

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: April 22, 1992

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SUPREME COURT, U.S.
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1 IN THE SUPREME COURT OF THE UNITED STATES

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

9 - - - - -X
10 Washington, D.C.
11 Wednesday, April 22, 1992

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 12:59 p.m.

15 APPEARANCES:

16 WALTER HELLERSTEIN, ESQ., Athens, Georgia; on behalf of
17 the Petitioner.
18 MARY R. HAMILL, ESQ., Deputy Attorney General of New
19 Jersey, Trenton, New Jersey; on behalf of the
20 Respondent.

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

2 (12:59 p.m.)

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

6 Mr. Hellerstein.

7 ORAL ARGUMENT OF WALTER HELLERSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. HELLERSTEIN: Mr. Chief Justice and may it
10 please the Court:

11 The essential question now before this Court is
12 whether there must exist some connection beyond the mere
13 jurisdictional presence of the corporation in a State in
14 order for a State to tax an apportioned share of all of
15 that corporation's income. In other words, must a State
16 have some connection with the activities of produced
17 income in order to tax an apportioned share of it?

18 We believe the answer to this question is yes
19 for three reasons that I'd like to state briefly and then
20 return to in more detail. First, a State's power to tax a
21 nondomiciliary taxpayer depends on the benefits and
22 protections that the State provides to the taxpayer's
23 activities in the State.

24 Second, over 100 years of precedent of this
25 Court make it clear that there must be some connection

1 beyond mere ownership between the in-State activities of
2 the corporation and its out-of-State activities before the
3 State can take account of those out-of-State activities in
4 determining the in-State tax liability.

5 QUESTION: Mr. --

6 QUESTION: What about a -- excuse me.

7 QUESTION: Go ahead.

8 QUESTION: What about a domestic corporation
9 . incorporated in the taxing State?

10 MR. HELLERSTEIN: Justice White, in terms of
11 State tax jurisdiction there clearly are two theories on
12 which jurisdiction can be based, one with regard to
13 nondomiciliary taxpayers is source. Another theory, which
14 is a well-established theory in the tax jurisdiction, is
15 residency, and there is no question that a State of
16 residence or domicile does have power to tax all of a
17 corporation --

18 QUESTION: Even though the income that it
19 includes within the gross income is produced by activities
20 that have absolutely no connection with the State.

21 MR. HELLERSTEIN: No, that -- Your Honor, the
22 reason underlying the residence principle does not have to
23 do with the particular --

24 QUESTION: Oh, you mean residence just gives a
25 connection no matter where the income comes from.

1 MR. HELLERSTEIN: Your Honor, that is a
2 well-established principle --

3 QUESTION: Well, it may be, but the kind of an
4 argument you're making would seem to challenge that.

5 MR. HELLERSTEIN: No, Your Honor, because our
6 essential position in this case is that when you have a
7 nondomiciliary that has no connection with the State other
8 than the activities that is engaged in there, the State
9 must provide benefits and protections to those activities.
10 With regard to a resident taxpayer, whether it's an
11 individual or corporation, while in principle the State
12 has power to tax all of the income, that power does in
13 fact yield when there are activities in other States that
14 are taxable by other States.

15 QUESTION: Well, what about a nondomiciliary
16 corporation that is doing business in the State and it's
17 a -- and there's no question that the State can tax its
18 share of the income of that corporation because it's doing
19 business there.

20 MR. HELLERSTEIN: That's correct, Justice
21 White --

22 QUESTION: Now, you would say that that
23 nondomiciliary's corporation income from activities that
24 have absolutely no connection with the State, like
25 investment income --

1 MR. HELLERSTEIN: That's correct, Your Honor,
2 because --

3 QUESTION: Would have -- the State could not
4 include it in gross income.

5 MR. HELLERSTEIN: That is right, because there
6 has to be an organic connection between the activities of
7 a nondomiciliary taxpayer and its activities outside the
8 State in order for the State to look outside.

9 QUESTION: So there's a difference between a
10 domiciliary corporation and a corporation that is not
11 domiciliary but it's doing business in the State and is
12 taxable there on its activities.

13 MR. HELLERSTEIN: Yes, Justice White, there is a
14 fundamental difference that underlies, for example, the
15 basic scheme in which the United States taxes --

16 QUESTION: You mean -- what you mean is that
17 there's a theory, there's an accepted theory that you can
18 tax a domiciliary corporation on all of its income.

19 MR. HELLERSTEIN: Justice White, there is more
20 than a theory, there is a practice going back 100 years,
21 the very basis, for example, that the United States taxes
22 all domestic corporations on income it earns in France or
23 Germany, or wherever, is based on the notion that a
24 domestic -- a domiciliary corporation may be taxed on all
25 of its income.

1 What is it that gives the State the power, for
2 example, to tax an individual on all of his income
3 wherever its earned? It's the same residence-based
4 principle, which is as well-established as the
5 source-based principle.

6 However, when we have States seeking to tax the
7 same income, it's quite clear when there's an intersection
8 between those two principles, then it is the source State
9 that generally may prevail over the residence State,
10 because to allow both States to tax would violate the
11 commerce clause.

12 QUESTION: Well, Mr. Hellerstein, I think that
13 probably ASARCO put forward the view that for the
14 nondomiciliary entity to be -- for their dividends or
15 income to be taxed in the taxing State that the dividend
16 payor has to be unitary with the payee. Something more is
17 required under ASARCO than just a flow of value into the
18 taxing State from that nondomestic entity. Now, do you
19 think that's a valid requirement?

20 MR. HELLERSTEIN: Justice O'Connor, we have
21 never taken issue with the proposition that there may be
22 apportionable income, other than income that is related by
23 a unitary relationship between the underlying payor and
24 payee. For example --

25 QUESTION: But there certainly is language in

1 ASARCO that would say just that, isn't there?

2 MR. HELLERSTEIN: Yes, Justice O'Connor, there
3 is language, you know, in ASARCO which if read literally
4 and applied to facts that were not at issue in ASARCO
5 might well exclude, for example, income of a foreign
6 products nature or working capital.

7 We have certainly not taken issue with the
8 notion that investments that are integrally related to the
9 taxpayer's operations in the State, organically
10 related -- capital that flows in and out of the business,
11 that certainly wouldn't be apportionable, but there is no
12 reason, as New Jersey suggests here, because of this
13 doctrinal foot fault, if that's what it was in ASARCO --

14 QUESTION: So there has to be some flow of value
15 into the State, anyway.

16 MR. HELLERSTEIN: We fully agree with that, and
17 indeed --

18 QUESTION: Well, all right. Now, if you agree
19 with that, can you say there is no such value that flowed
20 in here in the circumstances of this case where the
21 purpose of the investment was to acquire enough capital to
22 go ahead and acquire more of the underlying business in
23 the domestic State?

