No. 91-615

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ALLIED-SIGNAL INC.,
as successor-in-interest to
The Bendix Corporation,
Petitioner,
v.
DIRECTOR, DIVISION OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Does the unitary business principle permit a nondomiciliary State to tax a multistate corporation on income derived from a minority stock investment, when the investment is integral to the corporation's operational strategies of enhancing the corporation's existing businesses and diversifying into other businesses through the acquisition and divestiture of other corporations?

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BRIEF AMICUS CURIAE OF MULTISTATE TAX COMMISSION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Multistate Tax Commission is the administrative arm of the Multistate Tax Compact (the "Compact"). Nineteen States, including the District of Columbia, have adopted the Compact. In addition, fourteen States are associate members. The Compact seeks to facilitate proper determinations of state and local tax liability of multistate taxpayers, promote uniformity or compatibility of state tax systems, facilitate

taxpayer convenience and compliance, and avoid duplicative state taxation. Article I, Multistate Tax Compact, ALL ST. TAX GUIDE ¶701 *et seq.* (Max. Mac. 1991), ST. TAX GUIDE ¶351 (CCH 1991). The Court recognized the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The Compact was developed by cooperation among States and taxpayers. *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 1 and 23. The members States of the Compact are committed to resolving the inherent conflict of our a single national economy and States with separate taxing authority. The member States of Commission have accepted the challenge of federalism by developing uniform state tax rules of apportionment and allocation that seek to resolve the type of issue presented in this case.

In furtherance of its uniformity objectives, the Multistate Tax Compact utilizes the principles of the Uniform Division of Income for Tax Purposes Act ("UDITPA"), 7A UNIFORM LAWS ANNOTATED 331 (1985), as the core rules for the apportionment and allocation of income of a multijurisdictional business. Article IV, Multistate Tax Compact, ALL ST. TAX GUIDE ¶701 *et seq.* (Max. Mac. 1991), ST. TAX GUIDE ¶351 (CCH 1991). The Multistate Tax Commission has further developed regulations interpreting UDITPA. *See* MTC Regs. ALL ST. TAX GUIDE ¶600 *et seq.* (Max. Mac. 1991). Fostering state tax uniformity through voluntary state cooperation

remains central to the Commission.

The Commission's experience with the administration of state income taxation on a multistate basis is that the issue of the apportionability of intangible income repeatedly arises with respect to allegations of both underreporting and overassessment of income among the States. The difficulties experienced by both state tax administrators and taxpayers have in large part been due to their disagreement over the Court's pronouncements in earlier cases dealing with the issue. The Commission welcomes the Court's reexamination of this most important area of state taxation. Clearer understanding of the underlying constitutional principles will provide the States the necessary guidance to ensure against unwarranted positions and will provide prospect for the further refinement of the Commission's existing apportionment and allocation regulations in light of modern business conditions.

SUMMARY OF ARGUMENT

A State may include gain realized from the sale of an intangible within the preapportionment tax base of a non-domiciliary corporation, when that income is derived from a unitary business, part of which unitary business is conducted within the taxing State. To make the determination whether the income has arisen from such a unitary business, the examination may properly focus on whether the ownership of the intangible (*i.e.*,

the acquisition, management, and eventual disposition) of the intangible in of itself was an integral part of the unitary business of the taxpayer. The Court did not establish in *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico*, 458 U.S. 354 (1982), an exclusive test for determining the apportionability of gain resulting from the sale of an intangible, but only one possible rationale for apportioning such gain.

When tested by the foregoing standard, the ASARCO gain realized in this case is apportionable by New Jersey. The facts of this case reveal a taxpayer that operated an "functionally integrated set of diverse businesses." The term "functionally integrated set of diverse businesses" describes Bendix as an entity whose entire business was integrally and singularly organized through central management to promote economies of scale and functional integration that would realize the overall corporate strategy of dynamic growth and diversification. All of the diverse business interests of Bendix operated collectively to achieve profitability as an integrated company with the resulting subordination of their respective individual strategic interests. Restricting a State from apportioning the intangible income of an integrated business operating within the taxing State on the basis that the income did not relate to the integrated, in-state business is unwarranted.

