

The Unitary Tax Reconsidered

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Abstract

How to determine the amount of income of essentially integrated multi-jurisdictional business entities that should be taxable by a particular state constitutes one of the most persistent issues in the state tax area. The need to resolve this issue is critical in light of states' fiscal needs and the growing interdependence of the global economy. Unitary taxation constitutes a frequently employed approach to the issue. Unitary taxation, particularly its common variant of worldwide formula apportionment, has generated considerable controversy with regard to the appropriateness of its manner of apportionment and the impact it can have upon interstate and international commerce and relations. In this paper examination and analysis are made of: the major issues pertaining to the unitary tax and worldwide formula apportionment, the evolution of the unitary tax and the case law concerning it, as well as alternative courses of action for resolving the unitary tax controversy.

The Unitary Tax Reconsidered

One of the most controversial issues is the state tax area concerns the constitutionality of the unitary approach to the taxation of multi-jurisdictional business groups. At present in the case of *Barclays Bank*, the Supreme Court is considering whether to grant a writ of certiorari and review the constitutionality of the unitary approach as it applies to foreign parent - domestic subsidiary multinational corporations. The method involved is a common variant of the unitary approach referred to as worldwide combined reporting (WWCR). Under WWCR a portion of a unitary group's worldwide income will be amenable to state taxation. This amount is usually determined by multiplying the group's worldwide income by the average of the following three fractions: (a) in-state property/worldwide property, (b) in-state payroll/worldwide payroll, and (c) in-state sales/worldwide sales

So sensitive is the issue of constitutionality that in an unusual move the Supreme Court asked the Clinton administration to file an amicus curiae brief indicating its position concerning whether the writ should be granted. On October 8, 1993 the administration filed a brief advocating a denial of the writ [Carson (1993)]. On November 1, 1993 the writ was granted despite the administration's position [Carson (1993)]. The unitary approach has been under attack in recent months by American and foreign businesses as well as foreign governments. Great Britain Prime Minister John Major has indicated that should the *Barclays* case not be satisfactorily resolved by December 31, 1993, Great Britain will take retaliatory steps. In this article examination and analysis are made of the unitary method and the issues concerning its constitutionality. [Turro, 1993]

Principal Methods

The arms length/separate accounting method and the unitary method are the two principal approaches used by states in taxing the income of multi-jurisdictional corporate groups.

Arms Length/Separate Accounting Method (ALSA)

The ALSA is the internationally accepted method of taxing related corporations and is reflected in our Federal tax law [I.R.C. Section 482]. Pursuant to the ALSA, parent corporations and their subsidiaries are treated as separate and distinct entities. Taxation of each entity is largely based upon where the particular entity conducts business or has a permanent business establishment.

The treatment as separate entities also applies to transactions undergone between affiliated corporations. To prevent the shifting of income through manipulation of affiliated entity transactions these transactions are to be treated for tax purposes as having been made at arms length between independent entities [Hellerstein W., (1982) and (1983) and Waterland L., (1985)].

Unitary Method

Pursuant to the unitary method a state may subject to state taxation that portion of the multi-jurisdictional corporate group's income deemed attributable to the state based upon the group's presence or activities within the state. The tax is premised on the notion that highly integrated and interdependent entities of a corporate group derive substantial benefit from the conduct and location of their disparate units. Entities so interwoven are considered a "unitary group". As a

consequence of each unit contributing to the economic viability of the group as a whole, the income of the entire unitary group, regardless of where derived, is considered to some degree attributable to each state in which a member of the group conducts operations or activity [Edison California Stores, Inc., (1947); Exxon Corporation, (1980); Container Corporation, (1983)].

Determination of whether business entities will be considered sufficiently linked to require aggregation of their income under a unitary regime is based upon scrutiny of centralization of management, functional integration, and economies of scale [Harley, (1984)]. Evidence supporting the presence of these factors include:

Centralization of Management - Common directors and officers, supervision of subsidiaries by other entities, involvement of the management of other entities in setting policy and overseeing normal matters, determining personnel needs, recruiting and transferring personnel, as well as deciding upon capital needs.

Functional Integration - Common training of employees, warehousing of merchandise, guaranteeing of loans, making of intercompany loans, having accounting performed in common, a joint or common compensation or retirement plan, utilization of the same bonus guide or system, and the providing of intercompany technical assistance.