24 MR. HELLERSTEIN: Yes, Justice O'Connor, because
25 the only connection here is the very type of connection

1 that this Court has described as attenuated, not organic,
2 that connects every business that's under a single,
3 corporate shell. For example, if --

4 QUESTION: But isn't it something more than
5 that? Maybe it isn't the hard-core definition of working
6 capital, but it's capital for a longer term expansion, in
7 effect.

8 MR. HELLERSTEIN: Yes, Justice O'Connor. In
9 that situation, for example, suppose that Bendix had
10 earned income from aerospace operations in New Jersey.
11 Now, Bendix takes that income which is taxed by New
12 Jersey, and now it invests in some other asset having
13 nothing to do with New Jersey -- a yak farm in Outer
14 Mongolia -- and then it sells the yak farm and it buys a
15 hula hoop factory in South Korea.

16 New Jersey, I suppose, still has some attenuated
17 connection to the original dollar that might have been
18 earned in New Jersey, and sometime in the 21st Century
19 might well be reinvested in New Jersey, but until that
20 income has that connection with New Jersey, even if it had
21 some historical connection with New Jersey or may be
22 poised to be reinvested in New Jersey, to use the
23 phraseology of some of the amicus briefs here, New Jersey
24 does not have that organic connection with that income to
25 tax it, unless you want to fully abandon the notion which

1 has underlay this Court's decision for over 100 years --

2 QUESTION: Well, suppose that in New Jersey the
3 Bendix board of directors meets and they say we have a
4 very high-tech speculative research project we want to
5 conduct in New Jersey. Now, the only reason we're willing
6 to undertake that is because we know we have a very safe,
7 secure investment in ASARCO. There's no checks flowing
8 back and forth, but isn't there a value there that the
9 company relies on?

10 MR. HELLERSTEIN: Justice Kennedy, that's
11 precisely the kind of value that the Court said was so
12 attenuated that it could not be included in the
13 apportionable tax base in cases like Fargo v. Hart.

14 QUESTION: But is it attenuated in the real
15 sense? Isn't the example I've given you, the example of a
16 very real business kind of a decision and a business kind
17 of judgment, and isn't this the way a business is properly
18 valued? If you were a banker, you'd certainly want to see
19 the ASARCO balance sheet before you lent any money in New
20 Jersey, if you thought the company was a little on the
21 thin side.

22 MR. HELLERSTEIN: Well, that's -- Justice
23 Kennedy, it's certainly correct that in that attenuated
24 sense, you have a connection.

25 On the other hand, I think it's important to

1 recognize that in Fargo v. Hart, for example, there were
2 bonds worth 15.5 million that the Court recognized in some
3 sense added to the creditworthiness of American Express in
4 Indiana, but Justice Holmes said that was not sufficient.

5 In other words, the mere fact that there was
6 wealth in the corporation, there was money that adds to
7 the riches of the corporation, does not give the State the
8 concrete connection that it needs where it is not a
9 domiciliary State to tax the income of an out-of-State
10 corporation.

11 QUESTION: Well, you say that's attenuated, but
12 I think that's the issue in the case. It seems to me
13 there's a manufacturing analogy that you're relying on
14 here that is not wholly in accord with the way many modern
15 business corporations are formulated and with the way they
16 evaluate their own assets.

17 MR. HELLERSTEIN: Well, the consequences -- the
18 consequences of abandoning the notion that there must, in
19 fact, be a concrete, organic connection between what goes
20 on within the State and what goes on without the State,
21 because under this analysis everything, of course, becomes
22 apportionable, you then have the consequence of throwing
23 everything into the tax base regardless of whether it
24 might have been unitary or not under prior law, and having
25 significant misattributions of income.

1 For example, suppose we have -- to go back to
2 the example we had in the original argument of this case,
3 you have a series of beauty parlors in New Jersey, wholly
4 unrelated parking lots in California. Now, in some
5 general sense the parking lots are adding to the wealth of
6 the business. There's a connection there.

7 QUESTION: Suppose the beauty parlors are not
8 doing well and they borrow money, does it make a
9 difference to taxation whether or not the banker looks at
10 the balance sheet to see that the parking lots are in the
11 balance sheet?

12 MR. HELLERSTEIN: If the corporation goes to a
13 third-party banking institution and borrows based on its
14 overall wealth, it might well make a difference to the
15 bank as to whether or not it was willing to make the loan,
16 but that is precisely the kind of overall attenuated
17 notion that has never been the basis for allowing States
18 to tax income.

19 We're talking now about income from activity
20 such as the parking lot, or the investment, which itself
21 is not generated by any activities in the taxing State.
22 In other words, to go into this parking lot example, what
23 protections or benefits has New Jersey provided to the
24 parking lots in California that would allow it to tax that
25 income? The Court has always said there must be some

1 connection.

2 Now, you've suggested a loan. Clearly, if there
3 were interconnections between the parking lot and the
4 beauty parlors that might well justify looking to the
5 entire unitary business, but once you say that any time
6 anything is under a single corporate entity and in some
7 general sense may add to the wealth of the corporation,
8 this is simply abandoning the underlying notions that
9 justify a portion of it in the first place.

10 Why do we -- one thing, why is it the States
11 have been allowed to look outside the State? We start
12 with a notion that States are confined territorially in
13 their tax power. Now, the original notion was, going back
14 to the earlier cases, there must be some organic
15 connection because as a limited exception to the principle
16 that States may only tax within the State when in fact
17 there's a connection between what goes on within the State
18 and what goes on outside the State, then the limited
19 purpose of determining the value of what's in the State,
20 it may be appropriate to look outside the State.

21 Then the Court said of course, in cases like
22 Wallace v. Hines and Fargo v. Hart, and in ASARCO and
23 Woolworth, when you're looking outside the State you may
24 not sweep into that tax base these unrelated assets. You
25 can't sweep in these bonds, you can't sweep in the parking

1 lot or the yak farm, or whatever it might be.

2 Now New Jersey says, oh, this is all so
3 difficult. We can't distinguish. There are these flows
4 going back and forth. In effect, New Jersey is -- would
5 bite the hand that feeds them. The first -- the only
6 reason New Jersey could look outside in the first place
7 was because of this organic connection. Now New Jersey
8 says, let's abandon any notion of organic connection.
9 Let's just sweep it all in when it's too difficult.

10 Now, wholly apart from the theoretical flaws in
11 New Jersey's approach, the practical consequences of
12 adopting New Jersey's scheme, they're absolutely
13 astounding when you think about the existing structure
14 that's grown up around this Court's understanding of the
15 limits on State taxation. Over 30 State laws are based on
16 the very distinction that underlies the unitary business
17 principle, namely identifying income that's organically
18 connected and is therefore apportionable because of its
19 link, and income which is nonbusiness, which is not
20 included.

