SUPREME COURT OF THE UNITED STATES

NOS. 92–1384 AND 92–1839

BARCLAYS BANK PLC, PETITIONER
92–1384 *v.*
FRANCHISE TAX BOARD OF CALIFORNIA

COLGATE-PALMOLIVE COMPANY, PETITIONER
92–1839 *v.*
FRANCHISE TAX BOARD OF CALIFORNIA

ON WRITS OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

[June 20, 1994]

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins, concurring in the judgment in part and dissenting in part.

I joined Justice Powell in dissent in *Container Corp. of America* v. *Franchise Tax Board*, 463 U. S. 159 (1983), and I continue to think the Court erred in upholding California's use of worldwide combined reporting in taxing the income of a domestic-based corporate group. But because the State and private parties have justifiably relied on the constitutionality of taxing such corporations, and Congress has not seen fit to override our decision, I agree with the Court that *Container Corp.* should not be overruled, cf. *Quill Corp.* v. *North Dakota ex rel. Heitcamp*, 504 U. S. ___, ___ (1992) (slip op., at 18–19), and that it resolves the constitutional challenge raised by Colgate-Palmolive. I therefore concur in the judgment in No. 92–1839. Barclays Bank, on the other hand, is a *foreign*–based parent company of a multinational corporate group, and our holding in *Container Corp.* expressly does not extend to this situation. See 463 U. S., at 189, n. 26 and 195, n. 32. In my view, the California tax cannot constitutionally be applied to foreign corporations. I therefore respectfully dissent in No. 92–1384.

A state tax on interstate commerce must meet four requirements under our negative Commerce Clause precedents: the tax must be on an activity with a substantial nexus to the taxing State, it must be fairly apportioned, it must not discriminate against interstate commerce, and it must be fairly related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). Substantially for the reasons explained by the Court, see *ante*, at 11–15, I agree that imposition of the California tax complies with the four *Complete Auto* factors. (I also agree that California's practice of accepting "reasonable approximations" of the statutorily required financial data does not violate due process. See *ante*, at 15–17.) A state tax on *foreign* commerce, however, must satisfy two additional inquiries: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from `speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes *either* of these precepts, it is unconstitutional under the Commerce Clause." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 451 (1979) (emphasis added).

I am in general agreement with the Court, see *ante*, at 21–31, that the second *Japan Line* factor—the purported need for federal uniformity—does not prevent the use of worldwide combined reporting in taxing foreign corporations. The Congress, not the Executive or the Judiciary, has been given the power to regulate commerce. U. S. Const., Art. I, §8, cl. 3. The Legislature has neither approved nor disapproved the California tax. Although in such circumstances courts have the power to scrutinize taxes for consistency with our negative Commerce Clause jurisprudence, this determination should be made on the basis of the objective factors outlined in

Complete Auto (and, in the foreign commerce context, the multiple taxation analysis discussed in *Japan Line*), not statements made and briefs filed by officials in the Executive Branch. Cf. *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U. S. ___, ___ (1993) (slip op., at 3–4) (SCALIA, J., concurring in part and concurring in judgment). Indeed, the inconsistent positions taken by the Solicitor General in the course of Barclays' challenge to the California tax illustrate the perils of resting constitutional determinations on such "evidence." Compare Brief for United States as *Amicus Curiae* 21–24 (arguing that the California tax was constitutionally applied to Barclays during the tax years in question), with Brief for United States as *Amicus Curiae* in *Barclays Bank* v. *Franchise Tax Board*, O. T. 1992, No. 92–212, pp. 9–16 (arguing that the imposition of the California tax on Barclays was unconstitutional).

But I cannot agree with the Court's resolution of the other *Japan Line* factor—the need to avoid international multiple taxation. See *ante*, at 17–21. Barclays does 98% of its business in countries other than the United States. California, through application of worldwide combined reporting, taxes some of that income. The trial court found as a fact that "[t]here is a definite risk of, as well as actual double taxation here." App. to Pet. for Cert. A-25. This double taxation occurs because California has adopted a taxing system that is inconsistent with the taxing method used by foreign taxing authorities. California's formula assigns a higher proportion of income to jurisdictions where wage rates, property values, and sales prices are higher; to the extent that California is such a jurisdiction (and it usually will be) the formula inherently leads to double taxation. And whenever the three factors are higher in California, the State will tax income under its formula that already has been taxed by another country under accepted international practice.

In *Container Corp.*, we recognized that the California tax "ha[d] resulted in actual double taxation . . . stem[ming] from a serious divergence in the taxing schemes adopted by California and the foreign taxing authorities," and that "the taxing method adopted by those foreign taxing authorities is consistent with accepted international practice." 463 U. S., at 187. We nevertheless held that the tax did not violate the *Japan Line* principle. Two of the factors on which we relied—that the tax was on income rather than property, and that the multiple taxation was not "inevitable"—carry no more force today than they did 11 Terms ago, see 463 U. S., at 198–201 (Powell, J., dissenting), but they are present here as well.

