  
17 Bendix was a company at this time that operated various  
18 types of businesses, aerospace, automotive, and other, it  
19 had four operating groups. These businesses were operated  
20 in New Jersey and elsewhere around the United States.

21 In 1978 the chairman of Bendix, reviewing its  
22 broad financial interests, determined that it would be  
23 prudent to invest a substantial sum of money in ASARCO  
24 which is a copper and non-ferrous metals mining and  
25 refining company. It's undisputed that the business of

1 ASARCO had nothing to do with the businesses in which  
2 Bendix was engaged, and of that \$127 million was used to  
3 purchase approximately 20, a little over 20 percent of the  
4 stock of ASARCO.

5 2 years later in 1980 the chairman of Bendix  
6 decided that they had had a very nice profit in the ASARCO  
7 stock, it was an excellent investment. He didn't think  
8 that natural resources were going to continue to grow and  
9 be as profitable in the future as they had been during the  
10 period that they had held the stock. He thought it would  
11 be a good idea to concentrate the company's resources more  
12 in high tech areas closer to where it was already  
13 operating and the ASARCO stock was sold. A very  
14 substantial profit was made.

15 QUESTION: Mr. Frey, I take it ASARCO may also  
16 be a New Jersey company?

17 MR. FREY: ASARCO is a company that also does  
18 business in part in New Jersey, yes.

19 QUESTION: Not incorporated there, but does  
20 business there?

21 MR. FREY: I think it actually may have been  
22 incorporated there, but there's no question that ASARCO -  
23 -

24 QUESTION: Does that make any difference?

25 MR. FREY: No, I don't believe it makes any

1 difference. ASARCO was taxed on its income in light of  
2 the places in which it does business, and if it did  
3 business in New Jersey, New Jersey taxed that income. We  
4 are now talking about the right to tax Bendix's intangible  
5 income from this.

6 QUESTION: -- whether it made any difference  
7 (inaudible)

8 MR. FREY: Well, there is a different theory --  
9

10 QUESTION: -- the company in which the  
11 investment is made is also a New Jersey company.

12 MR. FREY: There is a completely different  
13 theory of measuring the taxation, which I believe New York  
14 uses, where you look at not where the taxpayer is  
15 operating but where the company is in which it has  
16 invested and is operating. That is not the basis of the  
17 decision below. That would produce a completely different  
18 measurement. I don't know what it is. And I think it is  
19 not material to what the Court has to decide today that  
20 ASARCO did or did not do business in New Jersey.

21 QUESTION: Do we have this case on the  
22 understanding that the investment by Bendix in ASARCO was  
23 a means of handling some of their working capital for a  
24 period of time?

25 MR. FREY: Definitely not. There's no

1 suggestion that that is true here. That would be  
2 completely untenable on the stipulated record in this  
3 case. Working capital is the capital that is employed in  
4 the day-to-day or week-to-week current operations of the  
5 company. It is like the money you need to cover the  
6 period when your expenses may exceed your revenues for a  
7 temporary period. We are talking here about drawing on  
8 what I would call investment capital or resources of  
9 Bendix and investing it somewhere where Bendix thought it  
10 would be profitable.

11 Now the question ultimately is whether that  
12 investment and the income from that investment is part of  
13 the business that Bendix was conducting in New Jersey or  
14 not part of the business that Bendix was conducting in New  
15 Jersey. And if it was not, New Jersey can't tax it.

16 Now, the nexus requirement, which is what we're  
17 talking about here, did New Jersey have nexus to tax the  
18 profit that Bendix made in the ASARCO investment, has two  
19 pieces. The first piece is sort of the personal  
20 jurisdictional element like was involved in the Quill  
21 case, that is was Bendix in New Jersey to be subject to  
22 any taxation by New Jersey, and the answer to that is  
23 clearly yes.

24 There is a second part, however, which is well  
25 recognized, deeply rooted. It goes back to sort of one of



1 the earliest principles of Fourteenth Amendment due  
2 process jurisprudence which is the transaction that is  
3 being taxed must have a connection with the taxing state,  
4 that is the state may tax a transaction only if it  
5 provides opportunities, benefits, or protection for the  
6 activity that it is taxing.

7 Now, the problem in applying this test which the  
8 Court has often stated comes up when you have a multi-  
9 state business engaging in a variety of activities in a  
10 number of states and you try to decide what parts of the  
11 activities of that business are taxable in the state and  
12 how do you measure a fair amount of tax. Now the Court in  
13 dealing with this has developed two concepts. One is the  
14 concept of apportionment which asks how you measure how  
15 much of the total income of a business may be taxed in a  
16 particular state, and the second is a concept which has  
17 normally been captured in the idea of the unitary  
18 business, that is identifying what is the business that is  
19 being conducted in part in the state that is trying to tax  
20 the income.

21 Now somebody might ask, and I think Justice  
22 O'Connor may have asked in her dissent in ASARCO, what's  
23 wrong with a system under which we just take all of the  
24 income of the corporation and we apportion it and we let  
25 the state tax a share of that. Isn't that good enough

1 really? And there is a couple of things wrong with that I  
2 think. One of the things is that that method exalts form,  
3 that is that it happens to be a corporation which is  
4 receiving this income rather than looking at the substance  
5 of the business activities, and that method does in fact  
6 invite extraterritorial taxation.

7 Let me give an example to try to capture this  
8 thought. Suppose I have a business that operates beauty  
9 parlors in New York and New Jersey. There's no question  
10 that the income from that business can be taxed by New  
11 Jersey in accordance with some measurement of the share of  
12 that business that I do in New Jersey. Now suppose I  
13 don't want to expand my beauty parlor business at present  
14 and I decide to open up a business in California in  
15 parking lots, or to buy stock in a business in California  
16 in parking lots. I don't think it matters for this  
17 purpose.

18 Now suppose that in a given year I make no money  
19 in New Jersey or in New York. The beauty parlor business  
20 is a stinker, I make no profit. The parking lot business  
21 which is conducted in California, it has nothing to do  
22 with the beauty parlors, is highly profitable. Now under  
23 the notion that you just take all the business of the  
24 corporation, lump it together, and apportion it, New  
25 Jersey would end up taxing 50 percent of the income that I

1 made in California.

2 So, and that I think would clearly, in that  
3 hypothetical, violate the principle of avoiding  
4 extraterritorial taxation. New Jersey had nothing to do  
5 with the parking lots, yet by apportioning my income in  
6 accordance with some formula let's say that gave New  
7 Jersey 50 percent of my total business, it would be able  
8 to seize a share of the profits that I made from a  
9 business that I was not operating at all in New Jersey and  
10 tax them.

11 Now, the problem that we're dealing with here,  
12 of course, is a problem of taxation of intangible income,  
13 that is --

14 QUESTION: Just before you get away from your  
15 hypothetical, in your hypothetical what was the  
16 domiciliary state of the corporation?