21 All of these -- if this Court were to adopt the
22 notion that New Jersey has advanced here that everything
23 gets swept in simply because it's within the corporation
24 and has some attenuated connection, you have in effect
25 invalidated the laws of 30 States. Why? Because this

1 Court has made it clear that taxation by
2 allocation -- that is, sending all of the value to a
3 single State and taxation by apportionment, allowing all
4 the States to allow a piece of it, is theoretically
5 incommensurate. Why? It would lead to inevitable
6 multiple taxation.

7 If New Jersey, for example, can tax the gain
8 from raw land that this hypothetical corporation has in
9 Florida, or from investment in an unrelated metal mines
10 corporation, New Jersey gets an apportioned share of that.
11 At the same time, under the existing States' regimes,
12 Florida would tax 100 percent of it.

13 Why? Well, because it's raw land in Florida.
14 It's got a connection. It's nonbusiness, allocable
15 income. Who would get the gain from the metal minings
16 company would be whatever the commercial domicile was
17 under the principle that a commercial domicile has in
18 effect the residuary power.

19 QUESTION: Well, Florida can surely tax the real
20 estate located in Florida.

21 MR. HELLERSTEIN: That's correct, Chief Justice
22 Rehnquist, and as a result of that combined with New
23 Jersey's alleged power to tax an apportioned share --

24 QUESTION: Of income.

25 MR. HELLERSTEIN: You're talking about the gain

1 now.

2 QUESTION: A what?

3 MR. HELLERSTEIN: I was assuming that you had
4 land in Florida and that the land was sold at a gain.
5 Now, Florida would clearly tax 100 percent of that gain
6 because this was land unrelated to any business of the
7 corporation and therefore would be regarded by Florida as
8 nonbusiness income taxable in full in Florida.

9 At the same time, New Jersey, simply because
10 this land was held by the same corporation under a single
11 corporation that owned beauty parlors in New Jersey, they
12 would say this is part of the business, we can tax an
13 apportioned share of that income.

14 QUESTION: Yes. They'd put it in the, what, the
15 numerator --

16 MR. HELLERSTEIN: Well, they would put it --

17 QUESTION: And the denominator.

18 MR. HELLERSTEIN: They would put it in the
19 apportionable tax base.

20 QUESTION: Well, what's wrong with that?

21 MR. HELLERSTEIN: What's wrong with that is that
22 it would lead to multiple taxation, because the same
23 income -- the same income has already been taxed in
24 Florida.

25 QUESTION: Well, in a very general way, perhaps,

1. but there's no terribly fire-strict prohibition against
2 that sort of multiple taxation, is there?

3 MR. HELLERSTEIN: Well, Chief Justice Rehnquist,
4 this Court has made it clear in cases such as Standard
5 Oil v. Peck and as recently as Mobil that the intersection
6 of a regime of allocation, let us say 100 percent of the
7 tax base were to again go into one State, then that
8 collides with a regime of apportionment, that the two
9 cannot coexist. One must yield, and in general what the
10 Court has indicated in that situation is that the State
11 that must yield is the State of --

12 QUESTION: That may be true as a generality, but
13 I mean I think what you've just pointed out, perhaps, is
14 arguably a rather small exception to it. You know, land
15 located in Florida, a traditionally absolutely immobile
16 thing, has always been subject to taxation by the State
17 where it's located, and a tax on a capital gain resulting
18 from the sale of that land, I'm not sure that would come
19 under the head of double taxation if New Jersey also just
20 seeks to tax a proportionate share of the income.

21 MR. HELLERSTEIN: Well, Chief Justice Rehnquist,
22 we're not just talking about the sale of an isolated piece
23 of land, we're talking about the sale, for example, of all
24 stocks, bonds, all the capital gains that are at issue in
25 this case, which incidentally would not find any

1 reflection in the factors underlying New Jersey's
2 apportionment scheme.

3 That is, what New Jersey wants to do -- take
4 this case. There is \$56 million of apportionable tax
5 base. That was the pie we started with. New Jersey says,
6 well, because there's some connection between what's going
7 on in New Jersey and this ASARCO gain, we want to increase
8 the tax base by \$211 million, and how do we -- what do we
9 do about that?

10 Do we make any adjustment in the
11 factors -- well, we'll put the receipts -- we'll let the
12 receipts be -- not even the receipts, but capital gain, go
13 into the numerator of the receipts factor which is
14 measured in the billions, so there's virtually no effect
15 on the amount, of the share of the pie. All that's
16 happened is that the pie has expanded enormously, and the
17 question --

18 QUESTION: Mr. -- well, go ahead. I want to ask
19 a question when you have a moment.

20 MR. HELLERSTEIN: Yes, Justice.

21 QUESTION: More than half the States have
22 adopted something called the Uniform Division of Income
23 for Tax Purposes Act, called UDITPA, and under UDITPA, as
24 I understand it, it would say -- it would define what is
25 business income, and it would say that business income is

1 taxable by the State, and that it includes income from
2 intangibles if the acquisition, management, and
3 disposition of the property constitute integral parts of
4 the taxpayer's regular trade or business operation.

5 Now, do you think that is valid, a valid
6 concept?

7 MR. HELLERSTEIN: Justice O'Connor, we are quite
8 satisfied with that definition, which we believe actually
9 reflects the longstanding dichotomy that this Court has
10 drawn between apportionable and allocable income.

11 QUESTION: Do you think that the Constitution
12 allows that but not one step further in terms of defining
13 taxable income?

14 MR. HELLERSTEIN: Justice O'Connor, certainly,
15 as the Constitution has been understood up to today, the
16 understanding is very clear that merely because -- and
17 this is the New Jersey position here -- merely because an
18 asset or income is earned by a single corporation that
19 happens to be doing business in the State, it's absolutely
20 clear that that does not constitute a sufficient
21 connection.

22 Now you're asking the question whether or not
23 the UDITPA definition is one, if stretched a bit, would be
24 satisfactory. Well, I think the Court gave the right
25 answer in ASARCO when it said the stretching of this to

1 the point of oblivion, where you simply look at the
2 corporate purpose, is unsatisfactory.

3 We concede, and we are -- let's say we're
4 sympathetic to certain aspects of your dissent in the
5 ASARCO opinion with regard to the facts of that case. It
6 could well have been that the flows of value between
7 ASARCO and Southern Peru should have justified a different
8 holding on the facts, but not the basic principle which
9 you yourself acknowledge in that decision, namely that
10 there's got to be a unitary business, the linchpin of
11 apportionability.

12 QUESTION: All right, and do you think UDITPA is
13 as far as the Constitution will allow, not a step further?

14 MR. HELLERSTEIN: We believe that UDITPA
15 reflects the constitutional rule. When you say not a step
16 further, there are -- there may be some -- there are some
17 constructions of the business income definition that have
18 gone too far, may have gone too far -- this Court has
19 struck them down -- but certainly not only the
20 definitions, but if you look at the way that the
21 multi-State tax commission that administers the statute
22 that is in force in 30 States, they draw the very same
23 lines.