The reasonableness of the conclusion reached by

application of the unitary business principle is corroborated when tested against a more direct application of the underlying constitutional principles. Thus, the evidence reveals no State with a better right to apportion the ASARCO gain, because (i) in the absence of actual duplicative taxation the Court is unwilling to restrict a non-domiciliary State's right to apportion income based on the possible existence of the right to tax such income in the domiciliary State; and (ii) the ASARCO gain in fact arose not only from acts that occurred and were controlled in Michigan but from the collective contribution of the entire group of diverse businesses interests that constituted Bendix.

In rendering its decision the Court should revisit its prior decisions and make every attempt to clarify the principles that govern the apportionability of income realized from intangibles, because the issue is a constant source of contention and the resulting confusion is injurious to the States and taxpayers alike. The business income definition in section 1(a) of the Uniform Division of Income for Tax Purposes Act ("UDITPA"), 7A UNIFORM LAWS ANNOTATED 331, 336 (1985), is the correct uniform expression of the applicable principles.

ARGUMENT

I. BACKGROUND ON HOW ISSUES ABOUT STATE INCOME TAX APPORTIONMENT OF INCOME ARISE UNDER FEDERALISM.

This case represents the inherent tension of federalism. The tension arises from the presupposition that there should be both a single national economy and separate sovereign States of limited geographical jurisdiction. The existence of States of limited geographical jurisdiction relying on their sovereign taxing power to supply the revenue necessary to discharge their governmental responsibilities inevitably creates the potential that multijurisdictional taxpayers will claim that a taxing State is overreaching. The Court, responding to practical realities, has developed principles that attempt to establish administrable standards by which to resolve these boundary disputes.

Both the Due Process Clause and the Commerce Clause implement the geographical limitation on state taxation. *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 165, *reh. denied,* 464 U.S. 909 (1963). These limitations restrict a State from taxing income arising out of interstate activities if there is no "'"minimal connection" or "nexus" between the interstate activities and the taxing State, and "a rational relationship between the income attributed to the State and the intrastate values of the enterprise."'" *Id.* Nexus is satisfied "if the corporation avails itself of the 'substantial privilege of carrying on business' within the State[.]" *Mobil Oil Corp.* v. *Comm'r of Taxes of Vermont,* 445 U.S. 425, 436-37 (1980). Nexus is not destroyed by "[t]he fact that a tax is contingent upon events brought to pass without a state." *Id.* In essence the question

being asked is whether the taxing State has given anything for which it can ask in return. *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444-45 (1940). Application of these limitations ensures that a State will not "'tax value earned outside its borders.'" *Container Corp.*, *supra*, 463 U.S. at 164.

The unitary business principle embodies the constitutional concern with extra-territorial state taxation. The unitary business principle is not a substitute for the substantive restrictions of the Due Process and Commerce Clauses, however.

State apportionment of income that is derived from a unitary business reflects the theoretical and practical realization that precise allocation of the income earned by a "more-or-less integrated business enterprise" operating on a multistate basis is often elusive. *Container Corp.*, *supra*, 463 U.S. at 164. The Court interprets the Constitution as permitting the States considerable flexibility in developing appropriate methods to determine how much income is properly attributable to a taxing State. *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978). States may determine their aliquot share of the income of a multijurisdictional business by (i) defining the nature of the unitary business that is operating in the taxing State, (ii) determining the total amount of income of that unitary business wherever it is operating, and (iii) apportioning the entire income of the unitary business through the use of a formula that

reflects objective measures of the business' activities both within and without the taxing State. *Container Corp., supra,* 463 U.S. at 165. The result secures the proportion of such income that is fairly attributable to the taxing State. Any taxpayer seeking to challenge a State's determination of the amount of the income properly attributable to the taxing State "has the '"'distinct burden of showing by "clear and cogent evidence" that [the state tax] results in extraterritorial values being taxed...."'" *Container Corp., supra,* 463 U.S. at 164.

The foregoing establishes the following statement of the unitary business principle:

> A State may not include an item of income in a taxpayer's preapportionment tax base, unless the item of income is derived from the unitary business, part of which unitary business is conducted within the taxing State.[1]

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[1]Because the unitary business principle is also used in another context that is not at issue here, *i.e.*, the combinability of separately organized business entities, different considerations can arise in Court's use of the term unitary business. Thus, when combination of separately organized business entities is at issue, one legitimate concern is ownership or control. *Container Corp., supra,* 463 U.S. at 166. Ownership or control of the payor of the income is not an *essential* element, however, to a determination of whether an item of income arises from a unitary business.

