In the Matter of the Petition of
BENDIX CORPORATION

for a Hearing to Review a Determination of the General Corporation Tax for the year ended September 30, 1981

Post-Hearing Brief in Support of the Petitioner
BENDIX CORPORATION

December 20, 1985

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STATEMENT OF FACTS

The Bendix Corporation (the "Taxpayer") received from the City of New York a Notice of Determination dated May 4, 1983 (City Exhibit 1). The Notice indicated additional taxes due totaling $244,281.00, together with interest of $38,532.81 for a total amount due of $282,813.81. The additional tax due resulted from the Department of Finance adding to the taxable base an allocation of $1.4747% of dividends and gains derived from ASARCO stock held and later sold by the Taxpayer during Fiscal 1981. The Taxpayer disputed this adjustment in its petition dated July 21, 1983 contending that no portion of the dividends or gains derived from ASARCO stock should be included in the New York City taxable base. In the alternative, the Taxpayer contended that even if any portion of the dividends and gains derived from ASARCO stock were to be included in the New York City taxable basis, the allocation percentage was incorrect.

Upon further discussions between the taxpayer and the city's representative, the city conceded the secondary issue and submitted revised calculations. See Transcript pp.3-5 and City Exhibits B & C. This reduced the assessment of tax from $244,281 to $96,540.

The taxpayer's remaining argument is that no portion of the dividends or gains from ASARCO stock should be included in the New York City taxable base because the taxpayer is not domiciled in New York City and there is no unitary relationship between the Taxpayer and ASARCO.
During the years at issue, the Taxpayer was a large corporation with its corporate headquarters in Southfield, Michigan. This is where its center of business was located, and where its corporate decisions were made. Michigan was the Taxpayer's commercial domicile (Transcript, pp.13-14).

In 1978, the Taxpayer purchased approximately a 20% interest in the ASARCO stock as an investment (Transcript, pp.14-16). ASARCO had 26,723,795 outstanding shares of common stock at the time (Exhibit 3, §2.2). Prior to April 13, 1978 the Taxpayer had purchased 1,296,900 shares of ASARCO stock on the open market (Exhibit 3, §3.2). This amounted to about 4.9% of the common stock. Pursuant to the terms of the purchase agreement (Exhibit 3), the Taxpayer purchased an additional 3,800,000 shares of common stock directly from ASARCO on April 13, 1978. The purchase agreement only allowed the Taxpayer thereafter to make additional purchases of ASARCO stock from third parties if it would not result in the Taxpayer's total holdings exceeding 21% of the total ASARCO stock. This restriction was in effect until early 1985 and could only be waived by approval of the ASARCO Board, (Exhibit 3, §9.1).

Among the most important of the Taxpayer's exhibits is Exhibit 3. Not only did this purchase agreement prohibit the Taxpayer from any additional purchases of ASARCO stock which would increase the Taxpayer's interest in ASARCO to over 21%, but it also prohibited the Taxpayer from soliciting proxies, and participating in any election contests relating to the election of directors of ASARCO. (Exhibit 3, §9.1).
Furthermore, subject to the restrictions stated in the purchase agreement, ASARCO had a right of first refusal to buy back any of the stock from the Taxpayer (Exhibit 3, §7.2).

In short, under the terms of the Purchase Agreement, the Taxpayer and ASARCO intended that the Taxpayer be a mere passive investor in ASARCO, rather than the Taxpayer being an active participant in ASARCO or a combined entity with it. On page 7 of the Exhibit 3, in section 3.3, the agreement states that "purchaser is acquiring the shares for its own account for investment..." Various announcements and media reports during the period also refer to the transaction as an investment (Exhibits 7-14).

During the period of time in which the Taxpayer held ASARCO stock, the Bendix Tax Department had only one contact with the ASARCO Tax Department which was to let them know that there would be no interference with ASARCO's tax affairs (Transcript, pg.16). This is indicative of the lack of interaction between the employees and managements of the two companies.

There were no major transactions between the companies during the 2 1/2 to 3 year period (Transcript, pp.16-18, 82).

There was also an absence of other factors commonly associated with highly integrated companies. There were, for example, no material employee transfers between the
Taxpayer and ASARCO (Transcript, pp.18 and 83). There were also no common management training programs for the management of the two companies (Transcript, pg.67). These facts are especially significant because they further show a general likelihood of little interaction between the managements and employees of the companies.

There was also an absence of purchase and sales between the Taxpayer and ASARCO (Transcript, pp.18 and 82). Nor did the two companies have any centralized purchasing or pooling of purchases or sales (Transcript, pp. 18 and 84). These facts again show that the two companies were discrete enterprises which were not integrated.

A major reason for this lack of integration between the two companies is that the two companies had entirely different product lines. The Taxpayer was a manufacturer primarily in the automotive and aerospace industries while ASARCO as a producer of non-ferrous metals, primarily silver. (Transcript, pp.66-67, 83-84). There would have been little benefit from the integration of two such entirely different companies.