24 They talk about investments that are part of the
25 business and investments that are not part of the

1 business, long term investments that don't relate to the
2 current operations, allocable businesses --

3 QUESTION: What happens under UDITPA? The
4 domiciliary State can tax all the intangible income, and
5 yet if it fits under UDITPA's formula in another State,
6 that other State can have some apportion.

7 MR. HELLERSTEIN: No, Justice O'Connor. Under
8 UDITPA the line is drawn, regardless of whether the income
9 is tangible or intangible, as to whether it is
10 apportionable. So, for example, if it were working
11 capital, we would concede that under the uniform act it
12 quite clearly would be apportionable. That goes into the
13 tax base of all the States in which there's a business.

14 Now take income that clearly is not
15 apportionable under UDITPA. For example, in our judgment
16 an investment in an unrelated metal mining company,
17 20 percent investment. What happens then?

18 That is then nonbusiness income. It doesn't go
19 in any State's apportionment factor. It simply is -- it
20 goes to the commercial domicile under the well-established
21 principle that the State of residence has the power to tax
22 all the resident's or domiciliary's income until -- unless
23 and until it collides with some other State's power on a
24 source basis.

25 New Jersey simply has no source-based power to

1 get at this income. It's not that it's in any sense
2 fairer to send to the domicile. There has to be the
3 connection.

4 QUESTION: Is the principle concern with double
5 taxation the taxing authority of the domicile State?

6 MR. HELLERSTEIN: Justice Kennedy, it could be
7 either. That is, the principle concern is if this Court
8 were to adopt New Jersey's everything is apportionable
9 regime and not indicate the same point, that States could
10 allocate what under their statute is plainly nonbusiness
11 income, then one of those must yield in order to avoid
12 multiple taxation.

13 QUESTION: But it's not -- if the State -- if
14 the corporation is incorporated in the State of Illinois,
15 is the concern that Illinois will cause the double
16 taxation, or is the concern if we adopt the New Jersey
17 regime, that there will be double taxation in all of the
18 other 49 States, or in some of the other 49 States?

19 MR. HELLERSTEIN: Well, I think the answer to
20 that, Justice Kennedy, would depend on which State would
21 have to yield, I would assume, looking, for example, at
22 Mobil, where the court saw this problem. Vermont wanted
23 an apportioned share of the income, allegedly New York had
24 the power to tax it all. The court said no, New York
25 can't tax it all.

1 So what would happen if this Court were to adopt
2 New Jersey's regime and would at the same time adhere to
3 the notion that this kind of multiple taxation was
4 inappropriate, it would render all of the domiciliary
5 States' nonbusiness income apportionable. That is, it
6 would say you couldn't allocate this any more. It would
7 say that was no longer the law.

8 I would like to reserve my --

9 QUESTION: Before you sit down, would you just
10 tell me what the third point you were going to make was
11 when you started your argument?

12 MR. HELLERSTEIN: Well -- thank you, Justice
13 Stevens. I was going to talk about the chaos that I think
14 the adoption of the --

15 QUESTION: I understand.

16 MR. HELLERSTEIN: Thank you very much.

17 QUESTION: Thank you, Mr. Hellerstein.

18 Ms. Hamill.

19 ORAL ARGUMENT OF MARY R. HAMILL

20 ON BEHALF OF THE RESPONDENT

21 MS. HAMILL: Mr. Chief Justice, and may it
22 please the Court:

23 We are pleased to be asked back to address the
24 Court's questions. As you know, we argued initially that
25 there was no need to overrule ASARCO and Woolworth,

1 provided that the Court would clarify the statements in
2 ASARCO and Woolworth, that there has to be an operating
3 relationship between the payor and payee of dividend
4 income in order to apportion that income.

5 But if the Court wishes to clear up the
6 confusion and dispel the misconceptions that those
7 opinions have generated, it seems to us that it should
8 overrule the two opinions, and once you get to that
9 point -- and it should do so retroactively. But once you
10 get to that point, then the question is, where do you draw
11 the line and how do you apportion, and we see no bright
12 line, no clear line until you go all the way to the
13 corporate entity.

14 And so we say that what is received as income by
15 the corporation, by a nondomiciliary corporation that is
16 doing business in the taxing State, should be apportioned
17 by that State, and the reason we believe that is correct
18 is that when there is a common corporate management, there
19 are inevitably going to be flows of value. There are
20 inevitably going to be mutual interdependence, no matter
21 how disparate these activities seem, the parking lot, the
22 beauty parlor. As Justice Kennedy suggested, there may be
23 borrowing going back and forth. There may be tax losses
24 offsetting one or another. There may be the need for
25 geographical diversification. There may be a William Agee

1 running both of those who sees that there is money to be
2 made in beauty parlors in New Jersey and he can generate
3 capital to go into parking lots in California.

4 The permutations of that are infinite, and to
5 ask the lower courts and the taxing authorities to pull
6 apart these very fine, intricate distinctions is really
7 asking too much, and it is getting into the very area that
8 the Court addressed with the exception to the corn
9 products -- the corn products exception to the statutory
10 definition of capital assets where we were talking about
11 business motive. If the motive for acquiring an asset was
12 to further the business, it wasn't a capital asset, and
13 therefore, it generated an ordinary loss on sale, the
14 Court saw that problem and got rid of it in Arkansas Best
15 and severely limited the corn products doctrine.

16 And it really seems to us that we have got to
17 move that --

18 QUESTION: Unitary business concept is just out
19 of the picture I suppose.

20 MS. HAMILL: We think it is not out the window.
21 We think that we are trying to --

22 QUESTION: Well, you can't draw a line where it
23 is in, can you?

24 MS. HAMILL: Why can't you define it at the
25 corporate level? Why can't you say that the unitary ties

1 are brought about by that management, that that is the
2 out-of-State activity that is tying the out-of-State
3 activity to --

4 QUESTION: If you do that, then can the State,
5 where the subsidiary is resident, so to speak, can it tax
6 all 100 percent of the income, even though New Jersey is
7 going to take a share of it too?

8 MS. HAMILL: Justice O'Connor, I want to answer
9 that question by -- the way you asked that question makes
10 me wonder about this combined reporting issue again. We
11 don't tax the income of the subsidiary. We tax the
12 dividends --

13 QUESTION: The dividends, right.

14 MS. HAMILL: And so we don't care what happens
15 to that subsidiary, where it is, what it does --

16 QUESTION: But the subsidiary sure does.

17 (Laughter.)

18 QUESTION: And so does the parent.

19 MS. HAMILL: We -- the fact, the double taxation
20 that would result would be, I think what Mr. Hellerstein
21 was talking about, where you have a UDITPA State that
22 says, this particular kind of income is allocable entirely
23 to the commercial domicile. For instance, take the gain
24 on the sale of real estate located in a UDITPA State; if
25 the UDITPA State said that was nonbusiness income, that

1 is, not related to the business being carried on, it would
2 then say that the entire gain should be allocated to that
3 State.

