

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
95 NOV -6 PM 12:49

CAPTION: FULTON CORPORATION, Petitioner v. JANICE H.
FAULKNER, SECRETARY OF REVENUE OF NORTH
CAROLINA

CASE NO: 94-1239

PLACE: Washington, D.C.

DATE: Tuesday, October 31, 1995

PAGES: 1-53

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

FULTON CORPORATION, :

Petitioner :

v. : No. 94-1239

JANICE H. FAULKNER, SECRETARY :

OF REVENUE OF NORTH CAROLINA :

- - - - -X

Washington, D.C.

Tuesday, October 31, 1995

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

APPEARANCES:

JASPER L. CUMMINGS, JR., ESQ., Raleigh, North Carolina; on
behalf of the Petitioner.

CHARLES ROTHFELD, ESQ., Washington, D.C.; on behalf of the
Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	JASPER L. CUMMINGS, JR., ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	CHARLES ROTHFELD, ESQ.	
7	On behalf of the Respondent	24
8	REBUTTAL ARGUMENT OF	
9	JASPER L. CUMMINGS, JR., ESQ.	
10	On behalf of the Petitioner	51
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-1239, Fulton Corporation v. Janice
5 Faulkner.

6 Mr. Cummings.

7 ORAL ARGUMENT OF JASPER L. CUMMINGS, JR.

8 ON BEHALF OF THE PETITIONER

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

11 The outcome of this case will depend on three
12 points. First, the North Carolina tax upon the intangible
13 value of stock discriminates, both facially and in actual
14 operation, against interstate commerce.

15 Second, there is no defense to this
16 discrimination either under the compensating tax defense
17 or otherwise.

18 Thirdly, this case is not controlled by the 1912
19 decision in Darnell v. Indiana.

20 First, I would like to speak to the
21 discrimination. That the discrimination in the tax is
22 facial is admitted either explicitly or implicitly by the
23 decision of the North Carolina supreme court and by the
24 State in its brief before this Court. Were it not for
25 that facial discrimination, there would not be necessary

1 the attempt to prove the compensatory tax defense which
2 both the State supreme court and the State before this
3 Court have argued.

4 Not only is there facial discrimination against
5 interstate commerce, but perhaps more importantly, this
6 tax --

7 QUESTION: May I just ask you, it's really not
8 discrimination against commerce as it's discrimination
9 against those who own stock that -- the company of which
10 does business elsewhere. It's discrimination against the
11 stock ownership, not against the activity, is what I'm
12 saying. The ownership in different kinds of companies is
13 taxed differently.

14 MR. CUMMINGS: That's correct, Your Honor, just
15 as in the very early case of I. M. Darnell Company, which
16 in fact was the same corporation involved in the Darnell
17 case, the company that receives logs shipped from another
18 State and was taxed in that case differently from logs
19 that it had received from the taxing State, while it might
20 not have been the outside shipper of the logs, it suffered
21 the first impact of discrimination.

22 QUESTION: Was the tax on the ownership interest
23 in the company the tax on the stock there?

24 MR. CUMMINGS: The tax at issue here is the
25 tax --

1 QUESTION: Here it is, yes.

2 MR. CUMMINGS: -- on stock, yes, sir.

3 QUESTION: It wasn't in that case though, was
4 it?

5 MR. CUMMINGS: Well, there it was a tax on logs
6 which were owned by the in-State company, but we've had
7 many cases before this Court where the party who was
8 objecting before this Court was not the party dealing in
9 interstate commerce but was just a local party who had
10 dealt with someone who was in interstate commerce.

11 QUESTION: But have we squarely held that it
12 would be impermissible to tax at a different rate the
13 ownership in stock of a company that did its business in
14 the State, as opposed to stock in a company that only did
15 its business out of State? Forget all the gradations of,
16 you know, half -- just the extreme polar cases. Is
17 that -- you think that's clearly invalid.

18 MR. CUMMINGS: Yes, sir.

19 QUESTION: And what is the closest case on that
20 point, in your view?

21 MR. CUMMINGS: The closest case to the facts in
22 this case, I believe, is Westinghouse v. Tully, the 1984
23 decision of this Court written, I believe, by Justice
24 Blackmun.

25 Westinghouse v. Tully also involved the tax on a

1 shareholder. The shareholder in that case was
2 Westinghouse Corporation. It had a subsidiary that was a
3 DISC, a domestic international sales corporation, and the
4 tax at issue was the parent's franchise tax. The
5 franchise tax was computed in a way that increased the
6 parent's franchise tax as the subsidiaries exports through
7 the ports of other States increased. It didn't matter
8 that the exports through the ports of the State of New
9 York stayed the same, but if the subsidiary did more
10 activity in interstate commerce, the shareholders'
11 franchise tax went up.

12 We submit that that same type of discrimination
13 exists here. Under the --

14 QUESTION: The Court -- are you saying the Court
15 struck down the tax in Westinghouse v. Tully?

16 MR. CUMMINGS: Yes, Your Honor, the Court struck
17 down the tax on the shareholder, which was a franchise tax
18 in that case.

19 So we have here both the facial discrimination,
20 which as I indicated was admitted both in the brief and by
21 the North Carolina supreme court, we have the actual
22 penalty against interstate commerce, in that here the
23 corporation could do the same amount of business in the
24 State of North Carolina but could expand its business in
25 interstate commerce and as a result of that the

1 shareholders' stock tax will go up.

2 So therefore the two taxes, the stock tax which
3 my client has paid and the corporate income tax which is
4 said to be a compensatory tax, which we will get to in a
5 minute, are not in this case mutually exclusive proxies
6 for each other. This is not an either-or case.

7 This is not a situation where one tax goes down
8 and the other tax goes up. Just as in Westinghouse v.
9 Tully, or by analogy to that, the tax paid by the
10 corporation to North Carolina could remain the same, the
11 shareholders' tax could go up just because the subsidiary
12 of the corporation had increased this interstate commerce.

13 Having shown both actual and facial
14 discrimination against interstate commerce, we turn to the
15 compensating tax defense on which the State and the North
16 Carolina supreme court primarily relied.

17 First, it is important to notice that the
18 compensating tax defense has never been allowed to impose
19 an actual penalty on interstate commerce by its operation.
20 As I have illustrated, it would do so if it were allowed
21 to be applied in this case.

22 QUESTION: Your theory of the penalty is the
23 theory that, in effect, the investment will be siphoned
24 out of interstate commerce and into investment in
25 corporations that do business solely intrastate.

1 MR. CUMMINGS: Yes, Your Honor.

2 QUESTION: Is that argument affected by the fact
3 that, by and large, the investment market is a national
4 investment market? I mean, if the stock were being sold
5 entirely in the State, your argument would be a very
6 strong one. Stock characteristically, though, is sold on
7 national markets, and is this fact, this tendency to favor
8 intra rather than interstate investment in effect going to
9 be diluted almost to the point of the incidental by the
10 fact that we have a national market, and that the investor
11 in Oregon isn't going to be worrying about this?

12 MR. CUMMINGS: Your Honor, it might be somewhat
13 invested. I can say from personal experience that I know
14 from many persons in North Carolina they like to invest in
15 corporations like CP&L, Carolina Power & Light, Duke
16 Power, local corporations that they know about, and it
17 motivates them, and there is some evidence in the record
18 of this motivation -- there's an affidavit -- to invest in
19 a corporation in which there will be less intangibles
20 taxed.

