

In the

Supreme Court of the United States

MOBIL OIL CORPORATION,

Appellant,

v.

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

No. 78-1201

Washington, D.C.  
November 7, 1979

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Wednesday, November 7, 1979.

The above-entitled matter came on for oral argument  
at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
BYRON R. WHITE, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JEROME R. HELLERSTEIN, ESQ., 80 Pine Street, New  
York, New York 10005; on behalf of the Appellant

RICHARD JOHNSTON KING, ESQ., The Valley Professional  
Center Waitsfield, Vermont 05673; on behalf of  
the Appellee

WILLIAM D. DEXTER, ESQ., Multistate Tax Commission,  
926-24th Way, S. W., Olympia, Washington 98502;  
as amicus curiae

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Mobil Oil Corporation v. Commissioner of Taxes of Vermont.

Mr. Hellerstein, you may proceed whenever you are ready.

ORAL ARGUMENT OF JEROME R. HELLERSTEIN, ESQ.,  
ON BEHALF OF THE APPELLANT

MR. HELLERSTEIN: Thank you, sir.

Mr. Chief Justice, and may it please the Court:

This is an appeal by Mobil Oil Corporation from a decision of the Vermont Supreme Court holding that dividends received by Mobil from its subsidiaries and affiliates which operated exclusively in foreign countries and derived virtually all their income from sources outside the United States, that such dividends were properly includable in the apportionable base of the Vermont tax. That's the only issue in the case.

Now, the facts are these: Mobil is a New York corporation. Its corporate headquarters and commercial domicile are located in New York City. It is engaged in all aspects of the petroleum business including exploration, production of oil and gas, refining, transportation, and sale of petroleum and petroleum products.

Now, the only activities carried on in Vermont consisted of the wholesale and retail marketing of products.

Mobile is subject to taxes measured by net income not only in the State of Vermont, but in 40 other States, as well as the District of Columbia.

The company is engaged in both interstate and foreign commerce.

Now, with respect to these stocks, Mobil owned the stocks of a large number of corporations, subsidiaries and affiliates, and as I have said, they carried on their business solely in foreign countries. These dividends that are here in issue constituted most of Mobil's taxable income. Now, 99 percent of the dividends were derived from, received from corporations that derived all or all except a very insignificant portion of their income from sources outside the United States.

Mobil's business as the owner of these stocks was in all respects conducted outside Vermont. Managed, directed offices outside Vermont. The same is true of the dividends. The receipt of the dividends and the disposition of the dividends, all outside --

QUESTION: Mr. Hellerstein --

MR. HELLERSTEIN: Yes, sir?

QUESTION: How large a tax would Mobil have paid in Vermont under your theory and under the return that it filed?

MR. HELLERSTEIN: Under the theory we are presenting, something like \$4,000 for the three years.

I'd like to go to that, Your Honor, because the

Commissioner has suggested that the tax of \$4,000 for this great multinational company can hardly be a fair representation of what Mobil ought to pay for the activities carried on in the state. Well, I think we ought to remember several things. The Vermont Legislature imposed an income tax, and when the Vermont Legislature imposed that income tax it knew perfectly well that that might result in a loss, even though we have a lot of property and assets in this state.

The Commissioner, in making this very argument, Mr. Justice Rehnquist, that you're making, \$4,000 for this gargantuan company --

QUESTION: I thought it was a question, rather than an argument that I was making.

MR. HELLERSTEIN: No, there's no question about it. It's a small amount.

The other point I want to make is, that's what the Vermont Legislature decided was a fair payment of the income tax. But this isn't the only tax we pay in Vermont. We're subject to other taxes: Property taxes, sales taxes, highway use taxes, and what-not. So that the smallness of this amount really reflects the fact that Mobil's income is earned from dividends that are all outside Vermont, for all practical purposes.

QUESTION: Where are those dividends taxed, other than by the Federal Government?

MR. HELLERSTEIN: That raises the question, Were those dividends taxed by any other state?

QUESTION: That isn't what I asked. I said where were they taxed?

MR. HELLERSTEIN: Where were they taxed?

QUESTION: Where were they taxed, outside --

MR. HELLERSTEIN: By no state.

QUESTION: In no state.

MR. HELLERSTEIN: Let me explain why.

They were taxed -- the State of New York, which is the commercial domicile of Mobil, has a policy of not taxing dividends from subsidiaries at all. With respect to non-subsidiaries, it reverts the tax, takes the percentage of the tax as to where the income was earned. So with respect to these dividends we paid little or no tax.

But now, Your Honor, Mr. Justice Blackmun, that gets to a key question in the case.

QUESTION: Let me ask another question. Am I correct, under the Vermont system is there not a statutory provision that enables the taxpayer to seek a reallocation in the event of --

MR. HELLERSTEIN: You're right.

QUESTION: -- unfairness? Did Mobil take advantage of that?

MR. HELLERSTEIN: We did, and it was denied.

Right. Now, I want to go to the question Mr. Justice Blackmun raised, because one of the key questions in the case, when we come to the commerce clause argument, in which we contend that we ought not, that the apportioned tax by a state, by Vermont, in which we carry on no aspect of these operations, that none of those, no state in which we carry on our operating functions as distinguished from the management of our interest in the stocks, that none of those states ought to be able to apportion that income because you would have a risk of multiple taxation, either the risk of possible double taxation as a result of the taxing power of the commercial domicile or business situs, if that was the state, plus the apportioned tax, or given just the apportionment, the risk of diversity of taxation.

Now, let me go first to this question that Mr. Justice Blackmun has raised. The doctrine, as Your Honors will recall, is well established. The multiple taxation doctrine clearly, as developed by its architects, who were Justices Stone, Rutledge, later extended by other Justices of the Court -- there isn't any question but that that doctrine depended on the following proposition, Do other states have the power to tax, regardless of whether they exercise it?

