

The Burger Court Opinion Writing Database

*F.W. Woolworth Co. v. Taxation and
Revenue Department of New Mexico*
458 U.S. 354 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

May 5, 1982

Re: No. 80-1745 - Woolworth v. Taxation & Revenue Dept.
No. 80-2015 - Asacro v. Idaho State Tax Commission

Dear Lewis:

Re your memo of May 5, I did not, unfortunately keep notes on the discussion since you indicated you would stay in the case. And when assigning, I did not recall the details mentioned in your memo of today.

Subject to further discussion I would be glad to try to "juggle" the assignments and work out a "trade" with someone. Let's sit down on this later today if possible.

Regards,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

80-1745
80-2015

May 7, 1982

Dear Lewis:

I regret my efforts have come to naught on "juggling" the assignments. At this season there is very little elbow room.

Regards,

WRB

Justice Powell

John - go to it!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 1, 1982

RE: No. 80-1745 F.W. Woodworth v. Taxation and Revenue
Department, New Mexico

Dear Lewis:

I agree.

Sincerely,



Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1982

Re: 80-1745 - F. W. Woolworth Co. v.
Taxation and Revenue Department
of the State of New Mexico

Dear Lewis,

I agree.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1982

Re: No. 80-1745 - Woolworth v. Taxation & Revenue
Dept. of the State of New Mexico

Dear Lewis:

Please join me.

Sincerely,

T.M.
T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1982

Re: No. 80-1745 - F. W. Woolworth Co. v.
Taxation & Revenue Department of New Mexico

Dear Sandra:

Please join me in your dissenting opinion in this case.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 5, 1982

80-1745 Woolworth v. Taxation & Revenue Dept.
80-2015 Asacro v. Idaho State Tax Commission

Dear Chief:

Upon my return to the Court this morning from the CALL Judicial Conference, I learned for the first time of the assignment to me of the above cases.

In view of my concern as to whether I should disqualify in these cases, discussed at Conference, I had hoped you would not assign them to me. My concern was based, as you will recall, on the fact that the bank holds in our accounts securities in several international corporations, two of which are corporations on the boards of which I served and also represented. I do not know - indeed have no idea - how these corporations will be affected, if at all.

As there was no feeling among members of the Court that I should disqualify, I took part in the consideration of the cases. My votes to reverse, however, were tentative. You may recall my saying - when Harry voted to affirm - that he had "unhorsed me". For this reason also I would have preferred not to write these cases.

Nevertheless, the assignments have been made and I will try to write the cases in accordance with the five firm votes to reverse.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

.85 WVA -2 4/1/82

May 7, 1982

80-1745 Woolworth v. Taxation & Revenue Dept.
80-2015 Asarco v. Idaho State Tax Commission

Dear Chief,

Thank you for your efforts to rearrange the assignments of the above cases.

I do appreciate your undertaking this, and know that it was an added burden.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
 Justice Brennan
 Justice White
 ✓ Justice Marshall
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Powell**

Circulated: 5/29/82

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1745

**F. W. WOOLWORTH CO., APPELLANT *v.* TAXATION
 AND REVENUE DEPARTMENT OF THE STATE OF
 NEW MEXICO**

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

[May —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the Due Process Clause permits New Mexico to tax a portion of dividends that appellant F. W. Woolworth Co. received from foreign subsidiaries that do no business in New Mexico. We also must decide whether New Mexico may include within Woolworth's apportionable New Mexico income a sum, commonly known as "gross-up," that Woolworth calculated in order to claim a foreign tax credit on its federal income tax.

I

Woolworth's principal place of business and commercial domicile is in New York. It engages in retail business through chains of stores located in the United States, Puerto Rico, and the Virgin Islands. It sells a wide spectrum of merchandise, including dry goods, hardware, small appliances, confections, packaged goods, and fountain items. In the fiscal year ending January 31, 1977, Woolworth's gross domestic sales totalled approximately \$2.5 billion, with New Mexico sales amounting to approximately \$13 million—or about 0.5% of the gross figure. App. 57.

Woolworth owns four foreign subsidiaries of relevance to this suit. Three are wholly-owned: F. W. Woolworth GmbH, in Germany; F. W. Woolworth, Ltd., in Canada; and F. W.

4
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12
15-17

stylistic changes

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JUN 1 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1745

F. W. WOOLWORTH CO., APPELLANT v. TAXATION
AND REVENUE DEPARTMENT OF THE STATE OF
NEW MEXICO

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the Due Process Clause permits New Mexico to tax a portion of dividends that appellant F. W. Woolworth Co. received from foreign subsidiaries that do no business in New Mexico. We also must decide whether New Mexico may include within Woolworth's apportionable New Mexico income a sum, commonly known as "gross-up," that Woolworth calculated in order to claim a foreign tax credit on its federal income tax.