II. PROPER RESOLUTION OF THIS CASE IS DEPENDENT UPON THE CORRECT IDENTIFICATION OF THE ISSUE BEING RAISED.

The need to reach an understanding on the proper statement of the issue in this case is self-evident from a comparison of the Petitioner Bendix' and Respondent New Jersey's respective statements of the Questions Presented.

Bendix' first question raises the issue as to whether the apportionability of its gain is dependent upon Bendix and ASARCO being jointly engaged in the same unitary business. Bendix' statement of the issue thus focuses on the interrelationship between the business activities of Bendix and the business activities of ASARCO as a critical element to the determination of the apportionability of the gain.

New Jersey's question, on the other hand, asks whether the apportionability of the gain is dependent upon the relationship that Bendix' ownership of the ASARCO stock (and not ASARCO's underlying business activities) had to the unitary business being conducted by Bendix in New Jersey. New Jersey's question accordingly focuses on the interrelationship of Bendix' own business in New Jersey to Bendix' own acquisition, management, and disposition of the ASARCO stock.

New Jersey properly states this case.

Bendix understandably chooses to base the apportionability of the ASARCO gain on the existence of a unitary business relationship between the underlying business activities of ASARCO and the business activities of Bendix. *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982); *F.W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico*, 458 U.S. 354 (1982). These decisions clearly determined the apportionability of the income there at issue exclusively upon a determination of the existence of a unitary business relationship between the underlying business activities of the companies whose stock gave rise to the intangible income and the business activities of the company that owned the intangible property.

Identifying the Court's method of analysis in *ASARCO* and *Woolworth* does not answer the question whether the analytical approach of those cases was intended as the *exclusive* method of analysis, however. After all, the Court adopted the method of analysis in *ASARCO* and *Woolworth* that was accepted by the parties. It is clear in this case, however, that New Jersey does not concur that the *ASARCO* and *Woolworth* method of analysis is exclusive.

New Jersey's position is well supported by the Court's observations that with a supporting record the *ASARCO* and *Woolworth* method of analysis is not

exclusive. Thus, in *ASARCO* the Court noted that its decision was based upon the trial court's finding that the "ASARCO's stock investments were 'not integral to nor a necessary part of [ASARCO's] business operations....'" 458 U.S. at 325 n.21. At the same point the Court noted the trial court findings did not support any argument that the stock investments were an "interim use of idle funds 'accumulated for future operation of [taxpayer's] own primary business.'". *Id.* Finally the Court in *ASARCO* intimated that it was not establishing a legal rule that would preclude the apportionment of investment income by non-domiciliary States. 458 U.S. at 327 n. 22. These observations were consistent with *Mobil Oil, supra,* upon which the Court in *ASARCO* relied, 458 U.S. at 327 n.22, because the Court in *Mobil* did not suggest that the lack of a underlying unitary business between dividend payor and payee would *absolutely* preclude apportionability. 445 U.S. at 442. Finally, *Container Corp., supra,* reiterated these observations by acknowledging that capital transactions can perform either an investment function or an operational function. 463 U.S. at 180 n. 19.

The Court and New Jersey are correct in understanding that ownership (*i.e.,* acquisition, management, and disposition) of an intangible asset may relate to the operation of the owner's own unitary business without regard to the relationship of the business activities of the owner and the business activities of the company whose intangible asset is being

held. *E.g.*, J. Hellerstein, STATE TAXATION: CORPORATE INCOME AND FRANCHISE TAXES ¶ 9.12[2], p. 550*ff.* (1983). California illustrates the wisdom of the understanding by noting some (but hardly all) circumstances where unitary income is realized without regard to any existing unitary relationship between the payor and payee. Cal. Am. Br. 16-17. What determines whether ownership of an intangible asset is part of a unitary business is how that ownership relates to the taxpayer's unitary business in the taxing State. New Jersey's view of Bendix' business in New Jersey is as a constantly evolving set of businesses that were integrated to achieve maximum growth and diversification. New Jersey's view is "'within the realm of permissible judgment.'" *Container Corp.*, *supra*, 463 U.S. at 176, 180.

III. THE ASARCO GAIN IS FAIRLY APPORTIONABLE BY NEW JERSEY.

The relationship of the ASARCO gain to the unitary business conducted by Bendix in New Jersey clearly satisfies the constitutional standard stated earlier. *See* p. 8.