That's clear. Everybody recognizes that. However, counsel say subsequent opinions of this Court have modified the doctrine so that the multiple taxation doctrine does not



prevent a tax on interstate or foreign commerce unless you prove you've actually been double-taxed by another state.

First of all, an analysis of the case does not support the view that that doctrine has been abandoned. But authority aside, I want to go to the reasons why it should not be abandoned by this Court, and there are two sets of reasons, Your Honor: One are pragmatic and one are matters of constitutional principle.

First as to the pragmatic objections to the actual multiple taxation test: Such a test would foster a competitive race among state legislatures, and tax departments, too, to be the first to tax and the first to assess. Moreover, inequalities between corporations earning the same amount of income within a state would be fostered. Why? The taxes could be different under the actual multiple taxation test because of different taxes that each of them pay in other states.

As a matter of constitutional principle, I suggest that likewise dictates the retention of the power to tax. What are we dealing with?

QUESTION: Are you saying that only New York could tax these --

MR. HELLERSTEIN: Sir?

QUESTION: Are you saying that only New York could tax --

MR. HELLERSTEIN: Our contention is this, Your Honor,

that given a situation in which all the operations of the company, vis a vis the management of the stocks, the receipt and disposition of the dividends, when all of those take place outside a state, typically it be the commercial domicile, our contention is this:

One, historically the tradition of state taxation was to allocate those in full to the commercial domicile.

Two, that's the right rule. Why is it the right rule? Through process of law --

QUESTION: Well, you are saying, then, that only New York can tax?

MR. HELLERSTEIN: That is correct.

QUESTION: Well then, doesn't that lead to the same sort of competitiveness in order to get the advantage of corporate presence and activity in a state, like Delaware used to have in corporate charters, that the state with the lowest income tax rate for investment income earned out of the country is going to be a haven for corporate domiciles?

MR. HELLERSTEIN: Your Honor, I think there's a fundamental difference. The Federal Constitution has never interfered with a state's working out their own policies to attract business, or to make life livable. That's a choice that every state has and should have, including the charting of its tax policy.

But Mr. Justice Rehnquist, it's very different to

say, very different to say one state's power of tax is going to be increased or decreased because of what another state does. Each of the states can use its own policy reasons for attracting trade, whether it's for energy purposes or whether it's to make management central. But that's the substance of our Federal constitutional system.

QUESTION: Mr. Hellerstein, suppose you didn't have these subsidiaries.

MR. HELLERSTEIN: Right.

QUESTION: And the income flowed in to the taxpayer, Mobil.

MR. HELLERSTEIN: Right.

QUESTION: Would you be here today?

MR. HELLERSTEIN: We would not be here on this case. The reason I have to say that is, we might be here on a later case. But this likewise gets to one of the gut problems in the case.

The whole pitch, really, of the argument on the other side is this: This runs through all their briefs, including the numerous briefs signed by their and my side.

They say Mobil and its foreign subsidiaries and the foreign affiliates from which we receive dividends, they're really all part of one unitary international petroleum business. And so it doesn't matter that these stocks were not handled, no part of the handling of the stocks was taken care

of in the State of Vermont.

We can look at the whole system and we can take into account the fact that what goes on in the Middle East in the digging for oil has some bearing on the international petroleum business, including let's say the marketing of oil in Vermont. That is one of the methods that a state may employ. There are some limitations. You have to avoid distortions. You have to have a unitary business. But if Vermont had treated Mobil and its subsidiaries and affiliates as a unitary business and had used what is known as the combined method of reporting, what would have happened would have been this:

The base of the tax would be all the income of all these companies in the unitary business worldwide. The apportionment factors, properties, payroll receipts that determine the fraction that this state tax is, would be of all those companies. In those circumstances we wouldn't have this problem, but there would be a different problem as to the propriety of that.

But that isn't our case. But that is a well recognized method. Vermont does---

QUESTION: But you are objecting here at the very outset of even including in the base this dividend income?

MR. HELLERSTEIN: What I am saying, Mr. Justice White, is this: Vermont doesn't use that combined method. Vermont uses the separate company method. Vermont doesn't

32  
34 treat the companies as a unitary business, else there wouldn't  
33 be any dividends to tax. That if you are going to treat the  
35 company, Mobil as a separate company, taking into account only  
31 Mobil's own income and only Mobil's own factors and giving no  
30 credit to the fact that these hundreds of millions of dollars  
18 of dividends were earned entirely outside the state, that the  
16 stocks were managed outside the state, if you're going to --  
14 you can't have apples and oranges. They are conflicting  
12 methods. If you want to tax our dividends, you've got to tax  
10 us as the owner of stocks and the holder of these dividends,  
12 and nothing took place in Vermont with respect to them.

13 QUESTION: Would you make the same -- are you making  
15 the same argument or would you with respect to dividend income  
11 from the United States subsidiaries?

10 Say Mobil does all its business in Alaska through  
8 subsidiary.

8 MR. HELLERSTEIN: We are making the same arguments  
1 would apply under our due process contention. The same argu-  
2 ments would not apply under our foreign commerce clause con-  
4 tention. That is, if we were dealing here with domestic divi-  
3 dends, our due process argument would be applicable. So when  
5 we get over to the commerce clause --

4 QUESTION: Well, we have a domestic commerce, you  
5 know. We have an interstate commerce.

MR. HELLERSTEIN: Right. We don't have any domestic

52 dividends here. This is all from foreign commerce.