17 MR. FREY: New York. I didn't mention it, but -  
18 -

19 QUESTION: Well, but in -- I take it under your  
20 proposal that New York could tax part of the parking lot  
21 business.

22 MR. FREY: If the parking lot business were  
23 operated, were a separate corporation in which I owned  
24 stock, New York could tax it. But the principle on which  
25 New York can tax it is I think a totally different

1 principle from the principle on which New Jersey or  
2 California could tax it. Well, yes, but they could tax  
3 it. And under your submission to us I take it in the  
4 ASARCO divestiture that we have here the domiciliary state  
5 --

6 MR. FREY: Michigan.

7 QUESTION: -- Michigan can tax the profits that  
8 are made from that.

9 MR. FREY: That is correct. We're not  
10 suggesting that it can't be taxed. That is not the  
11 question at all. The question is may New Jersey tax it.

12 QUESTION: And it seems to me somewhat odd under  
13 your system that Michigan can reap all of the benefits of  
14 the gain on disposition.

15 MR. FREY: I don't think it's odd at all because  
16 I think the principle under which Michigan gets to tax all  
17 of these benefits is the same principle that applies to  
18 individuals when they live in a state. The state in which  
19 they live, which presumptively and in practice when you're  
20 talking about the commercial domicile as the state that  
21 safeguards and provides opportunities and benefits for the  
22 generality of the operation although not the specific  
23 details of it, has the right to tax all income wherever  
24 earned except to the extent that it's being taxed some  
25 place else and you may have to give credit under the



1 Commerce Clause or under other principles.

2 That is if I live in New York and I make money  
3 abroad, let's say, New York has the perfect power to tax  
4 that, not because the activities abroad took place in New  
5 York, but because of a well settled, long standing  
6 recognition that proceeds from really a different  
7 principle that the domiciliary state has the right to tax.

8 I think you're asking the question the wrong way  
9 because I think the constitutional question is what has  
10 New Jersey done that would justify New Jersey -- that is  
11 what is the relationship between New Jersey and what it is  
12 that it seeks to tax. And if there is none, I don't think  
13 it helps New Jersey to say well, the commercial domicile  
14 doesn't have all that much better a relationship. That is  
15 my response to the question.

16 The alternative is to abandon, it seems to me,  
17 what the Court has clearly held in a number of cases, both  
18 the sort of bedrock principle that there has to be nexus  
19 to the tax transaction and then the principle that was  
20 developed in the Mobil, Container line of cases that  
21 suggests that unitary business is sort of the bench mark.

22 And let me say about intangible income that  
23 until, as I understand it, until 1960 or so no one ever  
24 suggested that intangible income, dividends, interest,  
25 capital gains, was taxable anyplace except the commercial

1 domicile or some other, that is that income was always  
2 allocable to a single place. That's the tradition that's  
3 deeply rooted. Now you may say --

4 QUESTION: Excuse me, was that true even then  
5 with respect to income from non tangibles resulting from  
6 just short term investments and working capital?

7 MR. FREY: I think it probably is not true as to  
8 working capital, and I want to explain -- I mean, I think  
9 the Court in the Mobil, ASARCO, Container line of cases  
10 developed a very coherent tenable theory for understanding  
11 the question that is before the Court today that governs  
12 the outcome in this case. What the Court, the Court --  
13 the unitary business principle, as I am sure the Court  
14 understands, is a notion that a single business conducted  
15 in many states may have different components, that is you  
16 may have factories in one state, you may have stores in  
17 another state. They all contribute to the wealth of the  
18 combined business activity and therefore it is fair to  
19 look at those activities as a single business.

20 And in the Mobil case where the Court was  
21 dealing with dividends that Mobil earned from primarily  
22 ARAMCO, that is production in Saudi Arabia, it said  
23 Vermont could tax its apportioned share of that because in  
24 essence the oil production in Saudi Arabia and the  
25 ultimate sale of oil in Vermont and elsewhere were part of

1 a single business. Vermont could tax its share.

2 The Court said that the linchpin of  
3 apportionability, the linchpin is the unitary business  
4 concept. That is you, the way you go about deciding this  
5 is whether the businesses are unitary. Now along come  
6 ASARCO and Woolworth a year later and the Court looks at  
7 those cases, and in those cases again you had an  
8 investment in various subsidiaries that produce dividend  
9 income and other income to the parent. And the question  
10 was whether Idaho or New Mexico respectively could bring  
11 that dividend income into the business that was being  
12 conducted in Idaho or in New Mexico.

13 And the Court said no. The Court said, and I  
14 quote, we cannot accept, consistently with recognized due  
15 process standards, a definition of unitary business that  
16 would permit non domiciliary states to apportion and tax  
17 dividends where the business activities of the dividend  
18 payor have nothing to do with the activities of the  
19 recipient in the taxing state.

20 Now in this case it is conceded that there is no  
21 relationship between ASARCO's business and Bendix's  
22 business. You would think that that would be the end of  
23 the matter. However, the New Jersey Supreme Court says on  
24 page 18a of the Appendix, the tests for determining a  
25 unitary business are not controlled by the relationship

1 between the taxpayer recipient and the affiliate generator  
2 of the income. So we have the Supreme Court saying one  
3 thing about as clearly as it could, the U.S. Supreme  
4 Court, the New Jersey Supreme Court in this case saying  
5 the opposite of that as clearly as it could.

6 Now New Jersey says it really, the Supreme Court  
7 can't literally have meant what it said in ASARCO. Why  
8 can't it have meant? Because it says consider working  
9 capital. Working capital is an example of something the  
10 income from which has always been treated as being part of  
11 the operating income of a business, taxable where the  
12 business operates without regard to the fact that the bank  
13 or the United States Government or whoever may be  
14 producing that income, paying those dividends or that  
15 interest, has no unitary relationship with the business.  
16 And that of course is true. We don't disagree with that.

17 So we had this exception to the broad principle  
18 that was stated in ASARCO and the Court dealt with this  
19 exception in the Container case, which was the last case  
20 in this series of cases. The Court said there, as we made  
21 clear in another context, in corn products, and I want to  
22 talk about the corn products case for a minute, capital  
23 transactions can serve either an investment function or an  
24 operational function. So what you're really looking at is  
25 did this intangible asset that produced this income, was



1 it used in an investment way or was it used in an  
2 operating way. If it was used in an operating way then  
3 it's part of the operations that took place in part in New  
4 Jersey and that New Jersey may tax.

5 QUESTION: Isn't part of the problem of using  
6 that criterion that you never know for sure until the  
7 investment is closed out? I mean, you may have reasons  
8 for making the original investment, but in fact the way  
9 you use it depends in part on the way you use the  
10 proceeds.