Satisfaction of the standard in this case can be demonstrated in two ways.[2] First, proper identification

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[2]The argument advanced here does not intimate that there are no other compelling rationales that support apportionability of the ASARCO gain in New Jersey.

of the nature of Bendix' unitary business, part of which was conducted in New Jersey, demonstrates that Bendix' ownership (*i.e.*, its acquisition, management, and eventual disposition) of its ASARCO interest was integral to the identified unitary business. Second, the reasonableness of the result obtained by identifying the nature of Bendix' unitary business can be checked by asking whether there are any States with a *better* claim to apportioning the disputed gain. The existence of no States with a *better* claim demonstrates the fundamental fairness of New Jersey's apportionment of the ASARCO gain.[3] The Due Process and the Commerce Clauses' regulation of extra-territorial state taxation is preserved but not overstated.

A. *Bendix' Acquisition, Management, And Disposition Of Its ASARCO Interest Was An Integral Part Of Bendix' Unitary Business In New Jersey.*

Bendix' ownership (*i.e.*, acquisition, management, and disposition) of the ASARCO interest was integral to Bendix' unitary business in New Jersey, because Bendix' unitary business in New Jersey was that of a *functionally*

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[3]This argument does not premise New Jersey's right to apportion the ASARCO gain on failure of other States to exercise fully whatever right they may enjoy to apportion or tax the ASARCO gain. Rather the argument contends that if no States can be identified with a better right to apportion or tax the disputed gain, then New Jersey's assertion of the right to apportion the ASARCO gain is likely to be fair.

integrated set of diverse businesses. As a functionally integrated set of diverse businesses, all Bendix' operations, whether located within or without New Jersey, combined as an integrated whole through centralized management, functional integration, and economies of scale to support the entirety of Bendix' business.[4]

The record evidence demonstrates that Bendix' combined business organization was singularly dedicated through centralized management to the achievement of dynamic growth and diversification. In furtherance of this objective, the evidence establishes the corporate business of Bendix was to monitor the business environment to determine what was hot and what was not and to shift the *combined resources of the Bendix group of companies* to those areas that were hot. Implementation of Bendix' business effected the philosophy of its then Chief Executive Officer that corporate managers must seek the highest returns and best growth prospects, impose tough-minded allocations of corporate capital even among operational assets to achieve these objectives, and manage the corporate pool of assets. *See How Companies Should Use Their Cash,* THE NEW YORK TIMES Section 3, p. 2 (April 25, 1982), Ex. D-

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[4]Bendix never informs the Court what its unitary business was in New Jersey, although that business was made up of four diverse business segments that it admits benefitted from centralized management, economies of scale and functional integration. *See* Pet. Br. 30-31.

19 to Depo. of Agee (J.A. 134).

The record indicates:

◇ Bendix' business strategy was to grow through acquisitions and to diversify. Ex. D-17 to Depo. of Agee (J.A. 87, 92), Stip. ¶¶ 141, 146, 151 (J.A. 188, 189, 190-91). Bendix central management was organized to integrate these objectives into Bendix existing operations. Stip. ¶¶ 18, 24, 25, 26, 27 and 28 (J.A. 156, 158-60).

◇ The ASARCO acquisition was consistent with the established business strategy. Stip. ¶ 158 (J.A. 192); Ex. I to Stip. (J.A. 234, 236); Ex. D-17 to Depo. of Agee (J.A. 95-100). At the time of the ASARCO acquisition, Bendix viewed its later favored Aerospace/Electronics Group as a slow growth, high risk segment. Ex. D-17 to Depo. of Agee (J.A. 89-90); Ex. D-18 to Depo. of Agee (J.A. 119, 120). When Bendix did not view ASARCO and natural resources buoyantly, it disposed of them and switched to the Aerospace/Electronics Group, its then favorite higher growth business segment. Stip. ¶¶ 154, 155, 158 (J.A. 191, 192-93).

◇ The acquisition of the ASARCO interest was largely achieved through debt financing. Stip. ¶ 52 (J.A. 52). Debt financing of the ASARCO acquisition is significant, because (i) Bendix

viewed its entire corporate borrowing capacity to be subject to a balance sheet limitation of 35% (Ex. D-17 to Depo. of Agee (J.A. 88)), (ii) the acquisition of the ASARCO interest, the largest in Bendix's history at that point in time (Stip. 150 (J.A. 190)), thus allocated a significant portion of Bendix' capital resources to the ASARCO acquisition with necessary subordination of the potential use of that capital resource by the other business segments of Bendix' unitary business, and (iii) the borrowing was achieved through a bank line of credit that necessarily was financed by the combined business operations of Bendix' unitary business.