Economies of Scale - This is present where the entities act together to derive financial benefit, e.g., decrease costs, obtain lower financing rates than would otherwise be available, and reduce the cost of such items as group term life insurance coverage, management fees, and the general cost of production [Earth Resources Co., (1983); F.W. Woolworth, Co., (1982); Mobil Oil Corp., (1982); ASARCO, Inc., (1982); Husky Oil, (1987)].

As the unitary method is dependent upon the worldwide income of the unitary group it has two aspects which stand in stark contrast to the ALSA method. These aspects are:

(1) The fact that intra-group transfers negate each other as the tax is based on the worldwide income of the group rather than the individual income of some particular unit of the group; and

(2) The unitary method takes into account the income of the unitary group as a whole rather than merely transactions undergone directly by the unit within the taxing jurisdiction.

Strengths and Weaknesses

Both the ALSA and the unitary methods have their

own strengths and weaknesses. Utilization of the ALSA method comports with the desire for uniformity and minimizes the risk of affiliated corporations being subject to multiple taxation. In accordance with most other aspects of the law the ALSA recognizes subsidiary corporations as independent from one another and their parent. Fundamental questions and problems inherent in the ALSA concern:

(1) The appropriateness of the assumption that corporations regardless of their level of integration or interdependence should be viewed as separate entities, and generally only held taxable on income reflected on each unit's own formal books and records. For example, under separate accounting a business with a research laboratory in one state and a manufacturing plant in another which transfers substantially finished goods to a related unit in yet a third state for sale may foreseeably have virtually all of its income be taxed by the third state; thus, largely ignoring the contributions to income made by operations in the first two states.

(2) The validity of the assumption that transactions between affiliated entities be treated for tax purposes as made at arms length between independent entities.

(3) The burden imposed on taxing authorities to determine whether an arms length price has been set on related company transactions, and what an arms length price should be.

(4) The corresponding burden imposed on entities of operating under the uncertainty of whether a price they have set is an arms length one and how such price should appropriately be determined, e.g., based upon a wholesale or retail price, variable cost, cost plus, or a maximum price [Langbein, (1990)].

Unlike the ALSA the unitary approach attempts to provide a more accurate determination of the actual income attributable to that part of a unitary business conducted within the state. In addition, the fact that transactions within the unitary group offset one another, eliminates some of the compliance and administrative burdens encountered in ascertaining an arms length price under the ALSA. Despite its apparent theoretical soundness the unitary approach has substantial drawbacks. These drawbacks militate against use of the unitary method in favor of the ALSA. These drawbacks include:

(1) The unitary approach conflicts with the internationally accepted method (ALSA) for taxing multi-jurisdictional corporations.

(2) The unitary approach poses a significant risk of subjecting an entity to multiple taxation on the same income. This results because the unitary approach taxes

a portion of corporation income based upon a fraction considered reflective of its proportionate contribution to the unitary group's worldwide income and at odds with the more commonly employed ALSA method. For example a company that has made a substantial profit from operations in a third world country due to the lower cost of operations there, may find a significant portion of such income taxable by a state where its presence has little connection with the production of such income. This income may also foreseeably be taxed in the third world country under ALSA. A major factor contributing to this scenario is the lack of sufficient direct linkage between the fraction upon which apportionment to the unitary tax jurisdiction is based and the factors causing the income production [Hellerstein (1968)]. The presence of multiple taxation to multinational corporations is particularly problematic in that most states, unlike the federal government, do not provide a credit for foreign tax paid.

(3) The unitary tax formula as reflected in number 2, may cause a disproportionate amount of income to be attributed to a taxing jurisdiction. A related concern is the fact that due to the averaging of the fractions in deriving the prescribed fraction under the formula approach undue weight may be given to a large instate fraction which is in reality either a relatively small total figure in comparison to the dollar amount appearing in the other fractions or has little correspondence to the cause of income production.

(4) The unitary tax creates a significant administrative burden on multinational corporate groups as they must restate their accounts and records into English and apply American accounting and tax rules [Harvard Law Review, (1984)].

(5) The unitary tax arguably allows states to extend their taxing jurisdiction beyond their boundaries in violation of due process, as it taxes values (income) earned through activities in other jurisdictions.