53 QUESTION: I know you don't, but some other people --

54 MR. HELLERSTEIN: Suppose we had that case, as Your  
55 Honor is asking --

56 QUESTION: Well, no.

57 MR. HELLERSTEIN: Then I am saying --

58 QUESTION: Your argument would certainly apply to  
59 domestic subsidiaries.

60 MR. HELLERSTEIN: The due process argument, yes.

61 QUESTION: Well, and why wouldn't the commerce argu-  
62 ment be?

63 MR. HELLERSTEIN: Because --

64 QUESTION: You have an interstate commerce clause.

65 MR. HELLERSTEIN: The due process argument, the rea-  
66 son why we are not arguing that the dividends received, if they  
67 were here, that dividends received from domestic subsidiaries  
68 could, need not, are not apportionable, is this:

69 There is a problem as to whether the Moorman case  
70 precludes that contention. We would argue it does not. If  
71 you get to the commerce clause argument, Mr. Justice White, as  
72 distinguished from the due process argument, and you get to the  
73 commerce clause argument, we've got the problem that Moorman  
74 took the position with respect to domestic commerce, that is  
75 interstate commerce, that the Court would not intervene in  
76 methods of apportionment. We argue it's a jurisdictional

problem, due process. But if that's rejected and you get to the problem that this is something that involves a right of apportionment, then Moorman says this Court will not intervene when interstate commerce is involved.

QUESTION: But wouldn't this --

MR. HELLERSTEIN: I'm sorry, Mr. Justice Rehnquist?

QUESTION: Just following up Justice White's question, isn't it precisely the same clause of the Constitution that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes that you derive your argument from? So if it's good for foreign commerce, it must be good for interstate commerce?

MR. HELLERSTEIN: Except, Justice Rehnquist, you here have the benefit of a decision of the majority of the Court in Japan Line which says foreign commerce is different. Foreign commerce is more sensitive. The majority of that Court, whatever else you may say about Japan Line, in which I am aware Your Honor dissented, whatever else you may say about Japan Line, it established two things that are the crux of this case, vis a vis the foreign commerce clause problem, Mr. Justice White, as distinguished from the interstate clause.

QUESTION: Yes.

MR. HELLERSTEIN: Those are two things it established: One, foreign commerce is much more sensitive than domestic commerce, and the tolerance under our Constitutional principles

for a certain amount of inequality and difference and double taxation that's acceptable in domestic commerce, that doesn't go in foreign commerce.

QUESTION: Is part of your argument here that if Vermont wants to take in these dividend income, it should include in all of the assets owned and the property factor, all of the assets owned by the subsidiaries?

MR. HELLERSTEIN: It would have to use a totally different method of taxation, that given this method of taxation --

QUESTION: They can't have it both ways?

MR. HELLERSTEIN: They can't have it both ways. And their tax, Your Honor, has to be judged by what they did. They didn't tax us as a combined company on a unitary basis, and they can't argue here, as most of their briefs argue, that jurisdiction to tax depends on being a unitary business. That just isn't the method by which they taxed us.

QUESTION: And what is your basis for saying New York could tax it all --

MR. HELLERSTEIN: That's right.

QUESTION: But without -- would they have to treat you as a unitary company?

MR. HELLERSTEIN: No. Here's what we're saying, Your Honor. What we are saying is that following the tradition in this country --



QUESTION: Why wouldn't you make the same argument with respect to New York if they attempted to include the dividends but not all the properties in the factor?

MR. HELLERSTEIN: I'll tell you why we wouldn't make that argument, Your Honor. I see no difficulty with the proposition that a state may impose a tax on a holding or investment company for its activities in connection with the ownership of that stock. We're not arguing that no state may impose this tax. I see the problem of dividend income as very different from operating income. They are very different problems. And I have no difficulty with the proposition that a state, in addition to taxing operating income, may impose a tax on the privilege of engaging in business in effect as a holding and investment company, and that's the commercial domicile typically.

So we wouldn't argue the point, Your Honor, you're suggesting. What we are saying is that the necessity of eliminating multiple taxation with respect to foreign dividends, apart from the due process problem, that a state like Vermont has no connection with this whole matter, that that necessity makes it important and sound as a matter of fiscal policy, sound under the due process clause, and sound under the necessity of avoiding multiple taxation, to limit this power of taxation just to the state of commercial domicile where all the activities take place, or the business situs --

QUESTION: And you would say that even if New York

52 just attempted to apply its regular income tax --

53 MR. HELLERSTEIN: I beg your pardon? I didn't quite  
54 get that.

55 QUESTION: You wouldn't object if New York attempted  
56 to apply a normal income tax statute to you --

57 MR. HELLERSTEIN: Not at all.

58 QUESTION: And include the dividend income?

59 MR. HELLERSTEIN: That's correct.

60 QUESTION: They didn't purport to say this is for  
61 the privilege of doing business in New York as an investment  
62 company?

63 MR. HELLERSTEIN: That's right. No problem with that.  
64 I think that's perfectly reasonable.

65 Now, I want to --

66 QUESTION: Mr. Hellerstein, may I ask you a question  
67 that would follow up on a question --

68 MR. HELLERSTEIN: Excuse me, sir?

69 QUESTION: Well, I'll raise my voice.

70 MR. HELLERSTEIN: May I come over here, Mr. Chief  
71 Justice?

72 QUESTION: Mr. Hellerstein, I want to follow up on  
73 a suggestion that was implicit in a question Justice Blackmun  
74 asked you. Assume there were no subsidiaries and no dividends,  
75 and with respect to your due process argument, assume that you  
76 had, say, a division that engaged in entirely separate business

54 from the oil company. Say they made toys.

53 MR. HELLERSTEIN: Entirely separate business?

55 QUESTION: From the oil business. Say they made  
51 toys.

50 MR. HELLERSTEIN: They sell shoes.

18 QUESTION: Or sell shoes or they own an apartment  
18 building, derive income that is clearly identifiable with a  
11 particular state other than Vermont. In your submission, could  
10 Vermont include that income as a matter of due process within  
12 the taxable base?