21 There are many decisions of this Court stating
22 that we do not need to know how great the impact on
23 interstate commerce is to strike down discrimination.

24 A third point, just 2 weeks ago, the supreme
25 court of the State of Kentucky, in a case titled

1 St. Ledger, dealt with a very similar tax upholding it,
2 relying on the Darnell case, which we will come to in a
3 minute, but finding, as a factual matter, the very
4 discrimination that you just described to actually occur
5 and to be a concern to that court, by analogy.

6 QUESTION: Why do you say that none of the other
7 compensating facts cases involve any discrimination,
8 discriminatory effect on interstate commerce? I would
9 think even the classic one does. I mean, that is the
10 offsetting sales and use taxes.

11 Every time such a tax is imposed, it becomes
12 much less attractive to buy a car in another State where
13 there's no sales tax. I mean, you know, if there's a
14 sales tax in Virginia and no sales tax in North Carolina,
15 I will go and buy my car in North Carolina all the time.

16 MR. CUMMINGS: I don't think that sort of
17 interstate luring by nontaxation is the type --

18 QUESTION: Oh, you can call it luring, but any
19 difference in price is a luring. This happens to be a
20 difference of price caused by the imposition of a sales
21 tax.

22 MR. CUMMINGS: Well, up to this point, this
23 Court's opinions in that type of case have -- by my
24 reading have looked to two types of discrimination.
25 First, is the imported good taxed by this State?

1 Let's talk about the State of North Carolina.
2 Is the imported car taxed by North Carolina at the same
3 rate as the car bought locally? If the answer is yes,
4 that's the first cut that there is no discrimination.

5 QUESTION: Okay.

6 MR. CUMMINGS: Then, as this Court discussed in
7 the decision in Jefferson Lines, there needs to be a
8 credit applied by this State -- let's say North
9 Carolina -- for any sales tax paid to the other State from
10 which the car was imported. When that credit is applied,
11 that's the second cut to ensure that there is no
12 interstate discrimination.

13 QUESTION: Okay. Well, you can say that there
14 cannot be undue interstate discrimination, perhaps, no
15 more than is necessary to prevent your higher taxes from
16 having what would be the normal economic effect of higher
17 taxes.

18 MR. CUMMINGS: Perhaps the response to your
19 question would be a statement that was made in Armco v.
20 Hardesty, which is a very important case to us. As you
21 may recall, in Armco v. Hardesty, there was concern about
22 the fact that out-of-State manufacturers had to pay the
23 in-State wholesaling tax, but in-State manufacturers only
24 had to pay the in-State manufacturing tax and did not have
25 to pay the wholesaling tax.

1 The decision -- of course, that was struck down.
2 The decision posited the situation where one State might
3 impose simply a wholesaling tax and one State might impose
4 simply a manufacturing tax, and the decision said that
5 would be okay, that's not a discrimination, and I think
6 that's somewhat analogous to your situation that one State
7 might choose not to tax at all, and another State might
8 tax.

9 QUESTION: Now, in order to win, Mr. Cummings, I
10 guess you would have to persuade us to overrule Darnell.

11 MR. CUMMINGS: Your Honor, no. I believe
12 Darnell -- if it please the Court, I believe Darnell can
13 be distinguished. If you choose not to distinguish it, we
14 do ask you to overrule it, and if you'd like me to turn to
15 Darnell now, I will.

16 Darnell is a very cryptic decision. It's a
17 decision that is hard to understand, and it's hard to
18 understand the facts without resort to the decision of the
19 underlying Indiana supreme court, which I've done and will
20 embroider a little bit on the facts of Darnell.

21 QUESTION: Well, when you say embroider, you
22 mean take it from the Indiana --

23 MR. CUMMINGS: Take it from the Indiana supreme
24 court -- I certainly will not add to that -- yes, Your
25 Honor.

1 It is important to notice that in Darnell there
2 was not the set of facts that we had here. In Darnell,
3 there was not a situation where the tax paid by the
4 corporation to the State of Indiana could remain level,
5 and the tax paid by the shareholder could increase,
6 because the corporation had entered into interstate
7 commerce. That was not the way the regime in Indiana
8 worked.

9 The regime in Indiana was a true, either-or
10 situation. It was a true set of mutually exclusive taxes.
11 The taxpayers would either pay one or the other.

12 What the State of Indiana tried to do, I
13 believe, was to tax all stock that it could get its hands
14 on at 100 percent. If the stock were owned by a local
15 resident in an out-of-State corporation, the State of
16 Indiana made that local shareholder pay tax on 100 percent
17 of the value of the stock he owned, a very unremarkable
18 sort of tax, sort of property tax.

19 If the corporation was domestic -- and this is
20 where the either-or comes in. If the corporation was
21 domestic, the shareholder didn't have to pay tax on his
22 stock, but the corporation paid tax, in essence, on all of
23 its stock as if it were paying for the shareholder, and
24 the way that was done was, the corporation paid tax on the
25 greater of the value of the tangible personal property in

1 Indiana that it owned, or the capitalization value of all
2 its market value stock.

3 And therefore, Justice Holmes looked at this
4 situation and said, well, certainly Indiana can tax the
5 stock of residents, and certainly Indiana can make the
6 corporations pay tax on their property, including their
7 capital stock, and we don't see anything wrong with that,
8 and by the way, we're not going to consider the situation
9 where the corporation might own property in Indiana and in
10 other States, because --

11 QUESTION: Was capital stock a net or gross?

12 MR. CUMMINGS: Gross. Well, it was the true
13 market capital value of the stock.

14 QUESTION: Yes, but if they had liabilities, did
15 they subtract it?

16 MR. CUMMINGS: Yes, Your Honor.

17 QUESTION: They subtracted liabilities.

18 MR. CUMMINGS: Correct.

19 QUESTION: So therefore in almost every case the
20 gross -- if there's goodwill in the company, and unless in
21 an unusual circumstance except for that, then the value of
22 the -- the total value of the stock will be greater than
23 the intangible or tangible property -- the tangible
24 property.

25 MR. CUMMINGS: That was my --

1 QUESTION: So almost every case, what they're
2 really paying tax on in the corporation is the stock.

3 MR. CUMMINGS: Is the stock, right. I agree,
4 Your Honor, and therefore it seems that Indiana was simply
5 trying to tax all the stock in the State. It taxed the
6 stock to the domestic corporate issuer, and it taxed the
7 stock to the local shareholder of the foreign corporation.

8 QUESTION: If we don't look any further than
9 what Justice Holmes wrote, wouldn't it be simpler to say
10 that what Holmes was, and what the Court was holding in
11 that case was really something about equal protection in
12 judging economic regulation, and the one thing that is
13 clear today is that that is not the standard for dormant
14 Commerce Clause taxation and let it go at that?