4 QUESTION: And if it is business income?

5 MS. HAMILL: Then it would be apportionable. We
6 meanwhile, under our theory, would say it is all
7 apportionable because it is all, that gain is received by
8 the company that is doing business in New Jersey.

9 QUESTION: Would you win under the UDITPA
10 definition in this case?

11 MS. HAMILL: I think so. Not every State would
12 have called this particular gain business income, but
13 under that business income definition, I believe there is
14 a transactional test and a functional test, and we would
15 arguably meet the functional test broadly defined.

16 QUESTION: But I take it from your argument that
17 you would make the submission that UDITPA itself is an
18 unworkable rule?

19 MS. HAMILL: I think that follows logically from
20 what we are saying, but what we are trying very hard to do
21 is not to upset the taxing schemes of the majority of the
22 States, not to upset the combined reporting States. We
23 are just --

24 QUESTION: You just want us to overrule ASARCO.

25 (Laughter.)

1 QUESTION: What is the constitutional rule that
2 you replace ASARCO with in the UDITPA States? Can the
3 domiciliary State now tax so that you can have two States
4 taxing, or is it only New Jersey, the nondomiciliary
5 States that can apportion?

6 Are you going to have double taxation --

7 MS. HAMILL: No, no --

8 QUESTION: -- or is it that the domiciliary
9 State gets frozen out?

10 MS. HAMILL: We say, first off, you have that
11 problem already, because you can have a UDITPA State
12 characterizing something as nonbusiness income and a full
13 apportionment State saying it is business income. But
14 say, if we do admit that what we are advocating will
15 increase it --

16 QUESTION: Because of disagreements of opinion
17 of what kind of an income it is.

18 MS. HAMILL: What is business income, that's
19 right.

20 QUESTION: But I am assuming everybody agrees
21 what kind of income it is.

22 MS. HAMILL: All right.

23 QUESTION: Can they both tax it or can only the
24 State, the allocating State tax it?

25 MS. HAMILL: I think it depends on what you

1 think the basis for the taxation is. If you think it's
2 that the benefits and protections that are being extended
3 by a State justify the tax, you could very well find that
4 the UDITPA State that is trying to tax it all has a
5 sufficient basis for doing that because the management is
6 there, the income may be -- there is a connection with
7 that State.

8 On the other hand --

9 QUESTION: It's your theory. What do you think?

10 MS. HAMILL: On the other hand, I think
11 our -- in that situation, we would have a sufficient basis
12 too, and we would be right into the Court's cases, the
13 intangible personal property cases and the personal income
14 tax cases.

15 QUESTION: But I am asking you, under your
16 theory, don't put it on me, you say it depends on what you
17 think the basis is. What do you think the basis is?

18 MS. HAMILL: Oh, I think the basis -- I think it
19 is the benefits and protections are extended.

20 QUESTION: They can both tax?

21 MS. HAMILL: Yes, they can both tax, and I think
22 the Court's cases dealing with intangible property,
23 Curry v. McCanless and the very common scheme under the
24 personal income tax where the State of residence can tax
25 all an individual's income and the State where that

1 individual earns wages or whatever can tax the wages, you
2 have absolute, inevitable double taxation. And the only
3 reason it doesn't happen in practice is that the State of
4 residence grants a credit. But it --

5 QUESTION: Well, we shouldn't encourage it,
6 should we, at least if we follow language in our prior
7 opinions, that isn't a goal to be achieved. It is to be
8 avoided.

9 MS. HAMILL: True, but I think if you are going
10 to promulgate a constitutional rule that says, favors one
11 State over another, you are taking on more than just this
12 case and just the apportionment of income in the context
13 of multi-State businesses and the corporate net income
14 taxes, because you are taking on the intangible personal
15 property tax cases and the personal income tax cases.
16 Ideally, I think you are absolutely right.

17 QUESTION: May I ask a question about, I think
18 it is Justice Kennedy's hypothetical, if we assume a
19 business that has its major operations in California, have
20 a whole bunch of operations there, but none of them on the
21 East Coast and all, and they also separately buy and sell
22 a parking lot in Florida which under traditional rules
23 would not have been considered part of the unitary
24 business. It would be considered a separate transaction.

25 In your view, could Florida tax the entire

1 income from the separate transaction, or must it treat it
2 as part of a unitary business in the same corporate shell?

3 MS. HAMILL: No. We think that Florida could
4 treat it --

5 QUESTION: Could have an option to do it either
6 way.

7 MS. HAMILL: Could do it either way because the
8 Constitution sets limits, and if there is nothing
9 constitutionally wrong with what Florida wants to do, it
10 can go ahead and go it. But that doesn't get -- then you
11 have the double taxation problem.

12 QUESTION: The only thing that would be
13 constitutionally wrong is it would lead to double taxation
14 which --

15 MS. HAMILL: Yes --

16 QUESTION: -- would not otherwise occur under
17 our present regime?

18 MS. HAMILL: Well, no, it might very well occur.

19 QUESTION: No, it wouldn't, because I am
20 assuming, my hypothesis is that it is not a unitary
21 business under present rules.

22 MS. HAMILL: Oh, all right, then perhaps not.
23 That's correct.

24 QUESTION: See, that would cause a change which
25 would increase the possibility of double taxation.

1 MS. HAMILL: Right, yes. But let me talk just a
2 minute about this risk of double taxation. You know, we
3 had 32 corporations filing amicus briefs at this stage of
4 the proceeding, and I don't know if you read our reply
5 brief and looked at the appendix, but 20 of those 32
6 corporations are domiciled in States that do apportion all
7 income, two-thirds of them, no possibility of double
8 taxation at all.

9 Then again --

10 QUESTION: Yet, yet.

11 MS. HAMILL: No --

12 QUESTION: I mean, those States could change
13 their laws.

14 MS. HAMILL: Oh, sure, they could. But if full
15 apportionment were to be the rule and they are already
16 doing full apportionment, I don't know why -- and they are
17 allowed to bring in more, I don't know why they would
18 change. But let me just go on a minute with this risk of
19 double taxation. Then you have to have the UDITPA States
20 say, okay, this is nonbusiness income, but there is a
21 presumption in the multi-State tax commission regulations,
22 I think it is in UDITPA as well, that income is business
23 income, apportionable.

24 Then you have to have a situation where in fact
25 there is double taxation and if you look at the laws of

1 all the States you find that the vast majority of them
2 have very substantial exclusions for dividend income.
3 Dividend income, of course, is the major recurring kind of
4 intangible income. 70 to 100 percent of dividend income
5 is excluded by the vast majority of the States.

6 QUESTION: Of course, if your hypothesis holds,
7 UDITPA also is unworkable and I think that should be
8 stricken down as well.

9 MS. HAMILL: Well, I don't think we ought to
10 rewrite UDITPA. There may be movements --

11 QUESTION: Well, you are rewriting the basic
12 formula under the due process clause.

13 MS. HAMILL: No, you aren't, because there would
14 be nothing wrong with a UDITPA State saying, we don't want
15 to apportion. We are happy with trying to make this
16 distinction between property, intangible property that is
17 integrated with the business. We want to do it. We like
18 it that way.