14 MR. HELLERSTEIN: Not only is my submission that  
13 no --

15 QUESTION: Mr. Hellerstein, would you like to give  
11 your answer into the microphone?

10 MR. HELLERSTEIN: Yes, thank you very much; I'm  
9 sorry.

8 QUESTION: Otherwise you'll not be on the recording,  
7 we'll not have your statement.

4 MR. HELLERSTEIN: I am sorry.

6 QUESTION: And furthermore, I won't hear you.

2 MR. HELLERSTEIN: Thank you very much.

4 Now, we have similar problems.

3 QUESTION: I have no problem.

5 MR. HELLERSTEIN: Oh, how nice. I have the problems.  
4 Mr. Justice Stevens asked, as usual, an important

question. His question was that suppose there were completely separate business operated in some other state, would I object to the inclusion, would I permit, would it be permissible under my submission to include that item in the unitary business, and I said that the answer is no, it would not be, and that no state does it.

Every state in applying the unitary principle recognizes that you cannot combine for unitary purposes two separate businesses, because there would be income distortion. Does that answer your question, Mr. Justice Stevens?

QUESTION: Yes.

MR. HELLERSTEIN: Very good.

Now, very good. I see my allotted time at this point has expired, so I will retire. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. King.

ORAL ARGUMENT OF RICHARD JOHNSTON KING, ESQ.,

ON BEHALF OF THE APPELLEE

MR. KING: Mr. Chief Justice, may it please the Court: Vermont imposes an annual net income tax on all corporations doing business in the state. That tax is measured by that share of a corporation's federal taxable income which is apportioned to Vermont by a standard three-factor formula.

Professor Hellerstein suggests that the tax system adopted by the Vermont Legislature necessarily produced the result that they seek. I suggest it did not. They arrived at

that result by clearly violating the terms of the Vermont statute and not using as apportionable net income their federal taxable income, but rather using as apportionable net income federal taxable income from which they had excluded all income received in the form of dividends.

As Mr. Hellerstein suggests, Mobil is a fully integrated petroleum company conducting business in part in Vermont and in part in other states of the Nation. The question presented is whether the due process and commerce clauses of the Constitution required Vermont to exclude dividend income from apportionable net income. In view of Mobil's substantial business activities in Vermont, I suggest that the due process inquiry is frivolous.

Mobil had the burden of proving that the dividends in question were not related to its integrated petroleum business, and therefore were not properly includable in apportionable net income.

Professor Hellerstein mentions that they did seek modification of the formula. That is correct. The Commissioner denied modification and that issue has not been appealed to this Court and the modification issue is not before this Court.

QUESTION: Mr. King, may I just ask you if you would regard as equally frivolous the position that as a matter of constitutional due process, the state would be required to exclude the toy business income, if they had a separate toy

business in a different state?

MR. KING: Yes, I would, Your Honor.

QUESTION: You would say that was frivolous, too?

MR. KING: I would say that was a frivolous question.

What Professor Hellerstein proposes there in his answer to that question is separate accounting. Separate accounting is an alternative to apportionment, but the two are not used in conjunction with each other.

QUESTION: Is he correct in saying that it is customary for states to segregate out, to permit a taxpayer to eliminate income from entirely separate aspects of its business which are allocable to another state, and clearly so?

MR. KING: That depends on the state statute, Your Honor.

QUESTION: I realize that, but he said typically states do permit that. Is that your judgment?

MR. KING: I think that's probably correct.

QUESTION: And does Vermont do that?

MR. KING: The Vermont statute would include in the apportionable net income all federal taxable income of the corporation.

QUESTION: So that would take a contrary position on that?

MR. KING: Take a contrary position. However, Your Honor, the Vermont statute contains a clear provision that if

the apportionment factors apply to all of a taxpayer's federal taxable income do not produce a result which fairly reflects the extent of business activities within the state, then the Commissioner is directed to modify. This is not such a case. Mobil has admitted that the income, or stockholdings in its subsidiaries and affiliates, are part of its integrated worldwide petroleum business.

Whether or not on different facts modification would be appropriate, I can't tell you. However, it would depend on the showing before the commissioner, much as the question of multiple taxation depends on the showing before this Court.

QUESTION: Well, did Mobil ever claim that if you wanted to include the dividends you must include the underlying assets in the allocation formula?

MR. KING: Perhaps they claimed it. But that, Your Honor, is confusing two entirely separate systems of taxation. Vermont imposes --

QUESTION: You're saying that this is an integrated business worldwide, but yet you exclude from the property factor the property that's owned by the subsidiary?

MR. KING: There's a very good reason for that, Your Honor. We are taxing only the income of Mobil Oil Company, Corporation. We are not taxing the income of Mobil's operating subsidiaries and affiliates, and there is a big difference between income and dividends. There is no necessary or direct

relationship between dividends paid and property, business activity, or profits. May I suggest that point is well illustrated on the record.

QUESTION: Do you include in the value, in the property factor, the total -- Mobil's total property, the value of the stock, of the subsidiaries?

MR. KING: We do not, Your Honor.

QUESTION: Why not?

MR. KING: Almost no state includes the value of intangibles. In fact, I don't believe any state includes the value of intangibles.

QUESTION: Well, that's not a reason. That's just a, that's just a --

QUESTION: But Mr. King, supposing --

MR. KING: May I answer that question, sir?

QUESTION: Let me just throw this out and you answer it together, because it's very close, really: Supposing the stock had not been subsidiaries but had been stock in, say, the duPont Company or something like that. Would you also include it, dividends from that stock?