(6) The unitary tax conflicts with established Federal policy, as expressed in provisions of the Internal Revenue Code, and treaties of Friendship, Navigation and Commerce (FCN), as well as presidential statements, and amicus curiae briefs submitted in court cases by the Department of Justice [Shell Petroleum, N.V., (1983) and Barclays Bank International, Ltd. (1990)]. As a result through application of the unitary tax system a state risks interfering with the federal government's conduct of foreign affairs and the stability of foreign relations.

(7) The unitary tax has been protested against by a substantial segment of the international community, including the nations of the European Community, Canada, and Japan [Business Week, (1981)]. This

negative reaction lends credence to the threat to foreign relations and the possibility of foreign retaliation against American interests that the unitary tax poses. The United Kingdom has in fact gone so far as to enact retaliatory legislation against American businesses conducting operations within the U.K. in response to the unitary tax [Grylls Amendment, (1985)].

(8) The unitary tax deters use of an affiliated entity to conduct business in favor of an unrelated entity in order to limit income subject to taxation by the unitary state [Santamaria, (1989)].

(9) The unitary tax will distort the location of investment and operations by multinational corporations as it will result in profitable operations outside of the unitary tax jurisdiction increasing the amount of income subject to tax in the unitary tax jurisdiction.

Many of these problems are evident when one examines the evolution of the unitary method and the case law concerning it. The principal legal challenges to the unitary tax have involved claims that the tax is unconstitutional under the due process and commerce clauses of the Constitution.

Commerce Clause

Article 1 Section 8 of the Constitution gives Congress the power to regulate interstate and foreign commerce. Where no regulatory action has been taken by Congress, it is often necessary to resolve whether state action affecting interstate or foreign commerce conflicts with federal policy. While the Constitution accords Congress the commerce power it appears that through Congressional inaction, inertia, or delegation the executive can establish such federal government position regarding commerce [Youngstown Sheet and Tube Co., (1952) and Dames and Moore, (1981)]. The stakes involved in resolving whether a state has violated the federal government's commerce power are significant particularly as they bear on state sovereignty and international relations.

As aptly expressed by the Supreme Court concerning states involvement in foreign affairs:

"If that government should get into difficulty which should lead to war, or suspension of intercourse, would California alone suffer, or all the union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it or the federal government? If that government has forbidden the states to hold negotiations with any foreign nations, or to declare war and has taken the whole subject of these relations upon herself, has the constitution, which provides for this, done so foolish a thing as to leave it in the power of the state to pass laws whose enforcement renders the

general government liable to just reclamations which it must answer, while it does not prohibit to the states the acts for which it is held responsible?

The constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nation: the responsibility for the character of these regulations and for the manner of execution, belongs to the national government. If it be otherwise, a single state can, at her pleasure, embroil us in disastrous quarrels with other nations." [Chy Lung, (1875)].

The need to limit the ability of states to take independent action which may impair interstate and international commerce, and create conflict and paralysis of trade and foreign relations, was recognized in the early history of our nation. Under the Articles of Confederation the federal government was not empowered to regulate commerce. This resulted in state unilateral action, which damaged both interstate and international relations, particularly as states with ports sought to impose significant taxes on imports and exports. In response to this problem, the power to regulate commerce was provided Congress in the Constitution [*Federalist Papers* and U.S. Constitution Article One Section Eight].

Supreme Court decisions in the early nineteenth century reveal that in the realm of foreign relations and commerce the federal government has exclusive regulatory authority. In large measure this recognition was felt necessary because the federal government alone is recognized as representing the United States, in dealing with other sovereign nations. In contrast, state sovereignty only exists with regard to other states and the federal government [*McCulloch v. Maryland*, (1819); *Gibbon v. Ogden*, (1824); and *Brown v. Maryland*, (1825)].

Due Process

The fourteenth Amendment of the constitution prohibits depriving a person of property without due process of law. According to the due process clause for a state to tax an entity, there must exist a nexus between the entity and the taxing state. A nexus may be regarded as minimum contacts with the state [*National Bellas Hess, Inc.*, (1968)]. If such nexus exists the tax must still be supported by a rational relationship between the taxed income and the firm's operations or presence in the taxing state [*Miller Brothers*, (1954)]. In essence a state may not extend its taxing authority beyond its jurisdiction. Pursuant to due process the tax statute must be clear and capable of being construed and reasonably followed.