19 Why should the Court or why should we suggest
20 that they not do it? It seems to me it is part of
21 Federalism that they be able to go on and do exactly that.
22 We just say that we don't think it is required by the due
23 process clause and we don't really have the ability to
24 keep on trying to make these distinctions. It is very,
25 very difficult.

1 Let me just turn just a minute to the
2 theoretical basis on which Allied grounds its argument
3 which is that -- the source argument, in that a
4 nondomiciliary State can tax only on a source basis, and
5 that there must be a relationship, a direct relationship
6 between the activities generating the income from
7 out-of-State and what's going on in the taxing State.

8 I don't think you find that in the Court's
9 cases, except possibly in ASARCO and Woolworth. I don't
10 think the Court has ever been so explicit, and I don't
11 think that there is any reason why single corporate
12 management couldn't provide that unifying factor that
13 would make it sensible to say that all of the income of a
14 single corporation is unitary income.

15 The property tax cases on which Allied
16 relies -- Fargo v. Hart, Adams Express, Pullman's Palace
17 Car -- are property tax cases and the difference is that
18 they are valuing tangible property in the State, and you
19 can look at that property. And you could see in Fargo v.
20 Hart that there was \$8,000 worth of property, tangible
21 property in the State and the apportionment formula put
22 \$800,000 of property in the State.

23 And when it is property that you can see and
24 there is a benchmark, it gets stuck in your craw when you
25 say that the out-of-State values did that much for this

1 tangible property in-State. But income is very different,
2 you can't see it, you can only measure it indirectly. You
3 certainly don't know where it is earned, and so that there
4 is a great deal more flux, a great deal more uncertainty
5 in where income is sourced.

6 The other problem that I think Mr. Hellerstein
7 didn't quite get to, but I know he has 5 minutes, and so I
8 guess I had better -- and I don't have any more time, so
9 after I sit down -- is the question I think of the chaos.
10 And I think he probably would start with the lack of fair
11 apportionment, that by putting all the income in the base
12 and then going to the apportionment formula you are going
13 to have terrible, terrible misattributions of income.

14 We don't think that is necessarily true. We
15 think that if you make the decision that the intangible is
16 related to the business, it is legitimate to use the
17 three-factor formula, perhaps some modification of the
18 formula to apportion all of that income. It isn't
19 necessarily a misattribution of income. Working capital
20 is apportioned, traditionally, income from working
21 capital, using the three-factor formula. Very often when
22 dividends are determined to be business income,
23 apportioned using the three-factor formula.

24 If too much income is being taxed in a
25 particular State, the taxing authority, the lower courts

1 can deal with that. They can deal with the apportionment
2 formula --

3 QUESTION: How can you say that unitarian
4 concepts are, for the most part, out of the window?

5 MS. HAMILL: Because the formula, I am talking
6 about the three-factor formula, you could for instance
7 decide that you should put intangible property in the
8 denominator of the property factor. That would be the
9 simplest thing to do.

10 QUESTION: You are suggesting that States will
11 not maximize their taxable authority?

12 MS. HAMILL: Well, you know, over the past 10
13 years, the States have really been sort of up against a
14 wall with ASARCO and Woolworth and really losing large
15 amounts of income out of the base. I think if you give
16 the apportionment formula a chance to work, that the
17 States will see that it has got to be used, particularly
18 if all income in the base --

19 QUESTION: They will simply have to be
20 reasonable; even if they weren't, they could get away with
21 taxing more.

22 MS. HAMILL: Well, I don't think the world will
23 ever be the same after ASARCO and Woolworth, and I think
24 the States have learned a lesson. You can't be too piggy.
25 You have really got to realize that in some cases where

1 there is recurring -- a huge, huge investment portfolio
2 with none of the, none of the generative assets in the
3 formula may very well create distortion.

4 But the States can and should deal with that.
5 This Court can deal with it --

6 QUESTION: That will be our principle, you can
7 tax whatever you like, but don't be too piggy.

8 (Laughter.)

9 MS. HAMILL: I think the Court --

10 QUESTION: That will put the fear of the Lord in
11 them.

12 (Laughter.)

13 MS. HAMILL: Again, though, I think that you
14 ought to give the apportionment formula a chance to work
15 and it may very well work, and you may though have a
16 couple of apportionment cases where a State is being piggy
17 and refuses to see the light, refuses to make any --

18 QUESTION: How do we decide then if it is being
19 too piggy without some rules?

20 MS. HAMILL: I think that courts have managed to
21 do it. Judge Cardozo sitting on the New York Court of
22 Appeals had no trouble --

23 QUESTION: We thought that we had managed to do
24 it already.

25 MS. HAMILL: You did, you certainly did. There

1 is no question that ASARCO and Woolworth in one sense,
2 they are a very workable rule, they just plain --

3 QUESTION: Sort of workable I think.

4 MS. HAMILL: They just limit the States -- but
5 they limit it in this unreal fashion and truly unreal
6 fashion, as I think Justice Kennedy is pointing out.
7 Nothing to do with the way corporations are --

8 QUESTION: You mentioned Justice Cardozo; he
9 said, life in all its fullness must provide the answer to
10 the riddle. He had not read the three-factor formula.

11 (Laughter.)

12 QUESTION: And I am concerned about the
13 three-factor formula because it has a manufacturing bias,
14 which is the very basis for your attack on the unitary
15 system.

16 MS. HAMILL: Right.

17 QUESTION: So it seems to me that we are really
18 destroying the unitary formula, but leaving intact as a
19 protection against overreaching, the apportionment formula
20 which has the same defect.

21 MS. HAMILL: Well, if we were a congressional
22 committee, we could fix it all at once, but I think you
23 are absolutely right. I think the apportionment formula
24 is probably as outdated as *Fargo v. Hart and Pullman's*
25 *Palace Car*. But we don't have that issue here --

1 QUESTION: One thing at a time, Ms. Hamill.

2 MS. HAMILL: That's right, I am saying one thing
3 at a time, you can't --

4 QUESTION: You are relentless.

5 MS. HAMILL: Bendix has given up. Bendix gave
6 up on the apportionment formula. We argued, in fact, in
7 the tax court of New Jersey, Bendix said, okay, if it's
8 unitary you have to put the factors of ASARCO into the
9 apportionment formula.

10 We said, that is not appropriate because these
11 are minority stock investments and this is not a combined
12 report. But we do think that it ought to be tested by
13 putting the value of the ASARCO stock, the intangible
14 value into the property factor.

15 We already have the receipts in the denominator
16 of the receipts factor, that is, the gain itself, in the
17 denominator, by the way, of course, which lessens what New
18 Jersey can tax.