11 MR. FREY: No, not at all. In fact that's one  
12 of the, the great fallacies in New Jersey's argument, is  
13 that you should look at what happened after the investment  
14 ceased being an investment and became money which might  
15 then be employed either in another investment or in the  
16 operations. I mean, this is the Martin Marietta thing.  
17 Our position is that it's quite clear that what you look  
18 at -- you're taxing the current income. You're looking at  
19 whether at the time this intangible income was generated  
20 it was being then and there used in some way, the  
21 intangible asset, in the operation of the business. So I  
22 don't think you have the problem. In fact what I think  
23 you have from the Mobil, Container line of cases, is a  
24 very coherent rule.

25 Let me just explain corn products if you're not

1 familiar --

2 QUESTION: Before you do that, Mr. Frey, would  
3 you comment a little, maybe you've already covered it,  
4 more specifically on what I understand to be the New  
5 Jersey Supreme Court's point that if you look at  
6 operations of the taxpayer, where the operations in a  
7 sense were acquiring and disposing of businesses --

8 MR. FREY: All right.

9 QUESTION: -- and that that's what makes this  
10 case a little bit different from ASARCO.

11 MR. FREY: That is an exception that I would  
12 recognize. You could have a line of business, such as  
13 let's say a mutual fund would have, of acquiring and  
14 selling intangible interests. That could be your  
15 business. If that was your business, then the income  
16 would be business income and you, the question you would  
17 ask in this case was whether the business of investment  
18 that was conducted, that line of business of Bendix, was  
19 conducted in part in New Jersey, in which case the profits  
20 from that business might be taxable.

21 The record in this case is unequivocally clear  
22 that there was no business of investment. I mean, Bendix  
23 was as far from a mutual fund or anything like that as I  
24 can imagine. It is true that during let's say the 10  
25 years prior to the ASARCO sale it engaged in a number of

1 acquisitions. Except for ASARCO every one of those  
2 acquisitions was operational, that is every one of those  
3 was a company that Bendix, that either became integrated  
4 in Bendix's existing operations, as with Fram auto filters  
5 or Autolite spark plugs and so on, the acquisition of  
6 those assets, or it was a line of business that Bendix  
7 itself operated. The only one that was a passive  
8 investment, which is a crucial concept here, was ASARCO.

9 So if they were in the business of -- in other  
10 words it's deceptive. And during this 10 years, I might  
11 add, there was only a single disposition. There were a  
12 lot of acquisitions. The acquisitions were operational.  
13 And I don't have a problem, and under the Court's  
14 decisions it is quite clear, if they acquire Fram auto  
15 filters in connection with their automotive business, they  
16 can operate it as a separate corporation and receive  
17 dividends, but the dividends that they receive will be  
18 part of their income if the business of Fram and the  
19 business of Bendix are unitary, which they would be in  
20 that case because there's an exchange of values between  
21 those businesses.

22 QUESTION: Where did the New Jersey Supreme  
23 Court get the idea that Bendix really was in the business  
24 of buying and selling interests in other corporations?

25 MR. FREY: I don't actually think that that is

1     what it was saying, although what it was saying is  
2     somewhat ambiguous. I --

3             QUESTION: Well, what was it saying?

4             MR. FREY: I think it was saying something a  
5     little different, which was that the investments that  
6     Bendix made, and it included the ASARCO investment in  
7     this, were functionally integrated or strategically  
8     integrated with the operations in terms of long term  
9     strategy of the company. The company had a strategy of  
10    acquiring and divesting intangible assets or companies.

11            QUESTION: Well, that isn't much different from  
12    what I said --

13            MR. FREY: No, no, it's not --

14            QUESTION: -- and that is the strategy of buying  
15    and selling interests in other business.

16            MR. FREY: I think it's quite different. You  
17    can have a line of business which is investments. It's  
18    your businesses, you have a lot of people who spend their  
19    time looking for good investments --

20            QUESTION: Well, however you put it, where did  
21    it get that idea?

22            MR. FREY: Well, in part it may have gotten that  
23    idea from New Jersey's counsel, although they sort of hint  
24    at it without suggesting --

25            QUESTION: Well, was there, is that a -- isn't



1       that sort of a factual question?

2               MR. FREY:  If you say sort of, it is sort of a  
3       factual question, but it is not a question --

4               QUESTION:  Where did this case start?

5               MR. FREY:  Where did it start?

6               QUESTION:  Yeah.

7               MR. FREY:  In the tax court.  It started with an  
8       audit followed by the tax court.

9               QUESTION:  In the State of New Jersey?

10              MR. FREY:  In the State of New Jersey.

11              QUESTION:  And then it went to -- and there was  
12       a record made there?

13              MR. FREY:  There is actually a stipulated record  
14       in this case, pretty much.  There's a lengthy stipulation  
15       which is in the Joint Appendix.

16              QUESTION:  And in, out of that did the, you  
17       think the New Jersey court concluded what it did from the  
18       joint stipulation?

19              MR. FREY:  I think so.  I think so.  But I don't  
20       think it concluded --

21              QUESTION:  And we just have to say, if you win  
22       we have to say they just drew the wrong inference from the  
23       factual, from the stipulation?

24              MR. FREY:  Well, it's not clear what inference  
25       they drew.  I mean, I do not believe they really drew the

1 inference that Bendix was in the business of investments.

2 QUESTION: Well, you have to. They purport to  
3 give a reason and in order to us, for, to reject it we  
4 have to know what it was.

5 MR. FREY: Well, I think the reason that they  
6 give ultimately is the very same --

7 QUESTION: Or I guess we could say they gave no  
8 reason at all.

9 MR. FREY: Oh, no, they -- well, I think the  
10 reason that they give is -- somebody once said that words  
11 are the outer shell of ideas, and the words that the New  
12 Jersey Supreme Court --

13 QUESTION: Who was that, do you think?

14 MR. FREY: I'm not sure who it was. I thought  
15 about it, I didn't go to my --

16 QUESTION: You thought it was --

17 QUESTION: It was Holmes.

18 MR. FREY: Holmes. All right. In this case the  
19 words are the outer shell of no idea. The concept that  
20 the New Jersey Supreme Court was promulgating here has  
21 several difficulties. One is it is completely  
22 meaningless. I do not understand what they are talking  
23 about except that it sounds to me like what they are  
24 saying is precisely what this Court rejected in ASARCO.

25 QUESTION: In ASARCO, exactly.

1 MR. FREY: Precisely what this Court rejected in  
2 ASARCO.

3 QUESTION: Well, it sounds to me, as I read the  
4 State's brief in this case it seemed to be arguing more  
5 from the dissent in ASARCO than the majority view.

6 MR. FREY: Right, although much of the dissent  
7 in ASARCO I would not have to take issue with at all in  
8 order for there to be a reversal in this case. That is in  
9 the dissent there was a substantial emphasis on the fact  
10 that ASARCO there was drawing upon its knowledge and  
11 expertise in the non ferrous metals business in making its  
12 investment, that ASARCO had a substantial --

13 QUESTION: Well, it was a closer case there than  
14 here perhaps.

15 MR. FREY: Closer case there than here. And  
16 what, what I believe -- there is a part of the dissent, I  
17 think in all fairness, that suggests that the unitary  
18 business inquiry should essentially be discarded. But I  
19 think if the Court made anything clear in that line of  
20 five cases it was that the unitary business interest is  
21 the principle test.