Evolution of the Unitary Tax

The unitary tax has a long and contentious history. Its origins go back to the 1800s when several states through which the first interstate railroad ran, adopted it as a revenue raising measure. By doing this these states could impose income taxes upon the entire income of the railroad companies, rather than settle for ad valorem taxes on the value of the track running through their state. In the *State Railroad Tax Cases* and *Adams Express Co.*, the tax was challenged for the first time on constitutional grounds [*State Railroad Tax Case*, (1875) and *Adams Express Company* (1897)]. The Supreme Court upheld the tax, finding that the railroad must be considered a unit, concerning which the track played an integral role in the production of overall revenue. As a consequence states through which the track ran could take such overall revenue into account in the determination of tax.

Over the years the unitary tax has become an increasingly popular method of state taxation. In 1957 three factor formula apportionment was accepted by a large number of states as part of the Uniform Division of Income for Income Tax Purposes Act [*Pierce*, (1957)]. This Act was in large part later incorporated into the Multistate Tax Compact which some seventeen states assented to [*Corrigan* (1976)]. At present some eleven states employ worldwide formula apportionment.

Despite its popularity the unitary tax has met with considerable resistance. Challenges to the unitary tax have primarily been based upon alleged violations of the due process and commerce clauses.

These challenges have met with little success. What success has been achieved has largely resulted from courts not finding entities sufficiently integrated to be deemed part of a unitary group. In the case of *Hans Rees' Sons, Inc.*, however an apportionment scheme was struck down due to the formula causing a disproportionate amount of income to be apportioned to the taxing jurisdiction [*Hans Rees' Sons, Inc.*, (1931)]. The tax scheme in *Hans Rees'* is distinguishable from that of the usual unitary tax method in that it concerned an apportionment scheme based solely on the location of tangible property, and resulted in between 66% and 85% of the taxpayer's income over a number of years being attributed to a particular state. This high percentage seemed grossly disproportionate to the percentage of revenue actually related to instate activities of the taxpayer. Application of the ALSA method over the same interval would have resulted in only about 21.7% of such income being attributed to the state.

In light of this discrepancy the court concluded that the tax method was invalid under the due process clause in that it taxed revenue not rationally connected to

activities conducted within the taxing jurisdiction. The Hans Rees' case is of limited precedential value in dealing with the typical unitary tax formula apportionment due to its involving apportionment based upon but one factor and the extent of the excessive apportionment to the taxing state.

Analysis of the constitutionality of the unitary tax has been problematic. The difficulty has largely resulted from the lack of a clear federal enactment or directive in the area, and the fact that unitary tax cases often involve international as well as domestic concerns. The lack of federal action triggers scrutiny of the tax scheme under what has come to be known as dormant commerce clause analysis. This analysis reflects elements of both the due process and commerce clauses. Under this analysis for a tax affecting interstate commerce to be held constitutional it must meet the following four criteria: (1) The tax must be applied to an activity with a substantial nexus to the taxing state; (2) The tax must be fairly apportioned; (3) The tax must not discriminate against interstate commerce; and (4) The tax must be fairly related to services provided by the taxing state [Complete Auto Transit, Inc., (1977)].

In Japan Line, Ltd., Inc., two additional criteria were established for reviewing a state tax affecting foreign commerce [Japan Line, Ltd., (1979)]. These criteria being: (1) The tax must not create a substantial risk of double taxation; and (2) The state tax must not impair Federal tax uniformity in an area where Federal uniformity is essential nor prevent the federal government from speaking with one voice in regulating commercial transactions with foreign governments.

Japan Line concerned a Japanese corporation's challenge of California's imposition of an ad valorem tax on cargo containers of the corporation temporarily sited in California. The containers had been fully taxed pursuant to a non-apportionment scheme in Japan (home port) and were registered and transported solely by foreign means in international commerce. The Supreme Court held the state tax to be invalid as it clearly violated the criteria against double taxation. In addition, according to the Court under the Customs Convention on Containers, signed by the United States and Japan containers which are temporarily imported are free from duties and charges attributable to importation. Thus, California violated this convention, and since American containers temporarily sited in Japan were not subject to taxation asymmetry resulted which could well lead to retaliatory action by Japan. Although a strong argument can be made that the Japan Line criteria should be limited to cases involving unapportioned ad valorem taxes and instrumentalities of foreign commerce, the Japan Line criteria have been applied by courts in reviewing challenges to the unitary tax made both by multinational corporations with domestic

parents as well as those with foreign parents. The general acceptance of these criteria in evaluating the validity of worldwide formula apportionment is evident in the 1983 Supreme Court decision in Container Corporation [Container Corporation, (1983)].