15 MR. CUMMINGS: I'm with you all the way,
16 Justice. I agree completely.

17 QUESTION: But I mean, it really could be --

18 MR. CUMMINGS: It really could be --

19 QUESTION: -- looked at as simply as that,
20 couldn't it?

21 MR. CUMMINGS: Yes, Your Honor.

22 The case can be parsed between the Commerce
23 Clause discussion and the Fourteenth Amendment discussion,
24 and the Commerce Clause discussion falls in the middle of
25 the second paragraph, I believe, where they said -- where

1 Justice Holmes said, we're not dealing with the case where
2 a foreign corporation owns some Indiana property, and
3 property tax was paid to the State of Indiana but there
4 was no deduction allowed against the shareholders' stock.
5 He said, we're not going to deal with that, because
6 they're not our facts, and that is the very paradigm case
7 that I stated at the outset that represents the actual
8 penalty here, where we can have --

9 QUESTION: Well, what did the Court say it was
10 deciding in Darnell?

11 MR. CUMMINGS: It said it was deciding, Your
12 Honor, whether a State can tax the property of a domestic
13 corporation, that property including the capital value of
14 its stock, in the stock of a foreign corporation.

15 QUESTION: Yes, but it didn't say that in the
16 abstract. I mean, if the State couldn't do it, it would
17 have to be some provision of the Constitution that would
18 prevent it. What provision of the Constitution did the
19 Court say was involved in Darnell?

20 MR. CUMMINGS: The citation follow -- well, the
21 Court said at the outset of the opinion that there had
22 been a claim made under the Fourteenth Amendment and under
23 the Commerce Clause, but when it got to the last
24 paragraph, where it discussed the stock tax on in- and
25 out-of-State corporations, it cited the case of Kidd v.

1 Alabama, which was a 1903 decision that was purely under
2 the Fourteenth Amendment.

3 And Kidd v. Alabama went off on Coe v. Erroll,
4 and Coe v. Erroll was one of those early cases which
5 dealt, again, with timber -- they seemed to have a lot of
6 timber in the early days -- and it simply held that the
7 State from which the timber was cut could tax the timber,
8 and then if the timber was shipped across the State line,
9 the State where it was received could tax the timber.

10 QUESTION: Well, but that's not equal
11 protection, even Fourteenth Amendment. That's due
12 process, isn't it?

13 MR. CUMMINGS: Yes, Your Honor. I believe it
14 was both due process and to some extent equal protection.

15 QUESTION: Well, did it -- is there any mention
16 of equal protection in the opinion?

17 MR. CUMMINGS: There's a mention of "substantial
18 equality." Justice Holmes in the last paragraph said that
19 substantial equality is attained by taxing the stock of
20 the foreign corporation and the property of the domestic
21 corporation, and I agree that the Commerce Clause, part of
22 the decision was really not decided by the Court because
23 it did not have the facts before it.

24 QUESTION: Do you think we follow that approach
25 today, that is, evaluate the tax just on the basis of how

1 it applies to the particular petitioner before the Court
2 and not how it applies overall?

3 MR. CUMMINGS: No, Your Honor.

4 QUESTION: I don't know that we've done that in
5 the cases since I've been sitting here, anyway. It seems
6 to me we look at the tax's overall impact, so no matter
7 how you slice it, you're asking us to cut back on what we
8 said in Darnell.

9 MR. CUMMINGS: Well, I believe -- yes, Your
10 Honor, and I believe a straw has already been put into the
11 wind on that issue in the Jefferson Lines decision earlier
12 this year. It was the first time that this Court has
13 cited Darnell since 1935.

14 And in that citation, in the footnote in
15 Jefferson Lines, the Court was dealing with giving credit
16 for -- to one taxpayer for a tax paid by another taxpayer,
17 or perhaps for a different tax paid by that taxpayer, and
18 this Court said, if a State chooses to have an apportioned
19 gross receipts tax on a bus company, and if it chooses to
20 give a credit for the sales tax paid to that State by the
21 bus rider, then it must give a credit for out-of-State
22 sales taxes paid by bus riders that bought their ticket
23 out of State.

24 The last line in that footnote said, however,
25 we're not now deciding -- probably because cert had been

1 granted here -- we're not now deciding whether a similar
2 credit must be given to a tax paid by a "third party," C.
3 F. Darnell, the first cite of Darnell since the 1935
4 decision in Colgate v. Harvey.

5 I think you were sending us a signal that you
6 saw the inconsistency of Darnell with the credit mechanism
7 set up in footnote 6 in Jefferson Lines, and I say to you
8 that your question about third party is, I think, easily
9 answered, because Darnell is no more a "third party" --
10 excuse me.

11 The corporation in relation to its shareholder
12 is no more a "third party" than is the buyer of the bus
13 ticket a third party in relationship to the bus company.
14 In fact, there is an even closer relationship, because
15 these are related parties. These are corporation and
16 shareholder, and if the State chooses to think that
17 there's a close enough relationship that the State can
18 create this sort of intertwining of the corporate tax and
19 the shareholder tax, then certainly this Court can see
20 that there's a close enough relationship to be concerned
21 about the impact on interstate commerce.

22 QUESTION: Is it your position that there is no
23 tax that a State can constitutionally impose on the in-
24 State shareholders of an out-of-State operating
25 corporation? There is no constitutionally permissible

1 tax?

2 MR. CUMMINGS: No, Your Honor. We believe --

3 QUESTION: What tax could a State impose on the
4 shares that its taxpayers hold in corporations acting out
5 of State?

6 MR. CUMMINGS: We have no objection to a tax on
7 100 percent of the value of stock in an out-of-State
8 corporation.

9 QUESTION: All stock, so if they didn't --

10 MR. CUMMINGS: A hundred -- if the State of
11 North Carolina wants to tax 100 percent of the value of
12 all the stock owned by everybody, that suits us fine,
13 because --

14 QUESTION: But nothing singularly. Is there any
15 tax that could be imposed on North Carolina shareholders
16 of out-of-State corporations that are operating out of
17 State, period? Are you saying that any tax -- of course,
18 if you tax domestic corporations you can put it on evenly,
19 but just with respect to the out-of-State --

20 MR. CUMMINGS: I would not think so, Your Honor,
21 and that question is somewhat similar to the question that
22 was raised recently in the Perini case from Massachusetts
23 involving the distinction between how you were going to
24 give a franchise tax relief for in-State and out-of-State
25 corporations, and the Massachusetts supreme court held for

1 the taxpayer and this Court did not issue certiorari, my
2 closest analogy in a recent case.

3 QUESTION: Well, has North Carolina repealed
4 this tax --

5 MR. CUMMINGS: Yes --

6 QUESTION: -- do I understand?

7 MR. CUMMINGS: Yes, Your Honor.

8 QUESTION: How many other States have a similar
9 scheme, do you know?

10 MR. CUMMINGS: At least four.

11 QUESTION: And what would they be?

12 MR. CUMMINGS: One is Kentucky. I believe
13 Georgia is another. They are listed in the response of
14 the State to our petition.

15 Whether --

16 QUESTION: The same -- I mean, I -- just perhaps
17 following up on Justice O'Connor's question, I suppose
18 your reasoning here is going to be equally applicable when
19 we're talking about related taxes on different taxpayers
20 who are themselves related not as shareholder in
21 corporations but as debtor and creditor.

22 I mean, I suppose this is going to be applied,
23 your rule would be applied in the area of taxation of
24 savings account interest, and so on, on banks, wouldn't
25 it? A bank could not say, well -- a State could not say

1 well, we will not tax interest earned in the banks of our
2 State, but we will tax interest earned in the banks of
3 other States. The rule would be the same.