19 We did the math. The State did the math. We
20 determined that the tax differential was extremely small.
21 Bendix never challenged those figures, never produced any
22 evidence, never did a thing, and the New Jersey tax court
23 ruled that Bendix had not succeeded in establishing any
24 unfairness in the apportionment formula.

25 QUESTION: May I ask you a question about your

1 basic theory, and I want to concentrate on the first point
2 that your opponent made. Assume the hypothetical we
3 talked about earlier with a geographically separate small
4 operation in Florida, and a mammoth business, through 30
5 other States far out West, but no connection with that
6 separate operation in Florida.

7 You think Florida has the power, because they
8 have a very small operation in Florida that is totally
9 unconnected with the rest of their business, to have
10 access to all of their business records to compute the tax
11 base and the tax should be paid. You don't find there's
12 any jurisdictional problem. Florida provides no benefit
13 whatsoever to 99.44 percent of their business.

14 MS. HAMILL: Are you asking whether they have
15 the --

16 QUESTION: Under your approach --

17 MS. HAMILL: -- the power to get the tax
18 records, or do you mean to include the income?

19 QUESTION: To include them in income and audit
20 and do everything else, what is the -- are you troubled at
21 all by the question of whether Florida in that situation
22 would have the jurisdiction to base their tax collection
23 on an operation so remote from what happened in Florida?

24 MS. HAMILL: No, because again I think if these
25 activities are in a single corporation run by single

1 management there are flows of value. And of course, the
2 apportionment formula under your hypothetical is going to
3 take care of problems --

4 QUESTION: I understand, there is nothing
5 unfair --

6 MS. HAMILL: It is a tiny tax.

7 QUESTION: You could always treat every business
8 as unitary, but in effect, isn't this a brand new concept
9 of taxing power on the part of a State? The mere fact
10 that they have set a foot 6 inches into the State
11 jurisdiction gives that State the power to say, I want to
12 look at everything you have done all over the world --

13 QUESTION: And apportion the entire --

14 QUESTION: And then apportion the whole thing.
15 That doesn't trouble you at all?

16 MS. HAMILL: I think it is a step, it certainly
17 is a step, but I don't think it is totally out of -- it is
18 not an enormous step. It is a small step. The Court's
19 cases, I mean, starting with Butler Brothers, which
20 involved the wholesale distribution houses --

21 QUESTION: Right.

22 MS. HAMILL: Geographically separate, the one in
23 California --

24 QUESTION: Yes, but the theory was you couldn't
25 separate it in an accounting sense in order to do it in a

1 meaningful way. I am assuming that all the accounting,
2 and all the rest, is perfectly understandable on a local
3 basis in Florida.

4 MS. HAMILL: Under that hypothetical, under my
5 situation, we would still say you put it in the base, but
6 you are going to have to do an adjustment somehow to the
7 apportionment formula. But of course, we don't agree with
8 your premise, which is that you can separate them --

9 QUESTION: That there can ever be a separate
10 operation within a corporation.

11 MS. HAMILL: -- totally, totally, separate,
12 that's right..

13 QUESTION: That the Butler case decided that all
14 corporations are totally unitary under all circumstances,
15 no matter how diverse their businesses --

16 MS. HAMILL: Well, no --

17 QUESTION: Anything that is under the same
18 management.

19 MS. HAMILL: Is going to be --

20 QUESTION: Under the same ownership.

21 MS. HAMILL: Well, I think we would say it has
22 to be the same management, I think we maybe misspoke a
23 little bit --

24 QUESTION: Well, in that case, I have a separate
25 manager in my Florida parking lot and then I don't

1 apportion?

2 MS. HAMILL: But you have got a corporate
3 president. You have got a corporate management that is
4 saying, okay, we are going to put it in the parking lot or
5 we are going to put it in the major operations that are in
6 the West.

7 QUESTION: Then the same management is the same
8 as the same ownership because every corporation has a
9 chief executive officer.

10 MS. HAMILL: Yes, but I wouldn't want to say
11 just management without putting in the fact that it's
12 being -- that there are some people in there calling the
13 shots and making it unitary.

14 QUESTION: What about the parent, the
15 corporation that owns stock in a company that it doesn't
16 really control, but it gets paid dividends? Is that
17 corporation under the same management?

18 MS. HAMILL: Well --

19 QUESTION: Say they own 10 percent of a
20 subsidiary -- this isn't a subsidiary at all. They just
21 own 10 percent of a company that is very profitable and
22 they have invested some money in it. Certainly, they are
23 not under the same management.

24 MS. HAMILL: No, but the fact that they have
25 bought that stock, that they think that stock is worth

1 having and not selling, that they see -- corporations
2 don't invest --

3 QUESTION: So you don't really care about
4 unitary; you just -- as you say, any income that a
5 corporation gets from any other corporation is
6 apportionable by --

7 MS. HAMILL: We are saying it is defined
8 differently, and we are trying to keep it, Justice White;
9 we think it does apply in combined reporting situations.

10 QUESTION: So your same management test really
11 doesn't -- except that, it is the same management that
12 runs the rest of the company that decided to invest in
13 this company.

14 MS. HAMILL: Yes, that's the Bendix, it is
15 William Agee all over again doing exactly what he did. If
16 I might I would like to turn very briefly to the question
17 of retroactivity. If the Court should overrule ASARCO and
18 Woolworth, we believe it should do so retroactively. We
19 believe that ASARCO and Woolworth were not the kind of
20 clear precedent on which litigants relied under the
21 Chevron Oil test. No prior case had formulated an
22 exclusive test of operating relationships between payor
23 and payee. Corporate purpose had been sanctioned, indeed,
24 in Adams Express Company the Court had said, quote,
25 presumptively, all the property of the corporation is held

1 and used for the purposes of its business, close quote.

2 One year after ASARCO and Woolworth were
3 decided, the Court decided Container, it may have referred
4 to ASARCO, not attacked it head-on, but the reasoning in
5 Container in many, many respects undercuts ASARCO. The
6 recognition that the California code tracks UDITPA and the
7 definition of business and nonbusiness income is a subtle
8 attack on the -- and the rejection of the corporate
9 purpose doctrine in ASARCO and Woolworth because that
10 corporate purpose doctrine really does come out of UDITPA.
11 It may have been formulated in a rather generalized way,
12 but it is the UDITPA test. It sanctions, Container
13 sanctions a business purpose for making an investment
14 unitary, and that is footnote 19 that talks about the
15 purpose of making loans to the subsidiaries, again,
16 totally different from ASARCO and Woolworth.

17 Container sanctions reliance on the potential to
18 control; whereas, ASARCO and Woolworth required actual,
19 operating control. Container sanctioned the presumption
20 that companies engaged in similar lines of business are
21 unitary, but Woolworth was engaged in exactly the same
22 line of business as its subsidiaries, and ASARCO's subs
23 were in segments of ASARCO's business. It rejects the
24 bright line test that there must be flows of product, and
25 it puts the burden of proof back on to the taxpayer, and

1 if you read ASARCO it is quite clear that all the gaps,
2 all the deficiencies in the record were construed against
3 the State.