MR. KING: Your Honor, that situation can't come up. Well, excuse me, that could come up. It would also be included.

QUESTION: It would be, wouldn't it?

MR. KING: It would be included, yes. The answer to the question of why there is no property factor for the



intangible stock is twofold: One, this is a tax on net income, not a tax on the property which produces that income. I think that's a critical distinction. The second point is that historically, and --

QUESTION: Why do you include any property, why do you have a property factor? I mean, none of this is tax on a property, but you include some property.

MR. KING: The second point is that historically, and conceptually, intangibles, particularly when they are held by a corporate multi-state business, are attributed to those states in which that corporation does business in the same percentages as the apportionment factors of those states. And mathematically if you exclude the intangible property entirely, it has no effect whatsoever on the apportionment factors, because it's excluded equally in all of the states, according to their apportionment factors.

QUESTION: But you include all of the dividends from the stock.

MR. KING: Correct.

QUESTION: Well, would Vermont treat the same way, I take it your answer to Justice Stevens would indicate yes, that income from Mobil's domestic subsidiaries --

MR. KING: Income from domestic subsidiaries, Your Honor, would be consolidated under the federal system. There would be no dividends. It's a full dividend deduction.

QUESTION: Because Mobil has chosen to report that way?

MR. KING: No, because we tax based on federal taxable income and in federal taxable income, intercorporate dividends from subsidiaries are subtracted, or deducted, excuse me. One hundred percent.

QUESTION: And how about separate businesses?

MR. KING: If it was a separate business, if Mobil was holding stock in duPont, then no, then it would be included. But Your Honor, the point raised on income from intangibles, the same point can be made with regard to patents, royalties. Professor Hellerstein has conceded that that is apportionable income. The same point can be made with many other property, tangible or intangible. The income is included and is apportionable.

Mobil has the burden of proving that these stockholdings were not connected with its integrated petroleum business. Mobil has not met this burden. In fact, the only proof that Mobil has offered in response to this burden are the statements that the stock certificates are held, managed, and controlled, and the dividends are received outside Vermont.

This brings up another interesting question, and that's Professor Hellerstein's commercial domicile point. I suggest that that question, that issue, is not properly before the Court. There is no evidence in the record that commercial

domicile had anything whatsoever to do with Mobil's stockholdings, with the stocks themselves, or with the dividends received. Mobil has shifted position somewhat in its reply brief to say well, it's either commercial domicile or business situs. There is no business situs which has been identified on the record. That leaves a taxpayer with this kind of a record in a position to go to each state in succession and say, "They're not here, can't tax them."

So I would suggest that the commercial domicile argument is entirely speculative on this record.

As to the fact that Mobil's properties are held, that Mobil's stockholdings are held, managed, and controlled outside the state of Vermont, so are many of Mobil's other properties, and the income from all of those properties is clearly includable in apportionable net income. The whole concept of apportionment is to get away from precisely what Mobil is trying to get us into here, and that is the difficulty of ascertaining where in an integrated operation profits arise, and to what particular location those profits are attributable. That simply is not a workable system, as I think this Court has recognized long ago, and certainly as any scholar in the field has recognized.

There is nothing in the Constitution which, or in the decisions of this Court, which would support or imply a prohibition against apportioning among the states income from

intangible property used in an integrated business activity, a part of which was conducted within the state.

I made a point on dividends a little earlier in connection with a question from Mr. Justice White. At page A90 of the consolidated appendix there appears a graphic illustration of what I said. In Paragraph 31 there, they report a dividend paid by a company which, and I quote, "had no gross income during the year 1970, the only year here at issue in which it paid dividends to Mobil."

What's the relationship between the dividends and the underlying factors? None whatsoever.

Mobil next argues that because its operating subsidiaries and affiliates are engaged in foreign commerce, that there is a prohibition against Mobil including the dividends paid on those stocks. Once again, a failure to focus on what the subject of the tax is. The subject of the tax is the net income, and in a very old case, Page v. Lull, this Court very clearly focused on that distinction and said the net income is not the foreign commerce which produced that income. I think that is a conceptual point that's exceedingly elementary and basic to this issue.

There is no decision of this Court that would determine the tax consequences of income in the hands of a taxpayer on the basis of the tax attributes of the payor of that income.

In this case, Mobil is receiving the income from its operating subsidiaries and affiliates, much as it would receive income from the sale of petroleum products, much as it would receive royalties from the licensing of patents. Nothing supports a tax analysis based on the characteristics or the business or the property factors of the payor.

The Court's decision in Japan Line, I suggest, therefore has no application whatsoever to this case.

As to Mobil's multiple taxation argument, I believe the Court clearly said in *Mcorman* that multiple taxation must be proved to have in fact occurred. I would also suggest that in the context of a tax on apportioned net income, the multiple taxation concept doesn't make any sense, because when you mix taxes, for example these types of tax Mobil argues for in its commercial domicile argument, is a gross receipts tax. It says that all dividends --

QUESTION: Was the tax imposed in Japan Line an ad valorem property tax?

MR. KING: Yes, it was, Your Honor.

QUESTION: Not an income tax?

MR. KING: Absolutely. And the problem of multiple taxation that was raised in Japan Line was simply this: A foreign sovereign had taxed that property. The County of Los Angeles sought to impose another tax on that property. Double taxation in fact appeared on the record, and the Court, in I

think a very sound rationale, said, "Look. We do not have the power to control the apportionment between a foreign sovereign and a United States political subdivision." That's basic.

Here the foreign commerce multiple taxation argument that Mobil makes is that there is a risk that the states will impose multiple taxation. That's a risk over which this Court clearly has a controlling power. This Court, as it has said in several opinions, will correct errors of apportionment when they occur.