◇ The acquisition of the ASARCO interest was viewed not as an "passive investment" but as an entry into a business. Ex. D-18 to Depo. of Agee (J.A. 127-28) (wanted to avoid undue share of Bendix' assets going into a new business). This business view of the ASARCO "investment" is further evidenced in the technique Bendix employed to acquire its equity interest and its future plans for possibly increasing that interest after becoming more knowledgeable. Ex. D-17 to Depo. of Agee (J.A. 104). Once ASARCO had been identified as Bendix' acquisition candidate, Bendix intended to acquire, and did acquire, sufficient interest to allow it to use the equity method of accounting for its interest. Stip. ¶ 55

(J.A. 168). Bendix secured representation on the ASARCO Board of Directors (Stip. ¶ 53 (J.A. 168) that gave Bendix access to insider information from which to determine whether it should proceed with a larger acquisition. Ex. D-17 to Depo. of Agee (J.A. 107-08). Bendix apparently liked what it saw, since within nine months of completing its acquisition Bendix unsuccessfully sought a business combination with ASARCO. Stip. ¶ 61 (J.A. 169).

◇ The integration of ASARCO as an operational asset of Bendix' unitary business is evidenced in Bendix' debt repayment and financial reporting plans. The various scenarios set forth in the planning documents demonstrate the total integration Bendix imposed on all aspects of its business to the fulfillment of its corporate goals.

◇ Bendix' disposition of its ASARCO interest was motivated by precisely the same kinds of considerations that led it to allocate a significant portion of its available borrowing power to natural resources in 1978. Thus, Bendix' dispositions created a pool of cash for acquisitions in the Aerospace/Electronics Group, the newly identified growth area. Stip. ¶¶ 158, 161 (J.A. 192, 193); Ex. B to Stip. (J.A. 215); Ex. U to Stip. (J.A. 265). When Bendix perceived the opportunity to execute on its newly favored

business segment, it proceeded to acquire a 70% interest in the Martin Marietta Corporation. Stip ¶ 162 (J.A. 193); Ex. U to Stip. (J.A. 264). The Martin Marietta acquisition thus reflected a continuation of the same business of being a functionally integrated set of diverse businesses.

These recited facts of the record demonstrate that Bendix' overall business, including the acquisition, management, and disposition of the ASARCO interest, employed the elements of centralized management, economies of scale, and functional integration.

Centralized management existed with respect to the ASARCO interest, because the combined business of Bendix was organized and operated around the achievement of dynamic growth and diversification. The focus of central corporate management of Bendix on dynamic growth and diversification resulted in the allocation of a significant portion of Bendix' combined capital strength to the acquisition, management, and disposition of the ASARCO interest. This allocation of Bendix' combined capital strength necessarily imposed a financial obligation on, and subordinated the capital interests of, the other business segments of Bendix that did not offer an acceptable rate of return.

Economies of scale and functional integration were similarly present, because the diverse business segments of Bendix under the aegis of the central

corporate management combined their respective individual strength to achieve by singular action the best business result possible in the existing business and economic climate. Central management thus integrated the needs of each diverse business into the overall business needs of the greater whole. The resulting efficiency and singularity in the use of the combined financial strength of the corporate group accomplished something none were likely to do on their own--the acquisition of the then single largest "business" acquisition in the history of Bendix. Central management's business strategy of deployment and "redeployment" of assets (*see* Stip. ¶ 159 (J.A. 193)) allowed Bendix to shift in and out of diverse businesses and other forms of investments to the benefit of profitability of the integrated whole. It is misleading to geographically source income in these circumstances. *See Mobil Oil, supra,* 445 U.S. at 438.

The strategic choices of central management that necessarily allocated Bendix' limited borrowing power and incurred cash flow payment obligations were made in the best interest of the entire company. If redeployment was subsequently called for, central corporate management stood ready to redeploy the combined strength of the company in the new direction. Subsequent history demonstrated precisely this point when central management no longer believed that the Aerospace/Electronics Group was a high risk, low growth business segment. Martin Marietta Corporation

became the new star.