4 QUESTION: Yes, Your Honor, and that issue has
5 percolated up through the appellate courts.

6 Justice O'Connor, if you are concerned about the
7 repeal, the repeal occurred on April 18 of this year,
8 3 days after the last due date for the filing of the '95
9 returns, and therefore the repeal has not even taken
10 effect yet.

11 Last week I called three attorney -- three
12 accountants and was told of five cases of assessment of
13 this tax that have occurred since the repeal, and
14 therefore this tax is ongoing in the State of North
15 Carolina.

16 The Court has not questioned the compensating
17 tax defense, and I will not dwell on it except to say that
18 it is designed to prevent a preference for interstate
19 commerce. It is designed to address the situation where
20 the normal taxing regime somehow misses taxation of
21 interstate commerce.

22 Well, here, the normal taxing regime, the
23 compensated tax, according to the decision of the North
24 Carolina supreme court, is the corporate income tax. What
25 does the corporate income tax fall on? It falls on all of

1 the income earned from business in the State of North
2 Carolina.

3 This Court has said many times that's all the
4 State of North Carolina is entitled to tax the corporation
5 upon, and therefore, nothing has been missed. There's
6 nothing left to be compensated for, and yet the North
7 Carolina supreme court decision did indicate that the
8 stock tax was a proxy for tax on corporate income earned
9 out of State.

10 No doubt realizing the difficulty of this
11 position, the State has developed a new theory on its
12 appeal brief to this Court that somehow there must be a
13 payment for access to capital markets by foreign
14 corporations, and if the foreign corporation is not paying
15 a corporate income tax to the State, then its shareholders
16 must pay a stock tax, which is a proxy tax on the foreign
17 corporation.

18 Getting back to Justice Ginsburg's question, we
19 have no objection to a tax on 100 percent of the value of
20 the foreign corporation's stock, as long as it's also
21 applied to the value of the local corporation's stock.

22 The issue is not really so much the compensating
23 tax defense as the need, as the other shoe that the State
24 has to drop, which is, oh, by the way, we don't just want
25 to tax 100 percent of the value of the stock for access to

1 capital markets, we want to give this deduction so that we
2 don't have double taxation intrastate, and that is, I
3 believe, the real issue in this case.

4 And that brings us, Justice Souter, back to
5 Jefferson Lines, because I believe Jefferson Lines
6 indicated that a State cannot attempt to avoid intrastate
7 double taxation and at the same time create interstate
8 double taxation and ignore taxes paid to other States.

9 And Justice Rehnquist, this also brings us back
10 to -- Mr. Chief Justice Rehnquist, this also brings us
11 back to Darnell, because in Darnell Mr. Justice Holmes
12 said, we need not, or the State of Indiana need not
13 concern itself with the taxes paid by the corporation to
14 other States. That can just simply be irrelevant.

15 Well, we know that the more modern Commerce
16 Clause jurisprudence of this Court indicates that a State
17 must concern itself with taxes paid to other States, and
18 that was mentioned in Armco v. Hardesty, where the
19 decision said, this out-of-State manufacturer who is
20 paying the local wholesaling tax undoubtedly is paying an
21 out-of-State manufacturing tax, or may be paying an out-
22 of-State manufacturing tax and therefore it is subject to
23 dual taxation, whereas the manufacturer who sells at home
24 only pays one tax.

25 Now, there might be some question of whether

1 other States have manufacturing taxes. Frankly, we don't
2 have one in the State of North Carolina, but there's not
3 much question that almost every State in these 50 States
4 has a corporate income tax, so with respect -- so
5 regardless of how many States have stock taxes, every
6 State has a corporate income tax, and therefore to the
7 extent other States are collecting corporate income taxes
8 on multi-State corporations, when their stock is held in
9 North Carolina there will be double taxation, whereas if
10 the stock is owned by the local corporation, and more
11 importantly if the local corporation just keeps its
12 business at home, only one tax is paid.

13 If there are no further questions, thank you.

14 QUESTION: Very well, Mr. Cummings.

15 Mr. Rothfeld, we'll hear from you.

16 Mr. Rothfeld, how does an individual taxpayer in
17 North Carolina, who perhaps owns some shares or something,
18 figure out what he ought to pay?

19 ORAL ARGUMENT OF CHARLES ROTHFELD

20 ON BEHALF OF THE RESPONDENT

21 MR. ROTHFELD: Mr. Chief Justice, and may it
22 please the Court:

23 Do you mean in filing as individual tax return?

24 QUESTION: Yes. There's a graded scale? Is he
25 supposed to find out for himself whether the shares he

owns are of an out-of-State corporation or in-State, and that sort of thing?

MR. ROTHFELD: My understanding, Your Honor, is that there is a list of stocks that's maintained by the State, and he can determine that simply by looking to that list to determine which percentage of the stock is taxable, so I think it's a fairly routine and easy mechanical matter.

I should say, I think that this case involves two distinct Commerce Clause principles. The first is the principle of nondiscrimination, which we think in this case turns on application of the compensatory tax doctrine.

The second distinct principle is the principle of apportionment, which we think in this case turns on the application of the internal consistency test, and I think it's useful to keep these principles straight, and I'll discuss them separately, starting with the question of discrimination, and on that question, given some of the discussion thus far, I think it's useful to begin with what the State understood the relationship to be between the income tax and the shares tax at the time that it enacted the taxable percentage deduction that's at issue in this case.

Now, at that time, before it enacted the taxable

1 percentage deduction -- and I think I should note, as has
2 been observed, the taxable percentage deduction and,
3 indeed, the entire intangibles tax, have been repealed.

4 QUESTION: Why don't you slow down a little bit,
5 Mr. Rothfeld.

6 MR. ROTHFELD: Oh, I'm sorry. We're so excited
7 to get to the meat of the case, Your Honor, that I'm
8 speeding along.

9 Before the State enacted the taxable percentage
10 deduction it entirely excluded corporate shares from the
11 reach of the intangibles tax, and when the State began to
12 consider an expansion revision of the intangibles tax, it
13 was of the view that intangibles were simply paper
14 representations of other values that might already be
15 subjected to other State taxes, and in particular, that
16 corporate shares were representations of other corporate
17 values that might be subjected to the State property tax
18 or income tax, and when the State determined to expand the
19 intangibles tax to reach corporate shares, it decided to
20 try to avoid duplicative taxation of these related
21 intrastate values.

22 Now, the State considered but rejected the idea
23 of a discriminatory tax that would exempt the shares of
24 domestic while taxing the shares of foreign corporations,
25 and instead hit upon the idea of the taxable percentage

1 deduction under which the shares of a corporation that
2 pays income tax are exempted from the shares tax, and the
3 shares of a corporation that does not pay income tax are
4 subject to the intangibles tax. The idea was to impose a
5 single, nonduplicative tax on all related intrastate
6 corporate values.

7 QUESTION: Why didn't you do the same thing with
8 the whiskey tax?

9 MR. ROTHFELD: Well, I --

10 QUESTION: I mean, people out of State don't pay
11 the whiskey tax --

12 MR. ROTHFELD: Well, I think --

13 QUESTION: -- and foreign corporations don't pay
14 tolls. I suppose the reason they don't pay income tax in
15 North Carolina is they don't have income in North
16 Carolina, nor do they buy whiskey in North Carolina, nor
17 do they use North Carolina bridges, so I mean, that's
18 obviously the thing that's bothering me.