Mobil's speculative argument that multiple taxation could result from diverse state formulae goes right to that point. When it does, the Court clearly is authorized to make a corrective, or require corrective measure.

Neither the Constitution nor any decision of this Court grants to the commercial domicile of a multistate business the power to tax without apportionment income from intangibles held in connection with that business. If that issue was ever properly raised, I suggest that this Court might require apportionment which would fairly allocate to those states in which business is conducted a share of that income. That case has not been raised on this record. That is, I think, exceedingly important.

Vermont is a state in which Mobil conducts substantial business activities, taxed Mobil's net income including dividends from operating subsidiaries and affiliates fairly

apportioned to local business activities. Mobil has conceded that the apportionment factors were correctly calculated and the apportionment formula was correctly applied. On the record, the tax imposed was nondiscriminatory, fairly apportioned to reflect Mobil's substantial business activities in Vermont, and fairly related to the services provided by Vermont. Mobil has failed to meet its burden of proving that its stockholdings in operating subsidiaries and affiliates were unconnected with its integrated petroleum business, a part of which was carried on in Vermont. In fact, Mobil has basically conceded that point.

Mobil has also failed to meet its burden of proving that its dividends could be subjected to multiple taxation if included in the Vermont tax base.

Accordingly, under the decisions of this Court, particularly the Moorman, or most recently the Moorman decision, the decision of the Vermont Supreme Court should be upheld.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Dexter.

ORAL ARGUMENT OF WILLIAM D. DEXTER, ESQ.,

AS AMICI CURIAE

MR. DEXTER: Mr. Chief Justice, may it please the Court:

Now, the basic issue in this case is whether certain income from intangible property, namely dividends, can be

included in a state's net income tax base subject to apportionment when the taxpayer has made no showing that the intangibles were not acquired and held as an integral part of its unitary, multi-state business.

Now, Mobil would lead this Court to believe that there is some constitutional requirement in both the due process and commerce clauses of the United States Constitution that expressly prohibits states in which that business is conducted from including such income in apportionable income for state income tax purposes.

Now, Mobil initially argues that the state in which a multi-state taxpayer maintains its commercial domicile has the exclusive power to subject such income to a net income tax. Now, no decision of this Court supports such an arbitrary rule. In fact, all of the apportionment decisions of this Court, net worth cases, income tax cases, ad valorem, utility, property tax cases, refute this idea.

Now, recognizing the weakness of the commercial domicile fiction, and we must remember it is a legal fiction, Mobil has changed this argument to include the states of either the commercial domicile or business situs of intangible properties. Now, let us examine this fictional situs theory in the context of state income tax laws.

First we must realize that intangibles by their very nature have no fixed location or situs. This Court was well



aware of that in many domiciliary cases and particularly in the case of Curry v. McCanless, and noted that the bundle of benefits and interests represented by intangible properties could be spread over many jurisdictions and that any jurisdiction had the power to tax intangibles if those jurisdictions conferred benefits and privileges in regard to the ownership of such intangibles.

But in the case of stock, where is it located for state income tax attribution purposes? This is the underlying question in this case, Your Honors. Is it at the legal domicile? The business headquarters or commercial domicile of the corporation? And remember, large multinational corporations may have various locations that could qualify as the commercial domicile. Or is it where the stock certificates are physically located? Is the situs where the stock would be pledged or hypothecated? Or is it where --

QUESTION: Mr. Dexter?

MR. DEXTER: Yes?

QUESTION: You are emphasizing the intangible point very properly, of course, because that's this kind of case. Would you distinguish my hypothetical case of a toy business or something else that is a separate operating business with actual tangible assets, but identifiable in a state other than the taxing state?

MR. DEXTER: Well, Your Honor, basically the position

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of the states is, and I think in conforming with the decisions of this Court, that all of the unitary income of a unitary business is subject to a reasonable rule of apportionment.

QUESTION: My hypothesis is that it's not unitary.

MR. DEXTER: Okay. Your hypothesis is that it's not unitary. Under the commission regulations you would treat those as two separate distinct trades or businesses and you would tax them accordingly.

QUESTION: Well, I understand that's the practice. My question is, as a matter of constitutional law, would you say that the argument that that is, there is a due process objection to taxing that out-of-state income --

MR. DEXTER: Well, it seems to me that --

QUESTION: You draw distinction in terms of constitutional law. I know what the practice is.

MR. DEXTER: Okay. The question is -- this is one of the fundamental questions in this case -- the bottom line is the apportionment result. What income has the state attributed to it by the application of an apportionment formula to a tax base?

QUESTION: Well, I don't understand that you've answered my question.

MR. DEXTER: Well --

QUESTION: My question is, is there a constitutional -- you say there is no constitutional objection to treating

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intangible income as being earned in Vermont because you can't really place intangibles and it's part of the overall business always.

My question is: Assuming you have income from tangible assets which is clearly identifiable to another state and it's not in the unitary, in the sense we've used it in the past, part of the unitary business operated in Vermont. Is there a valid constitutional objection to Vermont taxing that income?

MR. DEXTER: My answer would be yes. ✓

QUESTION: Then there is a valid.

MR. DEXTER: But here that is not the circumstance, you understand. We're talking about an intangible property integrated with Mobil as a single entity, unitary trade or business. It has nothing to do with combined reporting. We are saying that Vermont has a right to reasonably apportion that part of Mobil's total income from its overall operations by a reasonable attribution rule. And that Mobil has the burden of establishing that an apportionment result so applied is violative of due process, because it taxes extraterritorial values or income or violates the commerce clause on basically the same ground.

QUESTION: But Mr. Dexter, how do you answer Mr. Justice White's question that if you want to throw the income into the pot, you must also throw the assets in?