The organizational structure of Bendix facilitated precisely the kind of unmeasurable flow of value that a unitary business manifests, because each diverse business did not operate independently making its strategic business decisions without regard to the interests of the entire corporate group. It would be inappropriate to single out a specific source of the ASARCO gain in these circumstances. *See Mobil Oil, supra,* 445 U.S. at 438.

In addition, Bendix suggests no acceptable rationale for isolating the ASARCO gain from its ongoing business. Stipulation 62 (J.A. 169-71), upon which Bendix places some reliance is not inconsistent with these observations. That stipulation focuses on the ties of the business activities between Bendix and ASARCO and does not deny the existence of the recited facts that also were established by the Stipulation. At best Bendix bases its exclusion on the argument that the ASARCO interest was a passive, non-operational, investment. Pet. Br. 29. Passivity according to Bendix is the absence of Bendix' control of ASARCO and the absence of functional integration between the business activities of ASARCO and the business activities of Bendix. But, the absence of these two factors does not address whether centralized management, economies of scale, and functional integration *within Bendix* facilitated the acquisition, management, and disposition of the

ASARCO interest.

B. *New Jersey's Fair Apportionment Of The ASARCO Gain Is Consistent With The Due Process And The Commerce Clauses' Regulation Of Extra-Territorial State Taxation.*

The litigants have focused on application of the unitary business principle to determine the apportionability of the ASARCO gain. Application of the unitary business principle is an indirect examination of the applicable constitutional concerns, however. Uneasiness with the results obtained by application of the unitary business principle can be tested by an alternative analysis of the underlying constitutional principles. This alternative analysis corroborates the results obtained above.[5]

This brief at its outset states the applicable principles of the Due Process and the Commerce Clauses' regulation of extra-territorial state taxation. Identifying from these principles the basis of other States' possible claims to tax or apportion the ASARCO gain should be a useful check to determining the relative fairness and strength of New Jersey's claim.

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[5]Bendix apparently does not suggest that satisfaction of the jurisdictional concerns of the Commerce Clause raises anything additional to the concerns of the Due Process Clause.

There are two possible theories upon which States other than New Jersey might assert a better claim to apportion or tax the ASARCO gain.[6] First, Michigan might be suggested on the ground of the taxpayer's commercial domicile. Attribution of income to the State of commercial domicile rests on a jurisprudential concept borrowed from property taxation, *mobilia sequuntur personam*. *Mobil Oil, supra,* 445 U.S. at 444-45. Use of the doctrine of *mobilia sequuntur personam* in the income tax context appears to be a carryover of the concept that income sometimes results from property as opposed to the operation of a business. *See* J. Hellerstein, STATE TAXATION ¶ 9.4 pp. 488-91 (1983). Alternatively, fair apportionment among Michigan and perhaps other States (but not New Jersey) might be suggested on the ground that the ASARCO gain arose from another business, an investment business, that was *separate and distinct* from Bendix' unitary business in New Jersey. Neither basis justifies displacement of New Jersey as *one* of the States entitled to impose a fairly apportioned tax.

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[6]Bendix' Brief does not expressly suggest where the ASARCO gain should be taxed, although Bendix does come close to implying that Michigan, its commercial domicile (Stip. ¶ 10 (J.A. 154)), is the State with the better claim. *See* Pet. Br. i (first question presented emphasizes non-domiciliary corporation); 3 (all of its "'corporate (*i.e.*, non-operating) functions'" were "based and controlled in Michigan); 27 (States may not tax income of non-domiciliary taxpayer's investments); 28 (to same effect); 29 (attaching label "integral operational" to capital investment activities does not change fact ASARCO investment was passive).

Given an intangible's lack of physical location, the State of commercial domicile would appear to have no better claim to satisfying the constitutional concerns of the Due Process and Commerce Clauses based on mere domicile than would a State where the owner of the intangible is engaged in a fully operating business. Out of these considerations the Court has expressed some reluctance to borrow the property tax doctrine of *mobilia sequuntur personam* to solve state *income* tax issues in the absence of proof of actual double taxation.[7] *Mobil Oil, supra,* 445 U.S. at 444-45; *see also Container Corp., supra,* 463 U.S. at 188 (allocation for state income taxation not favored even in international arena). In the absence of proof of actual duplicative taxation, the Court appears committed to determining state taxing jurisdiction on an analysis of the business that has given rise to the intangible income. *See Mobil Oil, supra,* 445 U.S. at 445-46.[8]

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[7]In refusing to embrace the doctrine of *mobilia sequuntur personam* the Court has not disclosed whether it would impose any limitations on the taxing claims of domiciliary States. *Mobil Oil, supra,* 445 U.S. at 445; *Ford Motor Credit Corp.* v. *Dept. of Revenue,* 111 S.Ct. 2049 (1991).