Container Corporation involved a vertically integrated multinational corporate group having a domestic parent, and subsidiaries conducting operations in various foreign countries and states. Due to one of the subsidiaries operations in California, the worldwide income of the corporate group was included in determining a tax assessment under California's unitary tax system. The assessment was unsuccessfully challenged in state court and eventually appealed to the Supreme Court. The Supreme Court in what has become a landmark decision upheld the unitary tax noting that it had historically upheld the tax and believed it to be an acceptable departure from the commonly employed ALSA method.

In reaching its decision the Court utilized the Japan Line dormant foreign commerce clause analysis. This inquiry resulted in finding that:

- (1) Nexus - There were sufficient minimum contacts with the state due to the presence of operations in the taxing state and vertical integration to justify the corporate group being considered unitary and subject to the state's unitary tax.
- (2) Fairness - The unitary tax was deemed fair pursuant to analysis in terms of both internal and external consistency. The tax was considered internally consistent because application of it by all jurisdictions would result in all income being taxed but once. The tax was considered externally consistent because the factor(s) used in apportionment reflected in a reasonable way how income was generated.
- (3) Nondiscrimination - The court glossed over the criteria of nondiscrimination, by essentially equating it with fair apportionment which it had already deemed present.
- (4) Fair Relationship - The tax was considered fairly related to services provided by the taxing state due to the tax being found externally consistent.

The integration of the income of foreign subsidiaries into the income on which the state tax would be determined resulted in the court's applying Japan Line foreign commerce clause analysis.

- (1) Double Taxation - The court decided that there was no substantial risk of international multiple taxation. Paradoxically the court found that although double taxation in fact existed, it was not inevitable under the unitary tax method. According to the Court an absolute

prohibition against a state tax system potentially producing double taxation did not exist, rather a prohibition existed against a state tax that made subjection to double tax a certainty, e.g., as in *Japan Line*, where the full value of the property was already subject to tax based upon 100% of its value before the state tax was imposed. In addition, the court noted that before it could find a tax system invalid it had to consider the reasonable alternatives available to the taxing state. The Court then focused on the ALSA as an alternative, and considered that it too posed the potential for double taxation, due to the manner by which income could be reallocated.

(2) Uniformity and the One Voice Standard - The Court found the state tax to have foreign resonances but not to implicate foreign policy. As a result a violation of a Federal desire for uniformity could only be found where a Federal statute or directive explicitly requiring a particular treatment by the states exists. As there was no such statute or directive nor any such issuance indicating the federal government's preemption of state authority in the area no violation of the one voice standard was found.

The threat of foreign retaliation and impairment of foreign relations was not considered great due to the case concerning 1) a domestic parent, 2) the lack of clear asymmetry, and 3) the corporation clearly being subject to California taxation.

The *Container* decision provides insight into the legal analysis of the unitary tax as well as lays the foundation for what will likely become a dilemma if the validity of the unitary tax is determined over time through litigation rather than through federal action. The case reveals that challenges of the unitary tax be they by domestic based multinationals or foreign based multinationals will be determined pursuant to the higher level scrutiny of the foreign commerce clause analysis rather than that of interstate commerce clause analysis. The court's interpretation of the *Japan Line* anti-multiple taxation criteria essentially negates it as a decisive factor in unitary tax litigation. In contrast, the decision raises the non-impairment of federal uniformity and one voice standard to paramount importance in resolving challenges to the unitary tax by multinational corporate groups. Language in *Container* suggests that a different outcome might have been reached had the case involved a foreign parent corporate group, or there been a greater risk of foreign retaliation or a clear Federal statute or directive against the unitary tax. If as is suggested by the court a different decision would have been reached had the case involved a foreign parent the question must then be confronted of whether such a distinction in treatment between foreign parent and domestic parent corporate groups can be justified on both legal and practical grounds. Even if such dichoto-

mous treatment can be justified on legal grounds as nondiscriminatory, it would appear difficult to accept the notion that foreign interests be given preferential treatment over that accorded multinational corporate groups with domestic parents (or solely domestic corporate groups) that conduct operations in different states.