MR. DEXTER: Well, okay. The rationale of an apportionment formula is the three-factor formula that income of a corporation, regardless of what is the nature of the property that generates this income, is attributable to where its tangible property, payrolls, and sales are attributed. Now, intangibles by their very nature don't have a fixed situs. So that conceptually they may be spread over the business wherever it is conducted.

Now, that's basically what this Court did in the Adams Express case. \$15 million of intangibles, stocks and bonds, \$5 million of tangible property, the question is, what is the value of this tangible property, going concern value, in the taxing state. And this Court said it was an apportionment of the entire intangible value on the basis of the physical location of the underlying property.

And it seems to me that you have to do this because of the elusive nature of intangibles. And really what Mobil and COST and NAM are saying here, because of that elusive nature, they can know that it represents a tax exemption to apply legal fictions, or elusive concepts like business situs.

QUESTION: Well, would it make a lot of difference in a case like this if the value of the shares was included in the property factor?

MR. DEXTER: The value of the shares? Wasn't included in the property factor?

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34 QUESTION: Would it make a lot of difference if it  
36 was included in the property factor?

38 MR. DEXTER: Yes, but the question is, if you include  
40 it in the property factor, if you're going to include intan-  
42 gibles, what state you attribute it to. For --

44 QUESTION: Well, you just include it in the property  
46 and then apportion it. You just include it in the factor like  
48 other property.

50 MR. DEXTER: No, but you have, Your Honors, each fac-  
52 tor you have to give it, you have to locate it for purposes of  
54 the numerator of the apportionment factor. Where do you put it  
56 in the numerator? In New York, the commercial domicile, where  
58 the business situs of the property is, or do you spread it  
60 basically by ignoring it where the underlying tangible property  
62 is? And essentially, that is what is done, except when someone  
64 comes in and asks for some kind of relief.

66 QUESTION: But you are allocating, you are taking  
68 it -- what is the denominator in that, total property?

70 MR. DEXTER: The denominator would be total property,  
72 tangible property, or tangible property within the state.

74 QUESTION: Why don't you include in that the value  
76 of shares owned?

78 MR. DEXTER: Well, simply because the three-factor  
80 formula is limited to tangible property with the idea that in-  
82 tangibles have no fixed situs for denominator purposes.

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54 QUESTION: Well, you keep saying that, but I don't  
57 understand it. I don't know why not.

58 MR. DEXTER: Well, where do you attribute, the com-  
59 mercial domicile, the legal domicile --

50 QUESTION: Well, the denominator is total property,  
10 isn't it?

10 MR. DEXTER: What?

11 QUESTION: The denominator is total property, isn't  
10 it?

12 MR. DEXTER: No, it's total tangible property.

14 QUESTION: Yes, I know.

13 MR. DEXTER: I mean, that's the way the factors work.  
15 Now, I mean --

11 QUESTION: I know, but I'm just asking you, why not --  
10 if you're talking about the total property, why do you exclude  
8 the intangibles from the total property that you use in the --

8 MR. DEXTER: I am saying, because you don't know  
1 where to put it in the denominator. If it's used basically --

6 QUESTION: Mr. Dexter, the denominator doesn't have  
2 any relevance to where the property is located. That's the  
4 total.

3 MR. DEXTER: No, no, no.

5 QUESTION: The only time you need to know where the  
1 property is is in the numerator, isn't it?

QUESTION: Exactly.

MR. DEXTER: Yes. No, no, the numerator over the denominator equals the fraction.

QUESTION: I understand, but the denominator -- you don't know where 99.9 percent of the assets are in Vermont's denominator, do you? You just know they're not in Vermont.

MR. DEXTER: Right. Right.

QUESTION: So all you need to know is the total figure for their denominator.

QUESTION: You're just taking, in the numerator, the property that's located in Vermont?

MR. DEXTER: Right.

QUESTION: And you've said a hundred times already that the intangible isn't located in Vermont, but you do know that Mobil owns it.

MR. DEXTER: We do not say that it's not located in Vermont. We say that it has a business situs where Vermont, where Mobil carries on its underlying business --

QUESTION: Well, I'll put it to you this way: If you included in the denominator the value of the shares that Mobil owns in its subsidiary but didn't take any part of that, didn't assign any part of that to Vermont in the numerator, it would make a difference, wouldn't it?

MR. DEXTER: Oh, it would make a substantial difference.

QUESTION: And the state wouldn't like it?

MR. DEXTER: No, I doubt it.

QUESTION: And I doubt if you would.

MR. DEXTER: Well.

MR. CHIEF JUSTICE BURGER: Mr. Hellerstein, you have about -- a little time left.

ORAL ARGUMENT OF JEROME R. HELLERSTEIN, ESQ.,  
ON BEHALF OF THE APPELLANT --- REBUTTAL

MR. HELLERSTEIN: Mr. Chief Justice, one of the cardinal principles, one of the pillars of the argument of the other side in effect is this:

If you are dealing with apportionment, everything goes. But you don't have to have a due process connection. Between the items included in the apportionable base and the state, that's just not so. The cases are to the contrary. The cases have established the requirement that because a class of income, for example, goes into a base of the tax, typically, that's going to increase the tax attributable to the state. Not always, but typically so.

Now, it's for that reason that the courts have held throughout that there has to be a connection between the types of income that are included and the taxing state.

QUESTION: Mr. Hellerstein, what about including in the denominator the value of the shares owned in the --

MR. HELLERSTEIN: Of course, your answer -- it's a really very simple proposition. Of course if you include the



intangibles, which you have to do, it seems to me, if you're going to get to this problem of allowing apportionment of the income from the intangibles, of course they should be included in the base.

QUESTION: Well, they don't do it.