[8]Avoiding *mobilia sequuntur personam,* a doctrine that is designed to deal with the issue of duplicative *property* taxation, for state *income* tax purposes appears entirely justified here. Michigan made no claim to tax the entire ASARCO gain. MICH. COMP. LAWS 208.9 (1970), MICH. STAT. ANN. 7.558(9) (Callaghan 1991) (tax base means business income), MICH. COMP. LAWS 208.3 (1970), MICH. STAT. ANN. 7.558(3) (Callaghan 1991) (business income means federal taxable income), MICH. COMP. LAWS 208.45 (1970),

Determining taxability in a State other than New Jersey on the basis of the operation of a business, albeit *separate* from the unitary business operating in New Jersey, does not undermine the fairness of New Jersey's claim to apportion the ASARCO gain either.

First, Bendix strategically has avoided characterizing its "passive investment activities" as a *separate* business. Bendix rather seeks to characterize the acquisition, management, and disposition of its ASARCO interest as a passive investment. *E.g.*, Pet. Br. 29. But even if Bendix raised the argument that its passive investment activities were a separate business, that contention on this record would not assist it in demonstrating by clear and cogent evidence that (i) inclusion of the ASARCO gain in the preapportionment tax base in New Jersey resulted in extra-territorial taxation or (ii) the income attributed to New Jersey was out of all appropriate proportion to the business

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MICH. STAT. ANN. 7.558(45) (Callaghan 1991) (tax base as adjusted is apportioned by traditional three factor formula). There are many indications that duplicative state income taxation is not a pressing problem of federalism, including industry arguments against the uniformity proposals of your *Amicus*, which arguments essentially create the potential for "no-where income," industry opposition to domestic spreadsheets that potentially could reveal the degree to which multistate industry benefits from no-where income, in-house anecdotal evidence that has thus far been assembled from the few domestic spreadsheets that have been recently filed with some States that impose such filings, *e.g.*, CAL. REV. & TAX CODE §25401d (Deering 1992), and scholarship. Strauss, *Considerations in the Federal Collection of State Corporate Income Taxes*, STATE TAX NOTES 81, 82 (Sept. 16, 1991).

transacted in New Jersey. *Butler Bros.* v. *McColgan,* 315 U.S. 501, 507 (1942). Analyzing how Bendix earned the ASARCO gain proves the point.

Consistent with its theory of the case, Bendix could only suggest that the ASARCO gain resulted from management's *independent* (as far as its unitary business was concerned) investigation of and sensitivity to the changing world business environment, management's resulting decisions, and the implementing steps taken by Bendix' instructed employees. This view of the source of the ASARCO gain would be far too narrow and would conflict with the flexibility that the Constitution allows the States to use in apportioning income.

First, if the gain was really solely attributable to the *independent* (as far as its unitary business was concerned) acts of the management and employees of Bendix, management had no need for Bendix and would have done better to have realized these gains for themselves individually. The mere suggestion of this possibility reveals what is wrong with Bendix' view of how the ASARCO gain was achieved. Management's acumen was dependent upon an existing corporate structure which reflected and was financed by the collective strength of the entire business. The corporate structure captured the synergy of all of Bendix' diverse business interests. The capital power of the entire corporate group that was not available outside of Bendix

fueled the combined operating business interests of Bendix. To suggest that Bendix' acquisition, management, and disposition of the ASARCO interest was *solely* the product of the labors of personnel stationed or controlled in Southfield, Michigan, is to give no credit to what allowed the investment to proceed--the unified strength of the entire Bendix group of diverse businesses.

Second, the contribution of the unified, operational strength of Bendix' integrated diverse businesses to the acquisition, management, and disposition of the ASARCO interest necessarily supports New Jersey's equal claim to include the ASARCO gain in the preapportionment tax base. That contribution is best reflected in the combination of Bendix' New Jersey property, payroll and sales apportionment factors that would be used to determine how much of the gain to attribute to New Jersey.