22 We have this exception for working capital, and  
23 the corn products exception was a situation where a  
24 company which surprisingly produced products from corn was  
25 concerned about assuring stability in future prices and

1 therefore it purchased corn futures as a way of assuring  
2 that when it needed corn it would have them, have the corn  
3 at a stable price. And the Court there, that was a  
4 Federal income tax case, but the concept that's involved  
5 is that that was part of the ordinary course of the  
6 operation of the company's business and therefore was not  
7 a capital transaction that was subject to capital gains.

8 So we have, I think, a very coherent concept  
9 that comes out of the Mobil, Container line of cases.

10 QUESTION: Mr. Frey, did Bendix ever return,  
11 include in its gross income for New Jersey tax purposes  
12 the dividends that it received from the ASARCO sale?

13 MR. FREY: It did include the dividends and it  
14 tried to --

15 QUESTION: Mistakenly, I suppose?

16 MR. FREY: Mistakenly. I think it's clear --

17 QUESTION: Because you agree the same rule  
18 should apply to the dividends as applies to the capital  
19 gains?

20 MR. FREY: The Court made that clear in one of  
21 these five cases, I forget which one, that there was not a  
22 distinction.

23 QUESTION: ASARCO.

24 MR. FREY: Let me just say that the key  
25 attributes that the Court has looked at in deciding



1 whether the dividend income is taxable are first of all  
2 the unity of business, is it in the same line of business,  
3 is there a functional integration between the businesses.  
4 Secondly, the presence of control or potential control,  
5 which was crucial in ASARCO and was a bone of contention  
6 between the majority and the dissent. There is no  
7 question here that Bendix had no control over ASARCO.

8 Thirdly, whether the investment is operational  
9 or passive. If an investment is passive it's, the Court  
10 has thought of it as not being part of the unitary  
11 business. The Court said in Container a unitary business  
12 finding was impermissible because the partial subsidiaries  
13 were not subject to even minimal control by ASARCO, it was  
14 explaining the ASARCO case, and were therefore passive  
15 investments in the most basic sense of the term.

16 This was a passive investment. It was a place  
17 to park money that Bendix did not choose to use in its  
18 operation --

19 QUESTION: The New Jersey Supreme Court didn't  
20 regard it as a passive investment, did it?

21 MR. FREY: Excuse me?

22 QUESTION: The State Supreme Court did not  
23 regard it as a passive investment?

24 MR. FREY: Well, I don't think they would regard  
25 anything as a passive investment. I think if you apply

1     their test there is nothing -- I think their test is  
2     precisely what ASARCO rejected and --

3             QUESTION: I thought you said you couldn't tell  
4     what their test was.

5             MR. FREY: Well, to the extent -- I guess I  
6     could say that I can't tell whether they thought, although  
7     I think there's no basis in the record that Bendix had a  
8     mutual fund business on the side in addition to its  
9     automotive and aerospace businesses --

10            QUESTION: Well, it's not a mutual fund business  
11    on the side, but they said that the chief executive -- I  
12    guess he testified, didn't he? You said it was all  
13    stipulated, but I thought he testified at some length  
14    about his success in acquisitions --

15            QUESTION: There was deposition. There wasn't a  
16    trial, but there was a deposition that was introduced, and  
17    it's clear, and it's clear I think in every case, I mean,  
18    that doesn't distinguish an investment function from an  
19    operational function for an intangible asset. Any \$100  
20    million investment, even if it's a pure investment, the  
21    chief executive of the company is going to think about it  
22    and make the decision whether to make it. The fact that  
23    part of the day he was thinking about the ASARCO  
24    investment and part of the day he was thinking about the  
25    aerospace business doesn't make them unitary. It can't

1 be, otherwise you've destroyed the concept.

2 QUESTION: It may not be unitary, but it may be  
3 that that's a line of business, that's a separate line of  
4 business that the company is running, namely buying and  
5 selling interests.

6 MR. FREY: Well, (a) everything else -- I do  
7 want to reserve some time for rebuttal, though I'll just  
8 answer the question. These other acquisitions were  
9 operational acquisitions that were used in the business of  
10 the company. They were not investment acquisitions. They  
11 were operational acquisitions. This was a distinct unique  
12 investment. It stands out like a sore thumb from all of  
13 these other items. And to say that because you had this  
14 unique transaction in ASARCO you had a business of  
15 investment, a line of business -- and then how did that  
16 business get transacted in New Jersey? If you had a  
17 separate line of business that involved the purchase of  
18 ASARCO, where is the showing that that line of business  
19 occurred in New Jersey?

20 I would like to reserve the remainder of my time  
21 if I may.

22 QUESTION: Very well, Mr. Frey. Ms. Hamill,  
23 we'll hear from you.

24 ORAL ARGUMENT OF MARY R. HAMILL

25 ON BEHALF OF THE RESPONDENT

1 MS. HAMILL: Mr. Chief Justice, and may it  
2 please the Court:

3 I would like to just address very briefly some  
4 of the points made by Mr. Frey, and then proceed with my  
5 argument. Mr. Frey states that the question to be decided  
6 is whether Bendix's investment in ASARCO was an  
7 operational or a passive capital transaction. We agree  
8 with that formulation. That is the precise question, or  
9 one of the precise questions. And in our view it was very  
10 plainly operational.

11 Justice White I believe asked where New Jersey  
12 got the idea, the New Jersey Supreme Court got the idea  
13 that Bendix was in the business of buying and selling  
14 companies. The record is very clear that from 1965, the  
15 point at which we started, we got the annual reports of  
16 Bendix, to 1982 when Bendix was essentially acquired by  
17 Martin Marietta, Bendix made 40 acquisitions, disposed of  
18 11 companies, bought operating assets such as the Ford  
19 Motors, the Autolite trademark spark plug and trademark,  
20 and bought the ASARCO stock.

21 Mr. Frey says well, all those investments were  
22 operating, control situations, all of them in the same, in  
23 related lines to what Bendix was always doing. It is true  
24 that those other acquisitions were acquisitions of the  
25 full corporate assets, the control of the company, but it



1 is not true that they were all in the same lines of  
2 Bendix's initial businesses. 1965, Bendix bought the  
3 stock of United Geophysical Corporation. United  
4 Geophysical Corporation was in seismic surveying. 1970,  
5 Bendix bought the American Forest Products Corporation.  
6 Before that Bendix had no --

7 QUESTION: Don't you agree that except for the  
8 ASARCO acquisition that those, all of those other  
9 acquisitions, all of those other companies in which they  
10 acquired interest either totally or partially, all of them  
11 could have been justifiably found to be a unitary business  
12 with Bendix?