19 MR. ROTHFELD: Well, I think what you say is
20 right, Your Honor, but I think that the State's view --
21 and I'll suggest in a minute the State's view is clearly
22 supported by the decision in Darnell. The State's view is
23 that these paper representations that it's trying to tax
24 are representations that exist elsewhere, but they're
25 values that also are present in the State in the form of

1 the corporate shares, and the States -- I think as a
2 matter of economic reality, it is true that there is a
3 close relationship between the value of a corporation's
4 shares and the amount of the corporate income, and
5 therefore the States took the position --

6 QUESTION: I -- you're saying that the ones that
7 do business in North Carolina pay an income tax to North
8 Carolina, and what you're trying to do is make up for the
9 fact that the people who don't do business in North
10 Carolina, unfortunately North Carolina will lose that
11 income for the income tax.

12 MR. ROTHFELD: Well, I think --

13 QUESTION: And the problem that I have with that
14 is not the technical thing, it's just the practical thing.
15 Of course North Carolina loses the income tax of a
16 California company. So do they lose the whiskey tax. So
17 do they lose a lot of things.

18 If we were to uphold this, wouldn't we have to
19 say a State could impose some kind of tax on a Maine
20 company to make up for the fact that its employees don't
21 buy whiskey in North Carolina? What's the difference?

22 MR. ROTHFELD: I think the difference, Your
23 Honor, is that there is something in the State that's
24 taxable, and that's the corporate shares, and the
25 corporate shares represent something. They represent an

1 ownership interest in a part of the corporation, and there
2 are various ways that one could look at what those shares
3 represent.

4 In Darnell, we think that the State looked at
5 it, and this Court --

6 QUESTION: Let me try once more. Could you
7 assess a tax on shares in North Carolina of a foreign
8 company to make up for the fact that that foreign company
9 has employees who don't buy food in North Carolina so they
10 don't pay the sales tax, to make up for the fact that they
11 don't use bridges in North Carolina? You see --

12 MR. ROTHFELD: Yes, I --

13 QUESTION: -- if I accept your principle,
14 wouldn't I also have to accept that?

15 MR. ROTHFELD: I think clearly not, Your Honor.

16 QUESTION: Because. Because.

17 I think that the -- what we visualize this tax
18 as being, we visualize corporate shares and corporate
19 income as having a particular relationship, just as
20 corporate shares and perhaps corporate property do. We
21 don't think that corporate shares and the food purchases
22 of the corporation's employees have that relationship. We
23 don't think that that's what corporate shares represent,
24 or were understood to represent when the State passed this
25 test.

1 What we think the shares represent are corporate
2 values, and we think income is one of those values.

3 QUESTION: Well, then if that is true, you could
4 tax 100 percent of the income of any corporation
5 regardless of where its income was earned --

6 MR. ROTHFELD: Well, we --

7 QUESTION: -- which you know you can't do --

8 MR. ROTHFELD: We clearly --

9 QUESTION: -- and why does that not point to the
10 problem in this case?

11 MR. ROTHFELD: Well, I think that leads us to
12 the compensatory tax analysis here. It certainly is true
13 that --

14 QUESTION: You're saying compensatory tax
15 analysis in effect can supplant the rule that requires an
16 apportionment of income.

17 MR. ROTHFELD: Well, I --

18 QUESTION: I think that's what you're saying.

19 MR. ROTHFELD: I don't think so. We're -- both
20 of these taxes --

21 QUESTION: Well, that's going to be the effect
22 of it, isn't it?

23 MR. ROTHFELD: I don't --

24 QUESTION: That's the effect of your theory,
25 isn't it?

1 MR. ROTHFELD: I don't think so, Your Honor. I
2 think that --

3 QUESTION: You're saying the intangible stock is
4 in effect a surrogate for income, and therefore the two
5 may be considered in relation to each other in determining
6 what I should tax, and if, in fact, there is this
7 surrogate relationship, and you are justified in taxing
8 the one, you would be justified, I suppose, in taxing
9 100 percent of the income even though 80 percent of it was
10 earned out of the State.

11 MR. ROTHFELD: Well, we certainly recognize that
12 the State can't tax 100 percent of the income, or any of
13 the income which is earned outside of the State, unless
14 the State has apportionable taxing nexus to it, and we're
15 not trying to tax the income.

16 What we're suggesting is that under the
17 compensatory tax doctrine, related values that are present
18 in the State and out of State may be subject to tax, and I
19 think it's important, Your Honor, not to confuse the
20 apportionment principle which relates to credits for taxes
21 paid elsewhere and the nondiscrimination principle, which
22 relates to whether or not the taxable percentage deduction
23 here must be struck down as being discriminatory.

24 Now, our understanding of how that deduction
25 should be viewed is that there is one -- there are

1 substantially related values, and that is the test the
2 Court has articulated in the compensatory tax doctrine
3 cases, that there are substantially related values between
4 the value of corporate shares and the amount of corporate
5 income as a matter of economic reality, and we think given
6 that substantial relationship, imposing a tax, a tax as a
7 mutually exclusive proxy either on income, if income is
8 taxable, or on the corporate shares which represent those
9 values, that that does not impose a discrimination.

10 Now, the question of whether or not we're taxing
11 too much total value, whether the tax is on apportionment,
12 is a separate internal consistency question which I'll get
13 to once we've disposed of the discrimination problem.

14 Now, I think that first of all the Court has
15 addressed this issue in Darnell. Now, I know Mr. Cummings
16 said that it was a cryptic decision. We don't find it
17 cryptic.

18 QUESTION: Mr. Rothfeld, the Kentucky supreme
19 court recently dealt with this matter, and as I understand
20 its decision, it rejected your argument up until the last
21 step.

22 It found that there was discrimination against
23 interstate commerce. It went all the way down the line as
24 though it were going to hold for the taxpayer, but in the
25 end it said, but Darnell is the Supreme Court's

1 instruction, and so despite the prior steps that went in
2 the taxpayer's favor, at the bottom line, Darnell is the
3 Supreme Court's instruction and so we follow it.

4 But as I understand the Kentucky supreme court,
5 it rejected the argument that you have been making so far.

6 MR. ROTHFELD: Well, I'm not sure that I agree
7 with everything in the opinion of the Kentucky supreme
8 court in that case, although the Kentucky tax was a
9 different tax than this tax. The Kentucky tax was a
10 property tax which actually differed even from the
11 property tax in Darnell, in that as I understand the
12 Kentucky system, if a corporation paid tax on 75 percent
13 of its property to Kentucky, then there would be an
14 automatic complete deduction in taxability of the shares,
15 which is not the system we have here.

16 But insofar as the Kentucky court was saying
17 that the kind of system we have here is discriminatory and
18 is not saved by the compensatory tax doctrine, which we
19 disagree with that analysis, as I say, first of all we
20 think that the Court addressed precisely this problem in
21 Darnell, which we don't find cryptic, and I think looking
22 at what Justice Holmes said for a unanimous Court, and
23 looking at the arguments that were made to the Court in
24 Darnell, the argument was precisely the argument that's
25 being made here, that there was a discrimination in the

1 treatment of the corporate shares.