I

Woolworth's principal place of business and commercial domicile is in New York. It engages in retail business through chains of stores located in the United States, Puerto Rico, and the Virgin Islands. It sells a wide spectrum of merchandise, including dry goods, hardware, small appliances, confections, packaged goods, and fountain items. In the fiscal year ending January 31, 1977, Woolworth's gross domestic sales totalled approximately \$2.5 billion, with New Mexico sales amounting to approximately \$13 million—or about 0.5% of the gross figure. App. 57.

Woolworth owns four foreign subsidiaries of relevance to this suit. Three are wholly-owned: F. W. Woolworth GmbH, in Germany; F. W. Woolworth, Ltd., in Canada; and F. W.

14-16
footnotes renumbered

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JUN 5 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1745

F. W. WOOLWORTH CO., APPELLANT *v.* TAXATION
AND REVENUE DEPARTMENT OF THE STATE OF
NEW MEXICO

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the Due Process Clause permits New Mexico to tax a portion of dividends that appellant F. W. Woolworth Co. received from foreign subsidiaries that do no business in New Mexico. We also must decide whether New Mexico may include within Woolworth's apportionable New Mexico income a sum, commonly known as "gross-up," that Woolworth calculated in order to claim a foreign tax credit on its federal income tax.

I

Woolworth's principal place of business and commercial domicile is in New York. It engages in retail business through chains of stores located in the United States, Puerto Rico, and the Virgin Islands. It sells a wide spectrum of merchandise, including dry goods, hardware, small appliances, confections, packaged goods, and fountain items. In the fiscal year ending January 31, 1977, Woolworth's gross domestic sales totalled approximately \$2.5 billion, with New Mexico sales amounting to approximately \$13 million—or about 0.5% of the gross figure. App. 57.

Woolworth owns four foreign subsidiaries of relevance to this suit. Three are wholly-owned: F. W. Woolworth GmbH, in Germany; F. W. Woolworth, Ltd., in Canada; and F. W.

June 18, 1982

PERSONAL

80-1745 Woolworth v. Taxation
80-2015 Asarco v. Idaho State

Dear Chief:

In view of all of the paper that is circulating, I write merely to be sure that you see the notes that I am adding to my Asarco opinion, responding to Sandra's dissent.

If one reads her opinion in isolation, it is - as you suggest - rather forceful. Yet, she apparently does not understand that we simply have applied settled principles to the facts of these cases. Her opinion would create a per se rule with respect to all investment income, whatever the facts and circumstances.

Although I have a Court in both of these cases, I am anxious to have your vote to forestall any defection.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1982

Re: No. 80-1745 F.W. Woolworth Co. v. Taxation &
Revenue Department of New Mexico

Dear Sandra:

Please join me in your dissenting opinion.

Sincerely,

whr/cms

Justice O'Connor

Copies to the Conference

.85 10 21 1982

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

100-1-11 56

June 1, 1982

Re: 80-1745 - Woolworth v. Taxation &
Revenue Dept. of New Mexico

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 1, 1982 38

No. 80-1745 Woolworth v. Taxation & Revenue Dept.

Dear Lewis,

In due course, I shall circulate a dissent.

Sincerely,



Justice Powell

Copies to the Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: **Justice O'Connor**

Circulated: JUN 17 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1745

F. W. WOOLWORTH CO., APPELLANT *v.* TAXATION
 AND REVENUE DEPARTMENT OF THE STATE OF
 NEW MEXICO

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

[June —, 1982]

JUSTICE O'CONNOR, dissenting.

The \$39.9 million in dividend income at issue in this case was earned by four foreign subsidiaries of F. W. Woolworth Co.: F. W. Woolworth GmbH (Germany), F. W. Woolworth, Ltd. (Canada), F. W. Woolworth, S. A. de C. V. (Mexico), and F. W. Woolworth Co., Ltd. (England). F. W. Woolworth Co. wholly owned its German, Canadian, and Mexican subsidiaries, and had a 52.7% interest in its English subsidiary. During the tax year in question the subsidiaries apparently operated somewhat autonomously in their respective markets, but "mail, telephone, and teletype communication between the upper echelons of management of the parent and the subsidiaries" was "frequent." *Ante*, at 14 (footnote omitted) (quoting App. to Juris. Statement 34). Moreover, "[d]ecisions about major financial decisions, such as the amount of dividends to be paid by the subsidiaries and the creation of substantial debt, had to be approved by the parent," and "Woolworth's published financial statements, such as its annual reports, were prepared on a consolidated basis." *Ibid.* (citations and footnotes omitted).

These controlled subsidiaries, operating in geographically diverse markets in the same line of business as F. W. Woolworth itself, were simply not "unrelated,"¹ "discrete busi-

¹ *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U. S. 425, 439 (1980).