13 MS. HAMILL: Oh, no, Your Honor, absolutely not.  
14 When Bendix bought American Forest Products Company it had  
15 no forest products business. It was a completely new  
16 venture, a completely new line for Bendix.

17 QUESTION: Well, I know, but they stepped in and  
18 ran it, didn't they?

19 MS. HAMILL: That's true, but --

20 QUESTION: When they stepped in and ran it it  
21 became part of their business.

22 MS. HAMILL: Absolutely. That's absolutely  
23 true. But if you look at what you, the Court talked about  
24 it ASARCO and Woolworth, were there flows of value between  
25 Bendix Forest Products and what Bendix was doing in New

1 Jersey, for instance, you would be hard put to find them.

2 QUESTION: Well, I bet New Jersey claimed their  
3 share of Bendix's income from those subsidiaries --

4 MS. HAMILL: It did, and --

5 QUESTION: -- on the grounds that it was, they  
6 were unitary.

7 MS. HAMILL: And Bendix didn't object.

8 QUESTION: Isn't that right?

9 MS. HAMILL: That's absolutely right. And  
10 Bendix did not object to that. Bendix has not objected to  
11 the inclusion of any of the income from the operating  
12 businesses, the four lines of business, despite the fact  
13 that all that Bendix did in New Jersey was to operate the  
14 three units of its aerospace and one unit of its  
15 industrial energy.

16 QUESTION: Well, but Mrs. Hamill, it seems to me  
17 that both Container Corporation case and ASARCO case  
18 majorities did look to operational ties, not just  
19 investment ties, between the two corporations. I mean,  
20 the focus it seems to me of those opinions was that you're  
21 not going to be able to tax it under the unitary  
22 apportionment formula unless there is some kind of  
23 operational ties. Now, I was in the dissent in both  
24 cases, but I think you have to face up to the fact that  
25 those cases did look to those operational ties, and you

1 don't have that here, do you?

2 MS. HAMILL: Not the same way.

3 QUESTION: No.

4 MS. HAMILL: But what we say you do have,  
5 Justice O'Connor, is a company that operated the way we  
6 believe many companies operate today, using its  
7 investments interchangeably with its manufacturing lines.  
8 When it sees the ability to earn money in the short term  
9 money market it will put the money there. When it sees  
10 the opportunity of diversifying into an area that's going  
11 to generate capital for another line, which was one of the  
12 reasons, rationales for the ASARCO investment, it will go  
13 into that line. And the scope of the unitary business  
14 which is what the Court talked about in Container is that  
15 entire business, one aspect of which plays on the other  
16 contributes to the other.

17 QUESTION: You say then that for Bendix, maybe  
18 presumably at one time making washing machines was just a  
19 means to an end of making money.

20 MS. HAMILL: We -- I know what you're saying,  
21 and we're trying to say that we don't have to go quite  
22 that far, that what we're looking at is how these  
23 investments played with each other, the way that the CEO  
24 of Bendix viewed the assets of the corporation as pools of  
25 assets to be used interchangeably. And he wrote an

1 article in the New York Times which is in the Joint  
2 Appendix stating that philosophy. That was his philosophy  
3 of managing this company. And we believe many  
4 corporations do that.

5 We believe the problem, Justice O'Connor, with  
6 ASARCO is we see that it just doesn't comport with any  
7 kind of economic reality.

8 QUESTION: Well, you don't have to convince me  
9 about the problems.

10 (Laughter.)

11 QUESTION: I think you have some other people -

12 -

13 MS. HAMILL: I'm sorry, I thought from your  
14 earlier question I did have to convince you. The problem  
15 with ASARCO and Woolworth is the fact that you, we're put  
16 into a straight jacket of looking only at whether there  
17 are operating ties, control between the issuer of stock  
18 that generates a capital gain or a dividend or whatever,  
19 and the taxpayer operating in the taxing state, control -

20 -

21 QUESTION: So it's the position of the State,  
22 and I take it of the State Supreme Court, that the  
23 position that it reached is in considerable tension with  
24 ASARCO?

25 MS. HAMILL: Yes. There's no question that we,



1 we think ASARCO was wrongly decided. We think it was  
2 wrongly decided for three reasons. One is this  
3 requirement of a relationship between the payor and payee  
4 of investment income, which really fragments the  
5 corporation. You go around looking for some relationship  
6 between ASARCO and Bendix when we're not taxing ASARCO.  
7 We're trying to tax Bendix. That's one problem.

8 The other problem which I think is related is  
9 the inference in ASARCO and Woolworth that -- and Mr. Frey  
10 was really talking about this -- that once you get by the  
11 nexus jurisdictional issue under the due process clause,  
12 that the next question is whether the income itself that  
13 you're talking about has some relation to the taxing  
14 state. And we believe that once you show that what's in  
15 the taxing state and what is outside the taxing state is  
16 part of a unitary business, if the unitary business  
17 principle means anything, you don't have to go any further  
18 because we can't show, the majority of times the state is  
19 not going to be able to show a direct monetary flow, a  
20 direct relationship between the investment and the state.

21 QUESTION: I guess I don't know what you mean by  
22 a unitary business. I guess -- is every business that's  
23 owned by the same company part of a unitary business?

24 MS. HAMILL: Yes.

25 QUESTION: Is that the only condition?

1 MS. HAMILL: Yes. We would say because --  
2 QUESTION: So there's really no inquiry to be  
3 made at all.  
4 MS. HAMILL: That's -- yes --  
5 QUESTION: So long as it's owned by the same  
6 corporation.  
7 MS. HAMILL: Yes, that's right.  
8 QUESTION: That's what I thought.  
9 MS. HAMILL: That is New Jersey's position. And  
10 I'd like to say otherwise. I'd like to tell you that we  
11 could say well, let's look for an operational strategy,  
12 and once we --  
13 QUESTION: And I would have given you a hard  
14 time because I think you really are saying, you really are  
15 saying anything owned by the -- see, even the forest  
16 products business, for example, I don't know why they paid  
17 you taxes on that. Why, why was that? If Bendix had, you  
18 know, a forest in the Amazon and that business doesn't  
19 contribute to its other, its other automotive or aerospace  
20 operations at all, you would still consider that part of  
21 the unitary business because it's owned by Bendix?  
22 MS. HAMILL: Yes, we would. And the very fact  
23 that we don't know why they did points up this problem.  
24 And without 237 interrogatories with subparts, 10  
25 depositions, and a document request, we don't know why

1 they agreed to pay us the income related to the forest  
2 products operation --

3 QUESTION: But they did.

4 MS. HAMILL: But they did. They did.

5 QUESTION: That's a California parking lot,  
6 isn't it? I mean, that's what --

7 MS. HAMILL: Yeah. And the -- let me just talk,  
8 that's another point I wanted to get to. The California  
9 parking lot could perfectly well be unitary. In Butler  
10 Brothers v. McColgan the Court had quite, quite similar  
11 situation, with, that was the wholesale distributing  
12 houses that operated in seven states, quite fragmented,  
13 operating loss in California, the taxing state, and the  
14 Court says well, but still that, those other businesses  
15 contributed to what went on in California and they  
16 contributed because there was a central buying division,  
17 there was centralized management and centralized  
18 ownership. So you go from the out-of-state subsidiary,  
19 the out-of-state divisions there to the central corporate  
20 control and management.