Except for financial reviews for accounting purposes, the only interaction between the companies consisted of the fact that two of the fourteen Bendix directors also became directors on the ASARCO Board (Transcript, pp.18-19 and 83). Otherwise, there were no other common directors or officers of the two companies (Transcript, pp.68-69 and 83).
In 1981, the Taxpayer ended its investment in ASARCO by selling the stock to ASARCO. The Stock Purchase Agreement (Exhibit 19) and closing documents (Exhibits 19-21) for the purchase of the ASARCO stock by ASARCO from the Taxpayer are again indicative of a transaction entered into by two independent companies on an arms-length basis. The Exhibits clearly do not show a paper transaction between two related companies. There were differing economic interests at stake between two discrete entities which required an extensive agreement and many closing documents.

Finally, it should be noted that the various 1981 announcements and media releases (Exhibit 22) indicate two independent companies with the Taxpayer's holdings referred to as an "investment" or "assets" rather than as ownership of a subsidiary.
ARGUMENT

NONE OF THE DIVIDENDS OR GAIN DERIVED FROM ASARCO STOCK SHOULD BE INCLUDED IN THE NEW YORK CITY TAXABLE BASE BECAUSE THE TAXPAYER IS A NON-DOMICILIARY OF NEW YORK CITY AND THERE IS NO UNITARY BUSINESS RELATIONSHIP BETWEEN THE TAXPAYER AND ASARCO, THEREBY MAKING ANY SUCH INCLUSION UNCONSTITUTIONAL.

According to the City's representative, the City's position is that the dividends and gains from the ASARCO stock are within the statutory definition of investment income set forth in R46-2.05 and that the revised computation of tax is statutorily correct in accordance with R46-4.01E & 4.03(b). (Transcript, pg.11).

In light of the City's revised computations of the tax, the taxpayer is not disputing the City's construction of the relevant statutes. Rather, the Taxpayer's position is that these statutory provisions may not be constitutionally applied to the Taxpayer in light of the due process standards enunciated in recent U.S. Supreme Court decisions. The above-cited statutory provisions were enacted prior to these U.S. Supreme Court decisions and have not been amended since those decisions were handed down.

The United States Supreme Court has made clear, in the case of ASARCO Inc. v. Idaho State Comm'n, 458 US 307 (1982), and its sister case F. W. Woolworth Co. v. Taxation & Rev. Dep., 458 US 819 (1982), that a local jurisdiction may tax the dividend of a non-domiciliary only when there is a unitary business relationship between the taxpayer and the dividend payor. The Court in ASARCO stated:
We cannot accept, consistently with recognized due process standards, a definition of 'unitary business' that would permit non-domiciliary States to apportion and tax dividends 'where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State...'. Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 455 U.S., at 442, 63 L Ed 2d 510, 100 S Ct 1223. In such a situation, it is not true that 'the state has given anything for which it can ask return.' Wisconsin v. J.C. Penney Co. 311 U.S. at 4, 85L Ed 267, 61 S Ct 246."

**ASARCO, supra**, at 800-802.

Also in the same opinion, the Court extended this treatment of dividends to interest and capital gain income as well. **ASARCO, supra**, at 803-804.

In the instant case, the Taxpayer's commercial domicile is in Michigan which is where the ASARCO stock and other investments were managed and controlled and there was no unitary business relationship between the taxpayer and ASARCO according to the unitary standards set forth by the U.S. Supreme Court and hereinafter analyzed. ASARCO is not and never has been, a subsidiary of the Taxpayer, much less a part of a unitary business with the Taxpayer. The taxpayer never even held a majority interest in ASARCO, but instead for about three years merely held a minority interest in ASARCO as a passive investor. The Taxpayer's situation clearly falls within the scope of a non-unitary relationship.

In **ASARCO**, the Court stated the issue to be that "ASARCO claims...that the dividend payors at issue are not part of its unitary business, but rather are 'discrete business enterprises'...We must test this contention on the
record before us." ASARCO, supra, at 320. The record before the City of New York leaves no doubt that the Taxpayer and ASARCO were "discrete business enterprises" rather than a unitary business.

The "parent" in ASARCO had dividend payors in which it owned interests of between 34% to 53%. In Woolworth, the "parent" owned interests between 52.7% to 100% in the dividend payors. In the Taxpayer's case, it owned only a maximum of 20.6% of ASARCO. If ASARCO and Woolworth did not have a requisite interest to establish a unitary relationship with their higher percentage holdings, it would seem far fetched for the City to argue that the Taxpayer which was limited by the Stock Purchase Agreement (Exhibit 6) to no more than a mere 21% of the outstanding ASARCO stock and could not even vote those shares in election contests for ASARCO Board members, somehow had a sufficient interest in ASARCO to establish a unitary relationship.

In Woolworth, the Court applied the unitary business criteria that it had previously set forth in the case of Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 US 425, 438 (1980). That criteria includes three general factors which can result in the determination of a unitary business: (1) functional integration; (2) centralization of management; and (3) economies of scale. If these factors exist, then the "parent" has contributed to the income of
the "subsidiary" and the taxing jurisdiction has a justifi-
cation for its direct or indirect taxing of the "parent" on
the income of the "subsidiary" company. See Woolworth,
\textit{supra}, at 364.