4 So Container undercut ASARCO and Woolworth and
5 after Container no corporate taxpayer had a legitimate
6 reliance interest in ASARCO and Woolworth. And then of
7 course, ASARCO and Woolworth have provoked repeated
8 litigation in the State courts. The lower courts tried to
9 square those rulings with their notions of common sense,
10 tried to follow them and had a very difficult time doing
11 it.

12 We think the prospective application would not
13 further a new rule of law. We have been hurt by the
14 ASARCO/Woolworth rule. We, the State's fisc -- the
15 State's sovereign ability to tax, as long as it doesn't
16 violate the Constitution and to promote, to have a new
17 rule and then not let us have the benefit of it
18 retroactively would be very harmful to New Jersey. The
19 equities, for a similar reason favor, we think,
20 retroactive overruling.

21 QUESTION: Ms. Hamill, I have -- do you propose
22 that your theory applies only to a corporation in Florida,
23 for example, that is majority owned by the New Jersey
24 corporation that you are taxing?

25 MS. HAMILL: No.

1 QUESTION: 10 percent?

2 MS. HAMILL: Absolutely, 1 percent, because it
3 is not, you see, this control. It is the way it is used.
4 It is the way the investment is used.

5 To conclude, very briefly, again, I think Allied
6 is trying to paint New Jersey as taking a very radical
7 position. It relies on cases decided a century ago, but
8 we have repeatedly pointed out in this case, this not the
9 way companies operate today. Today they use their
10 investments interchangeably with their manufacturing
11 assets. The days of Pullman's Palace Car, Adams Express
12 Company and Fargo v. Hart are gone forever. There is
13 nothing wrong with the unitary business principle, but it
14 has to be brought into the modern world. The Court will
15 look in vain through everything that Allied has said about
16 how companies invest, how they act, how they really manage
17 these investments, and there is nothing there.

18 What they want is a constitutional formulary
19 that has nothing to do with present-day economic reality.
20 And what we are proposing is a rule that we think is
21 consistent with economic reality, that is clear and
22 predictable, and that is consistent with the due process
23 clause and puts the issue of the division of the tax base
24 where it belongs, which is under the apportionment
25 formula.

1 Thank you.

2 QUESTION: Thank you, Ms. Hamill.

3 Mr. Hellerstein, you have 5 minutes remaining.

4 REBUTTAL ARGUMENT OF WALTER HELLERSTEIN

5 ON BEHALF OF THE PETITIONER

6 MR. HELLERSTEIN: I would like to make three
7 points and given my experience in the first 25 minutes, I
8 had better make my first two fast.

9 Ms. Hamill seems to ignore the commerce clause,
10 that is, ignore the problem, or I guess acknowledge that
11 there simply will be multiple taxation. This is simply a
12 fact of life. Well, it may be a fact of life that New
13 Jersey is willing to live with, but it is certainly a fact
14 of life that the Court has not permitted, that is terribly
15 destructive to the underlying purposes of the commerce
16 clause, namely to prevent multiple taxation.

17 And indeed, her suggestion that because there is
18 an exclusion for dividends, that this is a nonproblem,
19 fails to recognize the fact that in this very case we are
20 dealing with capital gains; fails to recognize the fact
21 that under her regime it is not just intangibles we are
22 talking about, we are talking about all income. Income
23 from sales of tangibles, it doesn't matter, it all goes
24 into the tax base, and therefore there is going to be
25 multiple taxation resulting from the continuing existence

1 of the 30-odd States that have the business/nonbusiness
2 income distinction and States like New Jersey.

3 Second, the 30 years that we have been living
4 with UDITPA in which in fact the States have worked out
5 these relatively workable rules, indeed, Ms. Hamill has
6 conceded, at least for some purposes, that ASARCO and
7 Woolworth are workable. She says they are workable, at
8 least they are workable for the 34 other States that don't
9 want to do what New Jersey does. She wants to leave
10 intact a system in which the preexisting unitary business
11 principle exists for 34 States but not for New Jersey.
12 What will that mean? Think of the kinds of substance
13 versus form problems you would have.

14 For example, if you have a situation, going back
15 to our parking lot, the parking lot is in California. The
16 beauty parlor is in New Jersey. Under her regime, if you
17 put the parking lot into a separate subsidiary, New Jersey
18 cannot tax it. Why? Because there is no unitary
19 connection under traditional principles.

20 Now suppose you take that parking lot, you
21 dissolve it into the beauty parlor corporation. Now
22 miraculously, New Jersey's power to tax expands. The
23 Constitution does not permit this kind of form over
24 substance result. It is simply indefensible.

25 The notion that -- with respect to the

1. retroactivity point, that Allied may not have relied on
2 this case is simply irrelevant to the question of whether
3 or not, if this Court should determine that ASARCO and
4 Woolworth should be overruled, whether or not it should be
5 applied retroactively or prospectively. Under the Chevron
6 test it is quite clear, from Justice Souter's opinion in
7 which the Court joined in the judgment that selective
8 prospectivity is unacceptable, and clearly this Court
9 cannot decide this case on a retroactive, prospective
10 basis based on whether or not a particular taxpayer
11 relied.

12 It is obviously whether the taxpayers in general
13 have relied on ASARCO and Woolworth and to suggest that
14 this establishes, that this does not establish a new
15 principle of law and that somehow we were to glean from
16 Container, which actually reaffirmed, spoke favorably of
17 ASARCO and Woolworth, that it was becoming eroded or
18 discredited is simply contrary to common sense.

19 New Jersey also completely fails to appreciate
20 the complexity and chaos that will result from her
21 approach. The problem of having the tax base be congruent
22 to the underlying apportionment factors is serious enough
23 without the complication of sweeping wholly unrelated
24 assets and wholly unrelated businesses into a single
25 apportionable tax base.

1 Under New Jersey's regime, New Jersey would
2 retain the same three-factor formula regardless of the
3 differences of the businesses. You could have, for
4 example, an advertising business and a steel business
5 under the same corporate roof, steel business,
6 capital-intensive, all of its property based in the steel
7 mills would outweigh the advertising business, which was
8 generated largely by payroll, say, in New York.

9 The result would be complete misattribution of
10 income without a serious look at what the underlying
11 factors of the apportionment formula provided. This would
12 require the Court to become embroiled in the very
13 controversies that presumably it thought it was getting
14 out of over the last 10 years in developing these workable
15 principles.

16 ASARCO goes back 100 years, and not on a
17 discredited basis. The unitary business principle has
18 been there for 100 years, has involved intangible
19 property. There was no issue in Fargo v. Hart as to the
20 particular tangible property.

21 It was because intangibles were --

22 Thank you, Mr. Chief Justice.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Hellerstein.

25 The case is submitted.

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(Whereupon, at 1:59 p.m. the case in the above-entitled matter was submitted.)

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)

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