21 And that's really what we're saying here, that  
22 once you have somebody like the Bendix planning  
23 department, the CEO of Bendix, William Agee, writing memos  
24 to the board saying, you know, we've got to grow in the  
25 1980's, we've grown in the past, growth has been a

1 strength for Bendix, the only way we can grow is to make  
2 acquisitions. We need money for aerospace. The way we're  
3 going to get money is we're going to invest in copper,  
4 there's going to be a worldwide shortage of copper, copper  
5 prices are going to go through the roof. ASARCO was  
6 simply a basket of commodities. You buy that stock,  
7 copper price goes through the roof, you sell it, and lo  
8 and behold they tender for Martin Marietta which is  
9 exactly what the strategy was.

10 QUESTION: Mrs. Hamill, surely the Court must  
11 have had something in mind when it, in the cases like  
12 Mobil it says well, if you're a unitary business this kind  
13 of a tactic suggested that there were such entities as non  
14 unitary businesses. You don't think there were any such?

15 MS. HAMILL: Well, we could, I could give you  
16 some examples of, or one example that comes to mind of  
17 what might be a non unitary business, but the problem is  
18 this line drawing, and how is the Court going to help this  
19 situation if every time to find out whether there's a  
20 unitary business we have to go through the process we went  
21 through here. We have back in New Jersey IBM, WR Grace,  
22 TRW, American Home Products, Mobil Oil, all sitting,  
23 waiting --

24 QUESTION: Well then you're suggesting not just  
25 that we overrule ASARCO, but that we go back further than



1       that to cases like Mobil?

2               MS. HAMILL: Mobil -- again, there's this very  
3       serious problems with the record in Mobil as we read it,  
4       and there really was no evidence of the way the investment  
5       was linked to Mobil's operations, and so the Court looked  
6       at operations. I guess what you're question though, Your  
7       Honor, is is what do we do with the unitary business  
8       principle? Does it exist at all? And I think it's --

9               QUESTION: I had always thought it was in contra  
10      distinction to some other type of business, a non unitary  
11      business. But you don't even use the word, need the word  
12      unitary under your analysis.

13              MS. HAMILL: I'm really hard pressed -- let me  
14      give you the one, maybe -- here's an example. Say you had  
15      a company that, A, that goes out and buys company B, and  
16      company B owns the stock of company C, and C's business  
17      has absolutely no relationship to A's, and A didn't really  
18      intend to get C. So as soon as it gets C it sells, as  
19      soon as it gets B it sells the stock of C. There is no  
20      corporate strategy, there is no operational link. There  
21      is absolutely nothing, and it just turns the money over to  
22      the shareholders and says okay.

23              QUESTION: Well, you wouldn't say, though, that  
24      there's a unitary business between a company A that buys  
25      six shares of company B, and they will end up owning one

1 1/1000th of a percent of the company. Don't you at least  
2 have to, wouldn't you require to find it unitary that they  
3 at least had the potential of control?

4 MS. HAMILL: No, Your Honor. Control makes  
5 absolutely no difference.

6 QUESTION: It doesn't make any difference how  
7 much of a company they buy?

8 MS. HAMILL: That's exactly right.

9 QUESTION: Then it's a unitary business.

10 MS. HAMILL: That's right, because the company  
11 is not, it just defies logic and common sense to say a  
12 company is going to go out and buy 20 shares, 30 shares of  
13 IBM for no reason, no reason connected with its  
14 operations.

15 QUESTION: Well, they want to make money. They  
16 want to make money and they think this is a good  
17 investment.

18 MS. HAMILL: Well, but that's why they put money  
19 in, say they put it in the short term money market, they  
20 put it into Treasury bills. Everybody agrees Treasury,  
21 income from short term investments is apportionable  
22 because it's making money, it's a use of your idle cash.  
23 You can't distinguish between that and buying 20 shares of  
24 IBM.

25 QUESTION: Or buying, or paying \$200 million and

1 some for a piece of --

2 QUESTION: May I go back to your forest products  
3 example, an entirely separate operation out on the west  
4 coast. I can understand why they might include it on  
5 their tax return, because it doesn't necessarily increase  
6 their tax because their base goes up when they include  
7 these other businesses too. Don't you have the three  
8 factor formula where the land, I mean assets, wages, and  
9 all are part of the computation?

10 MS. HAMILL: Yeah, but there, it's only --

11 QUESTION: So it's possible that by putting in  
12 another business you might actually reduce the tax because  
13 your base goes up. Isn't that true?

14 MS. HAMILL: No, because you're putting it into  
15 the income base.

16 QUESTION: What if it lost money out there, to  
17 take an easy example?

18 MS. HAMILL: Taking it and you had lost money?  
19 Yes, I suppose that's -- yes, that's possible.

20 QUESTION: And they get the benefit of all the  
21 assets in the formula and they would have a much lower  
22 rate of return on their income.

23 MS. HAMILL: That's possible.

24 QUESTION: But if it's totally separate and all,  
25 there's no problem of accounting for the income from that

1 and accounting for the business in New Jersey, the reason  
2 why the unitary business concept was developed simply  
3 doesn't apply. The reason for it was to take care of the  
4 case in which you cannot determine where the income comes  
5 from. And when you can determine it precisely, in our  
6 forest products example, I'm not quite clear on why it's  
7 so obvious to you that that's part of the unitary  
8 business.

9 MS. HAMILL: Because --

10 QUESTION: I mean, you have to ask the basic  
11 question. Why do we have a unitary business concept?

12 MS. HAMILL: Because it seems to me that once  
13 it's in the same corporate shell, once it's being managed  
14 by the same corporate management, it's being -- there have  
15 to be flows of value. You have to assume that they're  
16 there. We can't delve into these facts in every one of  
17 these cases. It's an unworkable proposition.

18 QUESTION: You can't in every case, but the  
19 assumption that gave rise to the unitary business concept  
20 was that there were cases where you couldn't find out, and  
21 therefore you had to adopt some kind of a gross approach  
22 and then use a formula. But when you can identify the  
23 income precisely and without any problem of accounting, I  
24 don't understand why you need to get to the unitary  
25 business.



1 MS. HAMILL: But Justice Stevens, I'm not sure  
2 that -- that was the original formulation of the  
3 principle.

4 QUESTION: Right.

5 MS. HAMILL: I'm not really sure that's the way  
6 the Court was looking, has been looking at it. If that  
7 were the case a non domiciliary state would never be able  
8 to tax dividend income because you'd always know that it  
9 came from a separate payor, that wasn't operationally  
10 linked -- you'd always know where it's coming from, that  
11 kind of investment income. You can always source it to a  
12 particular corporation. But if that --

13 QUESTION: No, but you say it's part of the cash  
14 flow that they use in running the business within the  
15 state, it's part of the things that they rely on for  
16 operational purposes regularly.