To hold that Michigan and/or the other States in which the acts of Bendix' management and employees occurred have the exclusive claim to apportion the income is in effect to suggest that the ASARCO gain should be apportioned on the basis of payroll. This would be a curious suggestion since there has been no evidence that Bendix separately accounted for its "independent" management. In addition, exclusive reliance on payroll would unfairly deny the substantial contribution made by Bendix' diverse businesses under

the integrated sponsorship of its central management. In the absence of proof of duplicative taxation, for Bendix to contend that the unitary business in New Jersey did not contribute to the realization of the ASARCO gain is to assert a preference for a state taxing system that is best addressed to Congress. *Moorman Mfg. Co.* v. *Bair,* 437 U.S. 267, 280 (1978).

IV. THE COURT'S OPINION IN THIS CASE SHOULD CLEARLY STATE THE GOVERNING PRINCIPLES TO DETERMINING THE APPORTIONABILITY OF INCOME REALIZED FROM THE SALE OF AN INTANGIBLE ASSET AND UDITPA OFFERS THE CORRECT STATEMENT OF THOSE PRINCIPLES.

This case is important to the States, because it is the first opportunity for the Court since 1983 to refine the principles applicable to the determination of the apportionability of intangible income in the face of existing confusion. Confusion has arisen because the Court's statements in its prior opinions can be isolated from their factual setting to support absolutism by both taxpayer and state tax administrator. The resulting confusion further encourages positions based upon revenue effect without much sensitivity to the governing principles. In the end, the state tax result regarding apportionability of income in effect becomes elective, because the confusion grants to taxpayers in our self-assessment system little direction and considerable

discretion in their reporting position. As the application of apportionment is a double edged sword that can have both a positive and negative effect on a taxing State,[9] effective and fair state tax administration is jeopardized when taxpayers are given discretion of this magnitude. Given the small aliquot tax interests of an individual State with respect to a particular taxpayer, it is not economically feasible for States to enforce the same reporting standards against all taxpayers. In the end, this inevitably means that the state tax administrator allocates the substantial resources needed to develop the record of the quality found in this case only in the truly significant cases. This kind of tax administration is neither fair to the States nor to the taxpayers.

If the present climate of confusion remains following this Court's decision in this case, the result will be the further promotion of unrealistic arguments to support one side of an apportionment battle without regard to the underlying economics. The advent of modern telecommunications and the consequent ability to shift values over distances with great ease and to manage assets by remote control exacerbates this problem. Isolated statements of the Court will be used as the foundation for tax planning that is premised upon fictionalized concepts that do not comport with

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[9]Apportionment also affects the recognition of losses within a taxing State and/or results in the taxing State's loss of one hundred percent allocation in favor of equitable apportionment of only a portion of the income.

the modern operation of business to the substantial detriment of the States. Evidence of the reality of this concern is aptly illustrated by the so-called passive investment companies which have as their goal the location of income arising from intangibles in tax havens. The risk of this development is very real. *See* Rosen, *Use of Delaware Holding Company to Save State Income Taxes,* 20 TAX ADVISOR 180 (March 1989).

The appropriate standard for the Court to espouse is the definition of business income appearing in section 1(a) of the Uniform Division of Income for Tax Purposes Act ("UDITPA"), 7A UNIFORM LAWS ANNOTATED 331, 336 (1985). New Jersey's apportionment of the ASARCO gain meets this standard, because the gain arose as a part of the ownership of an intangible which ownership (*i.e.,* acquisition, management, and disposition) was an integral part of Bendix' regular trade or business operations. The facts of this case demonstrate Bendix regular trade to be that of a functionally integrated set of companies. The Court has already indicated its satisfaction with UDITPA's definition of business income. *Container Corp., supra,* 463 U.S. at 167. The UDITPA standard is different from the *mere* financial betterment standard which Idaho apparently advanced in *ASARCO, supra,* 458 U.S. at 326. The Court would immeasurably benefit state tax administration if it embraced this widely recognized standard for determining the apportionability of income.

CONCLUSION

For the foregoing reasons, the Multistate Tax Commission respectfully submits that the Court should affirm the decision of the New Jersey Supreme Court and in doing so should clearly state the principles applicable to determining the apportionability of intangible income.

Respectfully submitted,

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