The facts and circumstances of the Taxpayer
overwhelmingly show an absence of functional integration,
centralized management and economies of scale.

First, there was no functional integration of the two
companies. The companies had wholly different product
lines. The Taxpayer was a manufacturer, primarily in the
automotive and aerospace parts industry. ASARCO was a pro-
ducer of non-ferrous metals. The principal product of
ASARCO was silver which is certainly of little use to a
maker of automotive and aerospace parts. There were not any
material sales between the companies during the period that
the Taxpayer invested in \textit{ASARCO}. These facts are far
removed from the vertical integration that is commonly found
in unitary businesses.

Actually, less integration exists in the Taxpayer's
facts and circumstances than in either the \textit{ASARCO} or
\textit{Woolworth} cases. In \textit{ASARCO}, there were some intercompany
sales. See \textit{ASARCO}, \textit{supra} at 320-324. Moreover, in the
\textit{ASARCO} and \textit{Woolworth} cases, the "parents" and "subsidiaries"
actually had the same product lines and were therefore
potentially more susceptible to integration and therefore a
unitary relationship. See \textit{Container Corporation of America
this, the Court made non-unitary determinations in both the ASARCO and Woolworth cases. If there wasn't sufficient function integration in ASARCO and Woolworth for a unitary relationship to exist, then surely there isn't for the Taxpayer, either.

The Taxpayer's situation stands in sharp contrast to the facts and circumstances found in the cases of Mobil Oil Corp v. Commissioner of Taxes of Vermont, 445 US 425 (1980), and Exxon Corp. v. Wisconsin Dept. of Revenue, 447 US 207 (1980). Those cases involved highly vertically integrated oil companies who controlled (through the use of subsidiaries and divisions) every step of the commercial process from exploration, drilling and producing to refining wholesaling and retailing. No such similar relationships exist between the Taxpayer and ASARCO.

Second, there was no centralization of the management of the two companies. The Taxpayer did not own a majority interest in ASARCO. There were no common officers, no common management training programs, minimal, if any, employee transfers, and only two common directors. There was even an absence of consultation between the managements of the two companies. The documents indicate the purchase and sale of the ASARCO stock as arms-length transactions between two independent companies. ASARCO in no way considered itself to be a subsidiary of the Taxpayer.
Again, the Taxpayer's facts and circumstances are even more favorable than those of the taxpayers in ASARCO and Woolworth. In ASARCO, there were higher percentages of ownership, and more common directors. See ASARCO, supra at 320-324. In Woolworth, all but one of the "subsidiaries" were 100% owned by the taxpayer and it was determined that there existed some "managerial links" between the companies. See Woolworth, supra, at 362 & 368. If there wasn't sufficient centralized management in ASARCO and Woolworth to establish a unitary relationship, surely there isn't for the Taxpayer, either.

Third, there were no economies of scale. The two companies did not pool sales or purchases to achieve economies which they could not achieve separately. The reason for this is simple. They were in totally different businesses in different locations and with different needs and customers. Pooling sales or purchases was entirely impractical.

Once again, the Taxpayer's facts and circumstances compare favorably with those of the taxpayers in ASARCO and Woolworth. In those cases the "parents" and "subsidiaries" had similar product lines and at least the potential for some economies of scale. Such economies were unavailable to the Taxpayer as noted above.

To summarize, the facts and circumstances in the Taxpayer's case seem even more favorable to a non-unitary determination than the facts and circumstances of the ASARCO or Woolworth cases, both of which resulted in non-unitary determinations.
Because the ASARCO and Woolworth decisions were handed down only three years ago, there appears at present to be only one reported New York court decision which cites either case, In Re Campbell Sales Company, 111 AD 2d 995 (3rd Dept., 1985). In that case, the New York State Supreme Court cited the ASARCO decision as general authority to support its holding to annul the determination of the State Department of Taxation and Finance requiring combined reporting of a parent and subsidiaries. In the instant case, the specific issue involved is even more directly on point with the issue decided in the ASARCO and Woolworth decisions. This is all the more reason that the ASARCO and Woolworth decisions are controlling in this instance.

In short, if ever there were facts and circumstances to favorably support a non-unitary determination, the Taxpayer's facts and circumstances are it. The Taxpayer's case is an instance in which one large company found it to be a good investment to purchase a minority interest in another large company. It was a good investment as is evidenced by the resulting capital gain when the minority interest was later sold. But it was only an investment, and not part of a unitary business. A non-domiciliary taxing jurisdiction may not, consistent with the Due Process Clause of the U.S. Constitution, tax income derived from such an investment even if it was a good investment.
CONCLUSION

The Taxpayer is a non-domiciliary of New York City and there was no unitary relationship between the business activities of the Taxpayer and ASARCO in the City of New York. Any inclusion of gains or dividends attributable to ASARCO in the Taxpayer's New York City taxable base violates the Due Process Clause of the U.S. Constitution. The taxpayer therefore respectfully requests that the City's determination be rescinded.

Respectfully Submitted By:

[Signature]
Edward R. Koch
Petitioner's Representative

Dated: December 20, 1985