2 QUESTION: I do find it cryptic, so maybe you
3 can explain it to me.

4 MR. ROTHFELD: As I understand it, and perhaps
5 I'm missing the crypticism there, but as I understand it,
6 what was happening in Darnell was that there was a tax on
7 real and tangible property that was imposed on
8 corporations, and there was an intangibles tax imposed on
9 the value of all corporate shares in the State, and
10 insofar as the State paid intangible -- insofar as the
11 corporation paid tax on its tangible and personal property
12 in the State, then the taxpayer was relieved, the
13 individual shareholder was relieved of paying a shares
14 tax, just as there is relief here for the individual
15 shareholder if the corporation pays income tax.

16 And the Court, looking at this scheme, said that
17 a tax on the property of a domestic corporation -- and
18 this was the Court's language -- a tax on the property of
19 a domestic corporation and on the shares of a foreign one
20 is consistent with substantial equality, and that's
21 precisely what we're saying here, that there are related
22 values that are being taxed in precise proportion to one
23 another.

24 QUESTION: Well, why are they any more related
25 than whiskey is related? I'm sorry to go back to that,

1 but it just seems to me that the reason that you don't
2 have an income tax on California companies in North
3 Carolina is because the California companies don't have
4 income in North Carolina.

5 MR. ROTHFELD: Well, I think the best I can
6 do -- perhaps I can't satisfy you completely, Your Honor,
7 but the best I can do is that the share is a
8 representation of something else. It's a representation
9 of other values.

10 QUESTION: It's a discounted value of a future
11 income stream, and some of that income stream will be
12 taxed when it reaches a North Carolina person, and the
13 other is taxed in the form of an income tax.

14 MR. ROTHFELD: And --

15 QUESTION: And North Carolina gets its share of
16 that, and the others get their --

17 MR. ROTHFELD: Well, I think --

18 QUESTION: I mean, I agree that's what it
19 represents. You don't have to -- so --

20 MR. ROTHFELD: Well, and our analysis is that
21 taxing both the representation of the income stream and
22 taxing the income stream is in a sense a kind of
23 duplicative taxation, and -- because one is a
24 representation of the value, the other is the value
25 itself. I mean, that is the rationale for what the State

1 is doing here.

2 QUESTION: Do you agree with Darnell that the
3 shares represent property?

4 MR. ROTHFELD: Well, in a sense -- I mean, when
5 you look at the shares of --

6 QUESTION: I don't think anybody --

7 MR. ROTHFELD: No, I think --

8 QUESTION: -- any moderately sophisticated stock
9 analyst would value shares on the basis of book --

10 MR. ROTHFELD: I think that's right. That's why
11 this --

12 QUESTION: So Darnell must be wrong.

13 MR. ROTHFELD: Well, I think this case is a
14 stronger case for the State than Darnell, because as you
15 say, clearly investors understand shares as representing a
16 portion of income. I mean, that's why price-to-earnings
17 ratio is such an important instrument for investors, so I
18 think that -- Darnell makes our case a fortiori if Darnell
19 was a representation of equivalent value.

20 QUESTION: Mr. Rothfeld, how many cases have we
21 had that have approved compensating taxes? What kinds of
22 taxes have been approved as compensated?

23 MR. ROTHFELD: There have been very few
24 decisions of this Court involving compensating taxes at
25 all. I mean, there was a recent decision, the Oregon

1 Waste decision, which rejected a compensated tax argument.

2 QUESTION: Right.

3 MR. ROTHFELD: There was a decision, the Arctic
4 Maid case, which is cited in the briefs, which accepted a
5 compensating tax argument involving one tax which was
6 imposed upon the canning of fish and another tax that was
7 imposed upon the freezing of fish. Now, that is not a
8 perfect analogy to our case because both taxes were --

9 QUESTION: So canning and freezing of fish, and
10 sales and use taxes. What other ones?

11 MR. ROTHFELD: Well, we plead that Darnell --

12 QUESTION: Darnell.

13 MR. ROTHFELD: -- is a compensating tax which is
14 directly on point, and I think it's useful, Your Honor, to
15 contrast this case with the Oregon Waste Systems decision
16 from 2 years ago, which I think is very instructive on how
17 to analyze this.

18 The Oregon Waste Systems case, Oregon argued
19 that its discriminatory tax on disposal of waste at Oregon
20 landfills and its income tax were substantially related
21 and that the taxes were compensatory, and the Court
22 rejected that argument because it found that disposal of
23 waste at an Oregon landfill and earning income are not
24 substantially related, and to prove that point, the Court
25 found it decisive that an Oregon firm that disposed of

1 waste in an Oregon landfill would be subject both to the
2 income tax and to the discriminatory landfill fee, meaning
3 that the case -- that the taxes were not mutually
4 exclusive proxies for each other.

5 Now, I mean, here, I think that the test --

6 QUESTION: I know, and these are
7 substantially -- because you said here what is going on is
8 basically a tax on access to capital markets, is that --

9 MR. ROTHFELD: Well, I think that -- that should
10 not be misleading here, Your Honor. Neither of these
11 taxes is a tax on access to capital markets as such. The
12 income tax is a tax on the earning of income in the State,
13 and it's justified by the benefits that the State provides
14 to corporations that earn income there, and the shares tax
15 is a tax on the ownership of property, intangible property
16 in North Carolina, and the taxpayer here is a North
17 Carolina resident --

18 QUESTION: So I should ignore all the stuff
19 about access to capital markets.

20 MR. ROTHFELD: Well, we make that point, Your
21 Honor, simply because, in response to the taxpayer's
22 argument here that the effect of this tax is to burden
23 out-of-State corporations in their issuing of shares, and
24 that somehow that's unfair because those corporations get
25 no benefit from North Carolina.

1 In fact, we think they derive substantial
2 benefits from services provided by North Carolina which
3 allow those firms to sell to residents who have
4 accumulated capital and to engage in transactions with
5 these out-of-State firms, so we don't justify these taxes
6 because each tax is imposed in precisely the same way on
7 access to capital markets.

8 We justify these taxes because, and perhaps my
9 exchange with Justice Breyer was unsatisfactory, but we
10 justify these taxes because we view, as we think the Court
11 did in Darnell, corporate shares as being representation
12 of other values, and those values may be equivalent. They
13 may be substantially similar within the meaning of the --

14 QUESTION: The taxes are not equivalent, and
15 there is no substantial equivalent of taxing event.

16 MR. ROTHFELD: Well --

17 QUESTION: I mean, if your argument is sound,
18 then we're going to read an awful lot of recent
19 compensatory taxation law going off --

20 MR. ROTHFELD: I don't think that's right, Your
21 Honor. I think that the only really relevant recent
22 compensatory taxation law is the Oregon Waste Systems
23 case, and as I say, the decisive fact, the Court
24 identified as the decisive fact in that case that the two
25 taxes were not imposed as mutually exclusive proxies for

1 one another.

2 Here, the taxes are mutually exclusive proxies
3 by definition. They're linked in the text of the tax
4 statutes. If a corporation pays income tax, then its
5 shares are exempt from tax, from the shares tax. If a
6 corporation does not pay income tax, its shares are
7 subjected to the shares tax, so they are by definition
8 mutually exclusive proxies.