MR. HELLERSTEIN: No, they don't do it. They don't include the dividends either in the receipts factor.

QUESTION: But did they ever ask you -- did you ever ask them to --

MR. HELLERSTEIN: We asked for a modification on the basis of these points, and they denied it. Now, the Adams Express case has been cited by Mr. Dexter to the contrary has nothing to do with this case. That was a property tax case.

Of course all the property in a business, unless it is shown --

QUESTION: Well, Japan Line was a property --

MR. HELLERSTEIN: Sir?

QUESTION: Japan Line was a property tax case and you had no --

MR. HELLERSTEIN: Japan Line was -- excuse me, sir. Going back for a minute to Adams Express, it was a capital stock case. Capital stock tax measures are essentially property tax measures. Japan Line was a property tax case.

Now, the point I want to make is this, that we are dealing with an income tax case here, and the fact that

property was used and held to be included in Adams Express stocks and bonds, the Court said they're to be included in the base, stocks and bonds in connection with the transportation business are to be included in the base unless it's shown that they're not used in the business.

We've got a totally different kind of situation. We've got an income tax and we've shown that in the earning of this income, absolutely nothing takes place in the State of Vermont. So there's not the slightest basis for their taxing us.

Now, I do want to press another point, and that is, there really is an important difference between dividends and operating income for purposes of how the states divide income.

The history of apportionment by formula is this: Take the typical case. You've got a company manufacturing in one state, manufactures goods in one state and sells in another. We've never been able to work out any accounting method to determine how does the net income, which comes final step on the sale of the shoes or whatever you manufacture, how do you determine what the legitimate claim of each of those states that are part of this integrated operation, how do you divide it up among them?

The accountants failed us. And so we developed what is admittedly a rough and crude approximation, but the best thing we know. We said, "We'll use a formulary method and

we'll allow certain factors to determine which state has a claim." That we had to do. But dividends were traditionally not treated under the formula. Why?

QUESTION: When you say "we," Mr. Hellerstein --

MR. HELLERSTEIN: Sir?

QUESTION: When you say "we," are you talking about Mobil or are you talking about --

MR. HELLERSTEIN: At this point I have associated myself with the scholars and tax people in the field for the last thirty years. It has developed --

QUESTION: Court decisions?

MR. HELLERSTEIN: The states developed, the states developed and all of them use, an apportionment method. Now, when I'm saying "we," I mean the community of fiscal people interested in this area.

QUESTION: Well, how about Moorman, where as I recall Iowa used only one factor --

MR. HELLERSTEIN: The formula. It was a formula, Your Honor. The point I am making is this: Why did we go to the formulary method? In the Moorman case, what did you have? Manufacture of animal foods in Illinois, sale in Iowa. There's no way you can determine which piece of income without a formula, whether you like the Moorman formula or not. But they used a formula.

But dividends are different, and the reason is this:

Typically stocks are handled at the executive seat of the corporation, so that normally it's the commercial domicile where all the activities take place earning the stock. In some cases it may be, it may have a different business situs. And of course, we have made the contention throughout that the commercial domicile is the right rule unless you've obtained a business situs elsewhere.

Now, why is that so? You don't have any problem of localizing the source of the income. You know it. It's the commercial domicile or business situs. And that's why traditionally that income was attributed there, and that's why as a matter of fiscal policy it should be attributed there.

Why? By any precept of accepted fiscal policy, benefits, protection, costs of services, that's the state that's entitled to this income.

QUESTION: But this Court has never held that.

MR. HELLERSTEIN: This Court has never so held. State courts have so held, lower federal courts have so held: We're asking this Court so to hold, because it's right.

QUESTION: Mr. Hellerstein, what about the problem of the corporate domicile --

MR. HELLERSTEIN: What about the -- that's a very interesting question, Your Honor.

QUESTION: -- Delaware and a commercial domicile in New York --

MR. HELLERSTEIN: Right.

QUESTION: -- and each tried to --

MR. HELLERSTEIN: That's right.

QUESTION: -- attach 100 percent.

MR. HELLERSTEIN: Yes.

QUESTION: What do you do there?

MR. HELLERSTEIN: Your Honor, the only cases I know of in the history of this Court which have considered that question, the question, I take it, is this: Suppose you have a corporation organized in Delaware and it has the usual statutory office in Delaware but it really does business in New York, and New York is the commercial domicile. Under this commercial domicile rule, does that deprive the State of Delaware of the power to impose this tax?

The only cases I know, Your Honor, are the old Cream of Wheat case, I think, in the capital stock tax area which seemed to suggest that the state of corporate domicile, because it incorporated the company, might not be deprived of its power to include all the intangibles, all the assets in its base. Subsequent opinions of this Court indicated that's open to doubt.

I don't know how the Court would decide that. The Court could take one of two lines. The Court could determine that the commercial domicile becoming the real seat of the corporation is a substitute for the powers of the technical

corporate domicile, which I would think would be an economically and realistic rule, or conceivably the Court could hold that both would have the power to tax in that case. But that's a question that, as far as I know, has not been decided.

QUESTION: What about the case in which there is a valid argument as to whether the commercial domicile is in New York where they hold their directors' meetings and have some safety deposit boxes, or over in New Jersey where they have their principal offices day to day, and so forth.

Can't you have a problem as to which is the right commercial domicile?

MR. HELLERSTEIN: Your Honor, I have never heard of a rule of law that doesn't present problems. Of course we're going to have problems. But these are manageable problems, sensible problems, and not what you get into with the diversity of apportionment. Of course there'll be problems. But it's not beyond the wit of the tax administrators and the Court to deal with them. We do it all the time.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you.

Gentlemen, the case is submitted.

(Whereupon, at 11:00 o'clock a.m., the above-entitled case was submitted.)

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