We also relied on a third ground to distinguish the tax upheld in *Container Corp.* from the tax invalidated in *Japan Line:* "[T]he tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States. We specifically left open in *Japan Line* the application of that case to `domestically owned instrumentalities engaged in foreign commerce,' and . . . this case falls clearly within that reservation." 463 U. S., at 188–189, quoting *Japan Line*, 441 U. S., at 444, n. 7. In a footnote, we continued: "We have no need to address in this opinion the constitutionality of [the California tax] with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries." 463 U. S., at 189, n. 26; see also *id.*, at 195, and n. 32. As the Court recognizes, *ante*, at 18, and n. 15, Barclays' challenge to the California tax therefore presents the question we expressly left open in *Container Corp.:* does it make a constitutional difference that the multiple taxation resulting from California's use of worldwide combined reporting falls on a foreign corporation rather than a domestic one?

In my view, the answer is yes.

Japan Line teaches that where the instrumentality of commerce—and analogously, the corporate domicile—is foreign, the multiple taxation resulting from a state taxing scheme may violate the Commerce Clause even though the same tax would be constitutional as applied to a domestic corporation. 441 U. S., at 447–448. When worldwide combined reporting is applied to American corporate groups with foreign affiliates, as in *Container Corp.*, income attributable to those foreign companies will be taxed by California, even though they are also subject to tax in foreign countries. But in such cases the incidence of the tax falls on the domestic parent corporation—a corporation subject to full taxation in the United States notwithstanding the source of its income. When the California tax is applied to a foreign corporate group with both domestic and foreign affiliates, some of the income of the foreign companies will also be taxed by California. The incidence of the tax in such cases falls on a *foreign* corporation, even though the United States (and its subnational governments) is entitled to tax only the income earned domestically.

In my view, the States are prohibited (absent express congressional authorization) by the Foreign Commerce Clause from adopting a system of taxation that, because it does not conform to international practice, results in multiple taxation of foreign corporations. It may be that such a rule "leave[s] California free to discriminate against a Delaware corporation in favor of an overseas corporation," *Container Corp.*, *supra*, at 203 (Powell, J., dissenting), but the reason for this differential treatment is obvious. Domestic taxpayers have access to the political process, at both the state and national levels, that foreign taxpayers simply do not enjoy. If Cali-fornia's tax results in intolerable double taxation of domestic corporations, those companies can seek

redress through the normal channels. Cf. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 473, n. 17 (1981); *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 444, n. 18 (1978). It is all too easy, however, for the state legislature to fill the State's coffers at the expense of outsiders.

Most of the United States' trading partners have objected to California's use of worldwide combined reporting. See Démarche from Danish Embassy, on behalf of Governments of European Community (Mar. 26, 1993) ("The views of the EC Member States on worldwide unitary taxation are well known to the United States Government. All Member States have expressed their strong opposition to [the California] tax in a number of diplomatic communiques to the United States Government from 1980 to the present date"); Démarche from Belgian Embassy, on behalf of Governments of Member States of European Community and of Australia, Austria, Canada, Finland, Japan, Norway, Sweden, and Switzerland (Sept. 23, 1993). At least one country has already enacted retaliatory legislation. See Brief of Government of United Kingdom as *Amicus Curiae* 19–23. Moreover, the possibility of multiple taxation un- doubtedly deters foreign investment in this country. See Brief of Member States of the European Communities et al. as *Amici Curiae* 14–16. These adverse consequences, which affect the Nation as a whole, result solely from California's refusal to conform its taxing practices to the internationally accepted standard.

Unlike the Court, see *ante*, at 20, I would not dismiss these difficulties solely by relying on our observation in *Container Corp.* that "it would be perverse, simply for the sake of avoiding double taxation, to require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that also sometimes results in double taxation." 463 U. S., at 193. In addition to being factually incorrect, see *id.*,

at 199, n. 1 (Powell, J., dissenting), our discussion of alternatives in *Container Corp.* proceeded from the well-established proposition that States need not conform their taxing practices to those of their neighbors, at least so far as domestic commerce is concerned. See, *e.g.*, *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 277–281 (1978). Multiple taxation of domestic companies is avoided, to the extent necessary, by the fair apportionment requirement. See *Container Corp.*, *supra*, at 185; *General Motors Corp.* v. *Washington*, 377 U. S. 436, 440 (1964).

But in *Japan Line* we squarely rejected the argument that the same principle applies to taxes imposed on foreign-owned instrumentalities:

> "[N]either this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistently with the custom of nations, to impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. . . . Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though `fairly apportioned' to reflect an instrumentality's presence within the State, may subject foreign commerce to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids." 441 U. S., at 447–448 (footnote and internal quotation marks omitted).

In my view, the risk of multiple taxation created by California's use of worldwide combined reporting—a risk that has materialized with respect to Barclays—is sufficient to render the California tax constitutionally infirm. I therefore respectfully dissent from the Court's conclusion to the contrary.