9 That, I think, is the first and most important
10 evidence that the taxes are --

11 QUESTION: Mr. Rothfeld, could I ask you a sort
12 of preliminary question that I want to be sure I'm right
13 on?

14 You do concede, do you not, that if the State
15 repealed its income tax on corporate activity and merely
16 taxed the stock of the residents at different rates,
17 depending on whether the corporation did business out of
18 State on the one hand or was a local corporation on the
19 other, that that would be invalid?

20 MR. ROTHFELD: Well, as your initial question to
21 my colleague suggested, I think the Court has never
22 actually squarely resolved that, and it is arguable that,
23 given the nature of intangible property, this is something
24 we can get to in the apportionment part of our argument.

25 It is conceivable that duplicative taxation,

1 those intangibles would be permissible, and that principle
2 might also suggest that discriminatory taxation --

3 QUESTION: But you really haven't argued that.

4 MR. ROTHFELD: We have not made that argument.

5 We have argued on the assumption that there is a
6 discrimination within the meaning of the Court's cases,
7 that there is a compensatory tax that overcomes that
8 discrimination.

9 I think one should look to the three parts of
10 the compensatory tax test that the Court has identified.
11 It has asked that the taxpayer -- that the State identify
12 the intrastate tax burden for which it is trying to
13 compensate. Here, that is clearly the income tax.

14 It has asked that the taxes be shown to be a
15 roughly equivalent amount. Here, the North Carolina
16 supreme court demonstrated that in its opinion, pages 12
17 to 14, the petition -- the appendix to the petition for
18 certiorari to the North Carolina supreme court ran through
19 an analysis showing that the actual dollar amounts
20 imposed --

21 QUESTION: I'm beginning to see something in
22 what you say, that this is a -- the State has a use tax,
23 say 4 percent, on refrigerators bought out of State. Can
24 it charge that use tax if I go -- say you have that in
25 North Carolina. I buy my refrigerator in New York, and I

1 have to pay a New York sales tax. Do I have to pay the
2 New York sales tax of 4 percent, then take the
3 refrigerator back to North Carolina and also pay the use
4 tax?

5 MR. ROTHFELD: Well, probably not, Your Honor,
6 although the Court has never squarely resolved in a
7 holding that --

8 QUESTION: If that were so, I could understand
9 why you have this income tax argument.

10 MR. ROTHFELD: Right, but let me say --

11 QUESTION: It's not so, or it is so, in your
12 opinion?

13 MR. ROTHFELD: Well, I think it is an open
14 question, and --

15 QUESTION: Most States allow for the rebate.

16 MR. ROTHFELD: Virtually all States do, but I
17 think this is an important point --

18 QUESTION: And when this Court addressed it, it
19 was in the context of a credit situation, was it not?

20 MR. ROTHFELD: The Court in Jefferson Lines very
21 strongly suggested that such a credit would be necessary,
22 but I think that that --

23 QUESTION: So that if you were a betting man,
24 you would know the answer to the open question.

25 MR. ROTHFELD: Oh, I --

1 (Laughter.)

2 MR. ROTHFELD: Fortunately I am not a betting
3 man, Your Honor, so I guess that gives me the right not to
4 express an opinion on how that would be -- on the outcome.

5 But assuming that such a credit would be
6 necessary in the sales and use tax situation, and I will
7 assume that for purposes of answering your question --

8 QUESTION: Can I ask you a question about your
9 other argument? If you want to finish -- are you
10 finished?

11 MR. ROTHFELD: Well, I think that the outcome
12 would be different here. Even if a credit is necessary
13 there, we think that because this is a tax on intangible
14 property, there's a different outcome here.

15 The reason that the credit is required, if it is
16 required in that situation, is the apportionment
17 requirement, not the nondiscrimination requirement of the
18 Commerce Clause.

19 It's an internal consistency problem, and
20 apportionment and internal consistency go to the question
21 of whether the State is taking more than its fair share of
22 the value from any one transaction, more than its fair
23 share of any tax value, and the Court has said in
24 Jefferson Lines that a failure of internal consistency
25 is -- as a general matter shows that one State is taking

1 more than its fair share.

2 That's the problem generally with duplicative
3 taxation, that two States are taxing the same thing, each
4 taking 100 percent of the value, which might be the
5 situation you hypothesized, the sales and use tax. Then
6 we assume that one State is taking -- or perhaps both
7 States are taking more than their fair share.

8 But the Court has said that principle does not
9 apply to the taxation of intangible property, and while
10 with income one can see where the inputs that go to the
11 creation of income are located and apportion taxing
12 authority over that income accordingly, one can see where
13 tangible property is located and can assign taxing
14 authority to the States of that location, the Court has
15 said, and I'm here quoting from the Court's opinion in
16 Curry v. McCanless which was written by Justice Stone, and
17 it's very closely associated with that element of the
18 Court's modern due process doctrine -- or modern Commerce
19 Clause doctrine.

20 The Court has said that very different
21 consideration is both theoretical and practical applied in
22 the taxation of intangible property, and that is because
23 it is impossible to identify a single location for
24 something that has no physical characteristics and that is
25 intimately associated with the laws in more than one

1 State, and the Court --

2 QUESTION: But how can you rely on that kind of
3 an analysis when in your earlier breath you stood here and
4 told us that the State's theory in effect is that this
5 intangible is, in fact, a surrogate, and for purposes of
6 Commerce Clause analysis somehow can be identified with
7 the income of the corporations?

8 If we accept that analysis, then we, I suppose,
9 should not give any kind of special status to the taxation
10 of the intangible here, and if we accept that analysis, it
11 seems to me that backs you right into the internal
12 inconsistency, because on that analysis, if all States
13 enact the same tax there's going to be more than
14 100 percent of taxation on the identical segment of value,
15 or the identical event. I mean, you can't have it both
16 ways.

17 MR. ROTHFELD: I would strive to make my
18 arguments not internally inconsistent themselves, Your
19 Honor.

20 It is certainly our position that the values
21 reached by the income tax and the shares tax are
22 substantially related within the meaning of compensatory
23 tax doctrine in the Oregon Waste Systems decision, but we
24 do not say that the shares tax is, in fact, a tax on
25 income. It's a tax on the ownership of intangible

1 property, and as the Court has said, even though
2 substantially related values are reached by two taxes, the
3 constitutionality of the tax, and indeed the
4 apportionability of the tax, may turn on the form in which
5 the tax is pleased, the legal incidence of the tax, the
6 nature of the tax --

7 QUESTION: Well, if the form is going to govern,
8 then it seems to me you've got a different problem, and
9 that is the problem of compensatory taxation, supposedly,
10 but involving different classes of taxpayers, and to the
11 best of my knowledge, unless you rely on Darnell, we have
12 never applied the analysis under those circumstances.

13 MR. ROTHFELD: Well --

14 QUESTION: Isn't that true?

15 MR. ROTHFELD: Well --

16 QUESTION: Maybe I'm overlooking something.

17 MR. ROTHFELD: Well, I think, I mean, the sale
18 and use tax situation, one tax is imposed upon --

19 QUESTION: The buyer of the property is -- the
20 class of buyers is the only class that's being taxed.
21 Here, to the extent that you cut the ownership of shares
22 adrift from the corporation and its earned income, you've
23 got two classes of taxpayer.