17 MS. HAMILL: But that's what we're saying in a  
18 grander scale with the ASARCO investment, that it was part  
19 of this long standing business function of growth and  
20 developing the Bendix company into a diversified  
21 manufacturer. The ASARCO proceeds were intended to be  
22 used to get into, further into aerospace.

23 QUESTION: The business of owning a lot of  
24 separate businesses, but that just destroys the unitary  
25 business concept. I mean, if you say that you can be in

1 the unitary business of owning separate businesses,  
2 there's no such thing as the unitary business concept.  
3 It's gone.

4 MS. HAMILL: I think it's gone. I have to agree  
5 it's gone. But you've got to do something that's  
6 economically real. And what we have with ASARCO and  
7 Woolworth, it may be a bright line, insofar as they tell  
8 us it's workable, it certainly is workable. But it's just  
9 grossly unfair and it really fragments the principle. We  
10 aren't getting, we aren't getting a fair crack at large  
11 amounts of investment income when companies are operating  
12 through investments, where for whatever reason investments  
13 are a very major part, I mean -- Woolworth --

14 QUESTION: The domiciliary state can tax. It's  
15 not as though it won't get taxed. It will get taxed. The  
16 question is whether New Jersey, simply by reason of the  
17 fact that one of the many separate businesses is conducted  
18 in New Jersey, should be able to tax on the basis of all  
19 of the other separate businesses. That's what I thought  
20 the unitary concept was directed at.

21 MS. HAMILL: But then you're preferring, you're  
22 preferring the headquarters state simply because the  
23 company is there, this sort of notion of domicile. But  
24 why? That's not consistent with the way companies --

25 QUESTION: It has always been done that way. I

1 don't know why.

2 QUESTION: Well, if we were to agree with you  
3 and overrule ASARCO or say that the unitary business  
4 concept is completely unworkable, would it follow that  
5 there would be double taxation so that the domiciliary  
6 plus New Jersey could tax, or would it, or would we have  
7 to adopt a tandem doctrine saying that the domiciliary  
8 state is limited accordingly?

9 MS. HAMILL: Is limited to what, Your Honor?

10 QUESTION: Is somehow limited so that there  
11 would be no double taxation.

12 MS. HAMILL: Oh. There is a potential for  
13 double taxation, there is no question, because the, some  
14 of the states' statutory schemes give the domiciliary  
15 state the right to tax all so-called non business income.

16 QUESTION: And I take it we have said that that  
17 does not offend due process, or have we?

18 MS. HAMILL: Well, I think you've -- there's  
19 some question, I believe it's in Mobil, as to whether, if  
20 that came to pass whether you would necessarily prefer the  
21 domiciliary state over the states where the company does  
22 business and earns its income. So you would apportion it.

23 QUESTION: Let me put it this way. I take it  
24 there is no line of doctrine in our jurisprudence so far  
25 that would permit us to say that there could be no double

1       taxation were we to overrule ASARCO.

2               MS. HAMILL:   That there could be no double  
3       taxation?

4               QUESTION:   Well, if we rule for you is Bendix  
5       subject to double taxation, once in New Jersey and once in  
6       the domicile, or does it have a due process objection?

7               MS. HAMILL:   I don't think it does.   I mean, I  
8       think at that --

9               QUESTION:   I don't think it does either.

10              MS. HAMILL:   -- point I think it's a question,  
11       it's a question for the next case when you really have the  
12       record to show if there's double taxation.   It's  
13       remarkable, but that was not an issue in Mobil, not an  
14       issue in ASARCO, not an issue in Woolworth, not an issue  
15       here.   One begins to wonder whether a lot of  
16       multinationals locate their corporate headquarters in a  
17       state that apportions all income, which is the case with  
18       Michigan.   Bendix apportioned that capital gain to  
19       Michigan, and now claims New Jersey can't tax any of it.

20              I think maybe that gets to the question of  
21       fairness.   We are really just saying that since there is  
22       no double taxation, since all we're taxing is about 3/4 of  
23       a percent of this gain, since Bendix was clearly in New  
24       Jersey to the extent of 8 percent of its net income, the  
25       three factor apportionment formula in New Jersey yielded a



1 percentage of 8 percent. It's just not unfair to permit  
2 us to tax less than 1 percent of this ASARCO gain.

3 QUESTION: Mrs. Hamill, there's another side to  
4 this too. Let's suppose that the forest business is a  
5 good profit making business and let's assume it's in  
6 Tennessee or something. And Tennessee wants, does not  
7 want to -- and the other businesses of Bendix are not very  
8 profitable for this year. Tennessee says this forestry  
9 business is a totally separate business. This is not a  
10 unitary business, and we want to tax the forestry business  
11 on the assumption that it's all in Tennessee, and we don't  
12 have to take into account the losses from the other  
13 enterprises. Can they do that or not?

14 What I'm suggesting is that your everything is  
15 unitary approach does not always help the states. It  
16 sometimes helps them, it sometimes hurts them. Wouldn't  
17 Tennessee be hurt by that example I just gave?

18 MS. HAMILL: If the forest products was in  
19 Tennessee and Tennessee wanted to tax it all, and we think  
20 --

21 QUESTION: They tax it all. They say look it,  
22 this business has nothing to do with -- I know Bendix owns  
23 other businesses, but this business makes all its profit  
24 here, all of -- we don't want to have to apportion  
25 anything. We don't want to take into account the losses

1     that Bendix makes elsewhere.

2                 MS. HAMILL: I think once you've decided that  
3     what is in the business is presumptively part of the  
4     unitary business Tennessee would have to apportion.  
5     Tennessee could not then grab it all.

6                 QUESTION: Right. You'd say that.

7                 MS. HAMILL: Yeah. I think that would be the  
8     result.

9                 QUESTION: Well, I don't think they'd like that  
10    in Tennessee, you know.

11                MS. HAMILL: Well --

12                QUESTION: I don't know why they should have to  
13    pay for the losses in New Jersey. The whole business is  
14    just run out of Tennessee, it has no connection with the  
15    other states.

16                MS. HAMILL: But again, the same theory. I mean  
17    our theory, if you bought into this theory, would let,  
18    would say to Tennessee, well, you know, we're sorry, but  
19    you've got to apportion because constitutionally that's  
20    the rule. These businesses are truly indivisible. You  
21    just can't chop them up and say okay, this segment of  
22    income is related to what Bendix is doing in New Jersey,  
23    but this segment of income is not, when William Agee and  
24    the Bendix planning department are managing this entire  
25    thing to diversify, to grow the company. Let's talk also

1 a little bit about the way Bendix --

2 QUESTION: Is that what New Jersey does? Does  
3 New Jersey tax all of the subsidiaries that operate in New  
4 Jersey on a unitary basis?