Events after *Container* cast doubt on whether the same decision would be reached today. Following *Container* dissent toward the unitary tax became more prominent. Some 15 nations, including England, Japan and Germany, protested [Javaras and Browne, (1984) and Allen, (1984)]. The United Kingdom passed retaliatory legislation preventing United States doing business there from claiming rebates or refunds of the Advance Corporate tax [Grylls Amendment, (1985)]. President Reagan and Secretary of State Schultz through speech and correspondence indicated their desire for the elimination of the unitary tax [Rubin, (1989) Barclays International, Ltd. (1990) and Colgate Palmolive Co., Inc. (1991)]. A Treasury Department Task Force was formed which basically recommended that a water's edge approach be adopted, with regard to which the federal government would assist the states in gaining needed disclosures. The water's edge approach would limit state taxation to income generated within the United States. Although the recommendation would have eliminated the worldwide unitary method, it left open the door for unitary apportionment of income produced through operations within the United States. The Treasury Department found this aspect troublesome, but felt that through adoption of the water's edge approach the United States would at least be able to speak with one voice in dealing with its foreign trading partners [Treasury Department Task Force Chairman's Report, (1984) and Solet, (1984)]. In 1985, largely in response to these events California enacted a law enabling multinational corporations to elect to be taxed pursuant to the water's edge approach rather than worldwide formula apportionment effective as of 1988.

Despite these developments no direct legislation or specific treaty was engaged in indicating the federal government's clear rejection of the unitary tax.

A Justifiable Distinction

The principal distinction between the treatment accorded multinational unitary groups with foreign parents and those with domestic ones alluded to in *Container* raises the issue of whether such constitutes a form of discrimination - unfairly placing foreign concerns above those with a more domestic linkage. This question has both political and economic dimensions. Elimination of the tax's application to multinational corporate group's with foreign parents would enhance the appeal to them of conducting operations within

unitary states due to their ability to derive higher rates of return than would exist under a unitary system. Meanwhile multinational corporate groups with domestic parents would remain vulnerable to increased taxation and a lowering of their rate of return due to the unitary tax and have to take such into account in determining their location of investment.

Barclays Bank, International, Ltd.

During May 1992, in Barclays Bank International, Ltd., the California Supreme Court reversed a California Court of Appeals decision in finding the WWCR to be constitutional. According to the California Supreme Court the actions of Congress could be viewed as permitting states to adopt the WWCR. This decision deviated from the more thorough lower court decision wherein the WWCR was found to be unconstitutional under the circumstances.

The Court of Appeals had reached its decision based upon finding that the Executive branch had taken action indicating its disagreement with the use of the WWCR, that the WWCR violated federal uniformity and the need to speak with one voice, and would result in retaliatory foreign action. Unlike the California Supreme Court the Court of Appeals carefully examined the relevant facts and circumstances in determining that a federal policy hostile to the WWCR had been established. In reaching its ruling the court made particular mention of the fact that an amicus curiae brief had been filed by the Department of Justice in opposition to the unitary tax.

In resolving whether an established federal policy did in fact exist the court was confronted with the issue of whether the Executive has the power to establish federal policy so as to limit states taxing power. As set forth in the Constitution it is the legislature (Congress), not the Executive which has the commerce power and the ability to set appropriate limits on state taxing power. In determining whether there was an established federal policy against the unitary tax the evidence provided involved action taken by the Executive branch. This action primarily concerned application of the unitary tax to unitary corporate groups with foreign parents. The court held that under the circumstances the Executive did have the power to establish such policy. According to the court while Congress has the power to regulate commerce in certain instances the Executive may act and set such policy. This is particularly so in the realm of foreign affairs where the Executive is given significant authority. The standard for determining when the Executive may set such policy is expressed in the case of *Youngstown Sheet and Tube* by Justice Jackson [*Youngstown Sheet and Tube, Co., (1952)*]. According to Justice Jackson:

"When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress can have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area any actual test of power is likely to depend on the events and contemporary imponderables rather than on abstract theories of law."