24 MR. ROTHFELD: Well, I think many States like
25 North Carolina impose the legal incidence of their sales

1 tax on the seller, whereas the legal incidence of the use
2 tax is invariably on the buyer, so in that situation you
3 have different categories of taxpayers, and the very first
4 of the Court's compensatory tax cases, Hinson v. Lott,
5 involved a tax on -- one tax on distillers, another tax on
6 distributors and dealers in liquor, so there are different
7 categories who can be subject to the tax.

8 I think -- I mean, the way that the Court has
9 described the compensatory tax doctrine has not required
10 precise equivalents on every aspect of the tax, has not
11 required that the taxes be graphed and all the peaks and
12 valleys match exactly, as long as the ultimate burden on
13 interstate and intrastate commerce match up.

14 And indeed, the way the Court has described the
15 compensatory tax doctrine in the Oregon Wastes Systems
16 case is that the taxes must be substantially similar, not
17 that they must be identical, which mirrors the language
18 very closely in the Darnell case upon which we rely that
19 their taxes must be consistent with substantial equality,
20 so I don't think that we have to find precision to satisfy
21 the compensatory tax --

22 QUESTION: The only substantial equality we've
23 ever recognized is between sales and use, isn't it?

24 MR. ROTHFELD: Well, I guess that depends in
25 part upon the --

1 QUESTION: Darnell.

2 MR. ROTHFELD: Darnell. Alaska Maid was not a
3 question --

4 QUESTION: Darnell was a case that precedes
5 modern compensatory taxation analysis, so that the
6 question is, do we subsume Darnell under the modern law,
7 that Darnell was not applying anything like the modern
8 law, was it?

9 MR. ROTHFELD: Well, I think that it was, Your
10 Honor. I think that -- as I say, the Court in Hinson v.
11 Lott, the case that this Court cited in Oregon Waste
12 Systems decision as the genesis of the compensatory tax
13 doctrine, long preceded Darnell, and the language the
14 Court used in Darnell is similar, substantially similar to
15 the language that it uses in the Oregon Waste Systems
16 case, so there's no reason to think the Court was applying
17 different standards.

18 In any event, in Oregon Waste Systems, the
19 Court's most recent decision, it referred -- has used the
20 language of substantial similarity, and not precision.

21 I think the point of the doctrine is not a
22 formalism that's designed to match up the taxes, as I say,
23 at every point. The idea of the doctrine is to be sure
24 that interstate commerce is not being disadvantaged,
25 ultimately, in contrast to intrastate commerce, and I

1 think we can demonstrate to you that as a matter of
2 economic reality, that that is not happening.

3 But to return to the question of apportionment,
4 and in terms of consistency, which I think is a crucial
5 question here, and whether or not this should be treated
6 as an intangible property tax and an income tax, the fact
7 is, this is an intangible property tax.

8 As in Jefferson Lines, the fact that the tax is
9 put in that form may determine whether or not it's
10 apportionable, and if -- look at it this way. The
11 taxpayer's complaint here, ultimately, on the
12 apportionment part of the argument, is that its values are
13 being subjected, or could be subjected to duplicative
14 taxation in other States.

15 If we're right about the treatment of intangible
16 property, and we think that the Court's holding on that
17 are absolutely clear, then if this precise tax, this
18 precise shares tax on 100 percent of the value, were
19 replicated in some other State, he would have no
20 complaint. The taxpayer would have no complaint because
21 of that duplicative taxation.

22 So if other States had shares taxes at
23 100 percent of value, there would be no complaint by the
24 taxpayer here. The fact that the State had income taxes
25 and that is a duplicative taxation because of the

1 substantial similar value shouldn't give him more of a
2 complaint than he has now, and I think Jefferson Lines is
3 very good authority on that point, that one looks to the
4 nature of the taxes being challenged.

5 Even though the economic effect of the tax,
6 economic reality of the tax may be similar to a tax that
7 has to be apportioned, the fact that the tax is put in
8 forms that does not require apportionment should be
9 dispositive.

10 So I think ultimately for the Court to rule for
11 the taxpayer in this case, it clearly would have to
12 overrule Darnell v. Indiana, which we think is clearly on
13 point, it would have to set aside the precedents holding
14 that duplicative taxation of intangible property is
15 permissible.

16 It would also, we think, have to cut back on the
17 principle and say intrastate commerce can be made to pay
18 its own way and need not be placed in a favored position,
19 because if the taxpayer's position here prevails, the
20 State will have to either impose duplicative taxation of
21 intrastate commerce, which is clearly, as an historical
22 matter, what it was trying to avoid, or it will have to
23 abandon any taxation of intangibles altogether, which
24 means it will have to give up the chance to tax values
25 that clearly are present in the State and that it has a

1 right to tax.

2 There is no reason for the Court to take such a
3 substantial step in the decision, and the North Carolina
4 supreme court therefore should be affirmed.

5 If there are no further questions --

6 QUESTION: Thank you, Mr. Rothfeld.

7 MR. ROTHFELD: Thank you very much.

8 QUESTION: Mr. Cummings, you have 2 minutes
9 remaining.

10 REBUTTAL ARGUMENT OF JOSEPH L. CUMMINGS, JR.

11 ON BEHALF OF THE PETITIONER

12 MR. CUMMINGS: If this Court finds for Fulton
13 Corporation, I would request that the Court in its
14 decision give some indication of the application of its
15 decision to the 1990 tax year issue.

16 The reason for my concern is that the only
17 decision we have below, which was a decision of the North
18 Carolina court of appeals, which ruled for Fulton
19 Corporation and found the tax to be unconstitutional,
20 postponed the effective date of its decision for a year-
21 and-a-half after the date of the decision, and therefore
22 Fulton Corporation received no remedy.

23 We moved before that court for rehearing on the
24 basis of this Court's decision in Harper v. Virginia,
25 which expressed a very strong desire for --

1 QUESTION: Yes, but is it not clear that they
2 have an alternative, either doing away with the exemption
3 or doing away with the tax? You could lose, and you could
4 win the legal principle and lose this in dollars.

5 MR. CUMMINGS: I agree, yes --

6 QUESTION: Yes.

7 MR. CUMMINGS: -- Your Honor, but I would like
8 to make sure that they -- that the State makes that
9 decision either to do away -- either to make everyone pay
10 the full tax on stock they -- in 1990 forward, or to give
11 refunds.

12 Thank you, sir.

13 QUESTION: You agree that there could be a
14 retroactive imposition of a tax on people who had no
15 notice at the time that the tax liability accrued?

16 MR. CUMMINGS: This -- yes, Your Honor. This
17 Court many times has indicated that is a theoretical
18 possibility.

19 QUESTION: And they said that without the party
20 affected before the Court.

21 MR. CUMMINGS: I'm never aware of that having
22 actually been done, and I would not expect it to be done
23 in North Carolina. I think all we're talking about here
24 is refunds.

25 Thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
2 Cummings. The case is submitted.
3 (Whereupon, at 11:07 a.m., the case in the
4 above-entitled matter was submitted.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

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

FULTON CORPORATION, Petitioner v. JANICE H. FAULKNER,
SECRETARY OF REVENUE OF NORTH CAROLINA

CASE NO. : 94-1239

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

BY Don Mani Federico

(REPORTER)