5 MS. HAMILL: No, we, no -- let me be very clear  
6 about that. We don't use combined reporting in New  
7 Jersey, so we don't include the subsidiaries of, the  
8 income of the subsidiaries in the tax base. We take the  
9 dividends from the subsidiaries and we say under our  
10 statute dividends from subsidiaries that are 80 percent or  
11 more owned, i.e. wholly-owned or down to 80 percent, are  
12 excluded entirely from the base. Dividends from  
13 subsidiaries less than 80 percent owned are included in  
14 the base to the extent of 50 percent, then apportioned  
15 using the three factor formula.

16 So Bendix, as it was going along with the ASARCO  
17 investment those 3 years, gave us 50 percent of the ASARCO  
18 dividends, applied its 8 percent apportionment factor,  
19 applied the 9 percent tax rate, and gave us that. Not a  
20 very big bite.

21 QUESTION: And they never asked for it back, I  
22 guess?

23 MS. HAMILL: Well, they say they missed the  
24 statute of limitations and they --

25 QUESTION: I see.

1 MS. HAMILL: And then when we -- and we point  
2 out also that they never complained about including the  
3 value of the ASARCO stock --

4 QUESTION: Maybe they got a new lawyer too.

5 (Laughter.)

6 MS. HAMILL: They also included the value of the  
7 ASARCO stock in the net worth base of the tax, and they  
8 say well, that's too small, they don't really have to  
9 worry about that. But we apportion net worth. It's  
10 essentially book equity, just the way we apportion net  
11 income.

12 They concede that they deducted the interest  
13 incurred on the borrowing to purchase the ASARCO stock  
14 against their unitary net income. They say they did that,  
15 in the reply brief, because the statute permits it. Well,  
16 the statute requires it. The statute also requires that  
17 they include all their income. And so I don't know where  
18 they get with that argument.

19 QUESTION: Do you think, do you think you can  
20 win this case without overruling ASARCO and this line of  
21 cases?

22 MS. HAMILL: I think you have to overrule the  
23 principle in ASARCO. I think the holding, because of the  
24 factual, the enormous difference in the factual records  
25 here and there, I think you can stick with the holding,



1 because what Idaho was arguing was very close to what  
2 we're arguing. There's no question that it was arguing  
3 that all of, that these investments contributed to the  
4 overall profitability of the company, but they never, they  
5 just didn't have the record. It wasn't there.

6 We didn't have the memos from William Agee. We  
7 didn't have a history of corporate acquisitions. We  
8 didn't have William Agee and another Bendix director  
9 sitting on the boards of some of the, of southern Peru and  
10 MIM, or at least the record doesn't show it, and then  
11 making an offer to buy all the rest of the stock that  
12 ASARCO didn't own in southern Peru and MIM. There was a  
13 very active aspect of this investment. That's totally  
14 different from what you had before you in ASARCO.

15 We obviously learned our lesson from ASARCO. I  
16 mean, we couldn't possibly begin to -- and so did Bendix.  
17 I mean, Bendix amended its position and began to dispute  
18 the includability of the ASARCO gain as soon as this  
19 Court's decision in ASARCO and Woolworth came down. So I  
20 think you ought to be able to stick with it, with the  
21 naked holding, but the principle you certainly have to  
22 reject, it seems to me. It seems to me that -- oh, I see  
23 my time is just about up.

24 It really may be time for the Court to recognize  
25 and go back to fundamental due process principles, that if

1 the company is doing business in the state, the company is  
2 presumptively indivisible, that the state should be able  
3 to tax the entire income subject to apportionment.

4 Problems will arise, and they should be dealt with through  
5 the apportionment formula. And I know, Justice Stevens,  
6 you have talked in your Mobil dissent about putting into  
7 the factor the factors of the payors of the dividend  
8 income. We don't think that's the solution, because again  
9 then you're looking at the activities of the other  
10 company.

11 But one problem with the three factor formula as  
12 it now works is that it doesn't include intangible  
13 property at all. It was devised for manufacturing  
14 companies, so the value of the ASARCO stock is not  
15 reflected in the property factor of the three factor  
16 formula. The payroll and the receipts include apportion  
17 of the ASARCO, the receipts include the ASARCO gain, the  
18 payroll includes the management effort, whatever went into  
19 managing the ASARCO investment. But there is nothing in  
20 the property factor that reflects this enormous value  
21 which was contributing.

22 It was not big enough to create much difference  
23 in New Jersey in this tax year, but in some years it can.  
24 I mean, you can have a huge investment portfolio that is  
25 generating 90 percent of the company's income, the way it

1 was in Woolworth, the Woolworth case, and not have the  
2 value of that, those assets reflected in the property  
3 factor.

4 Thank you.

5 QUESTION: Thank you, Mrs. Hamill.

6 Mr. Frey, you have 1 minute remaining.

7 REBUTTAL ARGUMENT OF ANDREW L. FREY

8 ON BEHALF OF THE PETITIONER

9 MR. FREY: All right, I'll try to speak very  
10 quickly then. The forest products business was included  
11 in the New Jersey return in part because actually forest  
12 products were sold in New Jersey even though they weren't,  
13 didn't own forests in New Jersey.

14 QUESTION: They were what?

15 MR. FREY: They were sold. Some of the products  
16 that Bendix made were --

17 QUESTION: I see.

18 MR. FREY: -- sold in New Jersey. So New Jersey  
19 did have tax nexus over that part of the business. I  
20 thought that Ms. Hamill came close to admitting what I  
21 think is implicit in their position, ASARCO and Woolworth  
22 would have to be overruled and the analysis of Mobil and  
23 Container would have to be jettisoned in order for them to  
24 prevail in this case.

25 Now, Justice O'Connor, you said that she didn't

1 have to convince you, but she should have to convince you  
2 because, as you pointed out in Shiner, maybe you wouldn't  
3 have decided Arrow Mayflower the way it was decided, but  
4 that doesn't mean you should change it. This is a viable  
5 system that we have had for a long time.

6 The Uniform, the Termination of Income for Tax  
7 Purposes Act, UTITPA, addresses this subject and it's  
8 adopted in many, many states. And it says that in order  
9 for the income to be business income, and therefore part  
10 of the business and taxable, it has to be an integral part  
11 of the taxpayer's regular trade or business operations.  
12 This income clearly --

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frey.

14 The case is submitted.

15 (Whereupon, at 11:47 a.m., the case in the  
16 above-entitled matter was submitted.)  
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CERTIFICATION

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

NO. 91-615 - ALLIED-SIGNAL, INC., AS SUCCESSOR-IN-INTEREST TO THE BENDIX CORPORATION, Petitioner V. DIRECTOR, DIVISION OF TAXATION

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Michelle Sanders

(REPORTER)