In contrast to the situation encountered in Barclays, the state courts have uniformly upheld the WWCR as constitutional where applied to domestic based multi-jurisdictional groups. [Alcan Aluminum Corporation (1993)]

The Options Considered

Ignoring the fact that different units of an integrated multi-jurisdictional corporate group contribute to the income of the group as a whole results in a misleading portrait of the amount of the group's income attributable to a particular unit of it. How to appropriately determine the amount of income to be apportioned to a particular unit's jurisdiction is a difficult task. This task is made even more difficult when one considers that use of any such apportionment scheme is an aberration from the largely accepted ALSA method. Thus, increasing the likelihood that entities subject to a unitary tax will incur multiple taxation. The unitary tax, and its common variant of three factor formula apportionment, represent one means of making such apportionment. Although some apportionment scheme would appear theoretically desirable, the lack of uniformity, increased risk of multiple taxation and effect on foreign relations, and location of investment along with the claims raised against it by governments and big business militate against such a tax on practical grounds. While the alternative ALSA itself seems fundamentally flawed in its over-reliance on formalistic internally generated accounting records and view of each entity of an integrated corporate group as distinct and separate it is unlikely that a consensus could be formed on any other possible method. The desire for uniformity and the international acceptance of ALSA make it generally appealing.

The prospect of eliminating the unitary tax through litigation is uncertain. In all likelihood Barclays will be heard by the Supreme Court. Some commentators have opined that Barclays was incorrectly decided in that the Japan Line criteria were not meant to apply to an income tax, while it has also been claimed that there was inadequate evidence of an established federal policy to support the decision, as well as exaggerated claims of the compliance created and potential retaliation pro-

voiced by the unitary tax, [Turro, (1991)]. Even should Barclays be upheld by the Supreme Court there exists a real possibility that the tax may still be applied to multinational unitary groups with domestic parents. Such disparity in treatment appears discriminatory. While foreign parent unitary groups may be protected from the WWCR, domestic parent unitary groups would remain burdened with added compliance costs, increased vulnerability to multiple taxation, negatively impact rates of return on investment in locations outside the tax jurisdiction and affect logistic decisions. Relying on piecemeal litigation to resolve the situation is problematic. While eventual litigation may result in application of a unitary tax to domestic parent unitary groups to be held invalid - it is uncertain when and if such litigation and decision will be forthcoming.

Depending upon states to eliminate the unitary tax on their own accord without being compelled to do so by the Supreme Court or federal action is risky. If states merely eliminate the tax on their own accord the tax may well resurface in the future. Such resurfacing would be particularly likely during economic hard times as a revenue raising measure.

The best way of eliminating the unitary tax is through that action the absence of which has played a prominent role in litigation concerning the unitary tax. This action being clear federal preemption of the states ability to impose the unitary tax. There exist two principal options the federal government has for doing this. One option is to negotiate or renegotiate treaties, and thereby establish provisions making imposition of the unitary tax at the state or local levels impermissible. This alternative has two major flaws. First, it would likely only provide foreign multinational corporate groups protection against imposition of the unitary tax. And, second, it would risk reopening well established foreign relations and treaties, while taking a significant period of time to complete and approve.

A politically palatable alternative might be for the federal government to adopt the water's edge approach as recommended by the Treasury Department Task Force in the 1980s. Pursuant to its commerce power legislation may also be enacted regarding domestic parent multi-jurisdictional groups. Absent a special inquiry and commission devising a formula to better match apportionment with causes of income production, apportionment within the United States, retains some of the same problems associated with the world wide unitary tax. Although the water's edge approach would eliminate much of the translation of records burden, and distorted apportionment of income caused by operations in foreign countries, the onus of unitary apportionment would remain on domestic unitary groups operating or having a presence within different states.

A preferable alternative would appear to be passage of a statute, essentially requiring states to use the ALSA method. Several attempts have been made in the past to enact legislation to modify or eliminate the unitary tax. These efforts have failed largely due to the federal government's fear of intruding on state sovereignty. In light of growing international interdependence and the need to place domestic corporate groups on equal economic footing with foreign corporate groups, it appears that the time for the federal government to act and finally eliminate the unitary tax has arrived.

Suggestions for Future Research

There exists several critical issues in need of further research concerning multi-jurisdictional business groups. These issues are of importance to both federal and state taxation. An analysis should be made comparing the revenue impact and equity of alternative approaches. In addition, an examination should be made into the effective tax rates incurred by multi-jurisdictional groups and the significance of tax systems and rates upon logistical decisions.

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