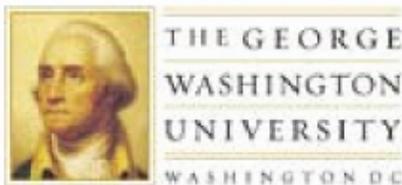


# The Burger Court Opinion Writing Database

*Container Corp. of American v. Franchise  
Tax Board*  
463 U.S. 159 (1983)

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

June 24, 1983

Re: Case No. 81-523 - Container Corporation of America v.  
Franchise Tax Board

Dear Lewis:

I join your dissent.

Regards,

A handwritten signature in cursive script, appearing to read 'WRB', is written below the typed name 'Regards,'.

Justice Powell

Copies to the Conference

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

From: **Justice Brennan**

Circulated: JUN 02 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-523

**CONTAINER CORPORATION OF AMERICA, APPELLANT  
v. FRANCHISE TAX BOARD**

**ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA,  
FIRST APPELLATE DISTRICT**

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This is another appeal claiming that the application of a State taxing scheme violates the Due Process and Commerce Clauses of the Federal Constitution. California imposes a corporate franchise tax geared to income. In common with a large number of other States, it employs the "unitary business" principle and formula apportionment in applying that tax to corporations doing business both inside and outside the State. Appellant is a Delaware corporation headquartered in Illinois and doing business in California and elsewhere. It also has a number of overseas subsidiaries incorporated in the countries in which they operate. Appellee is the California authority charged with administering the state's franchise tax. This appeal presents three questions for review: (1) Was it improper for appellee and the state courts to find that appellant and its domestic and overseas subsidiaries constituted a "unitary business" for purposes of the state tax? (2) Even if the unitary business finding was proper, do certain salient differences among national economies render the standard three-factor apportionment formula used by California so inaccurate as applied to appellant's multinational enterprise as to violate the constitutional requirement of "fair apportionment"? (3) In any event, did California have an obligation under the Foreign Commerce Clause, U. S.

*6/3  
Jou*

FOOTNOTES RENUMBERED.

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 1, 5, 6, 12, 14, 16, 22, 24, 26,  
28, 31, 33, 35, 36.

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

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: JUN 09 1983

*WJB*  
*Please see me*  
*JM*

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-523

**CONTAINER CORPORATION OF AMERICA,  
APPELLANT v. FRANCHISE TAX BOARD**

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA,  
FIRST APPELLATE DISTRICT

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This is another appeal claiming that the application of a State taxing scheme violates the Due Process and Commerce Clauses of the Federal Constitution. California imposes a corporate franchise tax geared to income. In common with a large number of other States, it employs the "unitary business" principle and formula apportionment in applying that tax to corporations doing business both inside and outside the State. Appellant is a Delaware corporation headquartered in Illinois and doing business in California and elsewhere. It also has a number of overseas subsidiaries incorporated in the countries in which they operate. Appellee is the California authority charged with administering the state's franchise tax. This appeal presents three questions for review: (1) Was it improper for appellee and the state courts to find that appellant and its overseas subsidiaries constituted a "unitary business" for purposes of the state tax? (2) Even if the unitary business finding was proper, do certain salient differences among national economies render the standard three-factor apportionment formula used by California so inaccurate as applied to the multinational enterprise consisting of appellant and its subsidiaries as to violate the constitutional requirement of "fair apportionment"? (3) In any event, did California have an obligation under the Foreign Commerce

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

STYLISTIC CHANGES THROUGHOUT.  
SEE PAGES: 2, 4, 7, 13, 27, 33

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

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-523

**CONTAINER CORPORATION OF AMERICA,  
APPELLANT v. FRANCHISE TAX BOARD**

**ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA,  
FIRST APPELLATE DISTRICT**

[June —, 1983]

JUSTICE BRENNAN delivered the opinion of the Court.

This is another appeal claiming that the application of a State taxing scheme violates the Due Process and Commerce Clauses of the Federal Constitution. California imposes a corporate franchise tax geared to income. In common with a large number of other States, it employs the "unitary business" principle and formula apportionment in applying that tax to corporations doing business both inside and outside the State. Appellant is a Delaware corporation headquartered in Illinois and doing business in California and elsewhere. It also has a number of overseas subsidiaries incorporated in the countries in which they operate. Appellee is the California authority charged with administering the state's franchise tax. This appeal presents three questions for review: (1) Was it improper for appellee and the state courts to find that appellant and its overseas subsidiaries constituted a "unitary business" for purposes of the state tax? (2) Even if the unitary business finding was proper, do certain salient differences among national economies render the standard three-factor apportionment formula used by California so inaccurate as applied to the multinational enterprise consisting of appellant and its subsidiaries as to violate the constitutional requirement of "fair apportionment"? (3) In any event, did California have an obligation under the Foreign Commerce

(c)

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

HAB

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 28, 1983

MEMORANDUM TO THE CONFERENCE:

Cases Held for No. 81-523 --  
Container Corp. v. Franchise Tax Bd.

-----

No. 81-349 -- Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.

This appeal from the Supreme Court of Illinois was argued last Term, and then carried over to this Term when we decided to note probable jurisdiction in Container Corp. The two issues in this case are (1) whether application of the unitary business concept and formula apportionment to a domestic corporation and its foreign subsidiaries violates the Foreign Commerce Clause, and (2) whether application of the standard three-factor formula to an international unitary business violates the Due Process and Commerce Clauses. Each of these issues is controlled by Container Corp. The one significant factual difference between the two cases--and the reason we decided to hold it pending resolution of Container Corp.--is that, in this case, application of worldwide apportionment led to a reduced tax liability for the taxpayer. (The appeal was brought by another corporation which had intervened in the state court proceedings.) Another difference, which played some role in the opinions in Container Corp., is that the SG filed an amicus brief last year when Chicago Bridge & Iron Co. was argued, but did not file one this year in Container Corp.

I will vote to **AFFIRM.**

*State court*

No. 82-298 -- Anaconda Company v. Franchise Tax Bd.

This is an appeal from a decision of the California Court of Appeal holding that appellant and three of its subsidiaries doing business in Latin America constituted a unitary business for purposes of state taxation, and that the income of the unitary business was subject to worldwide formula apportionment under the same statute that was at issue in Container Corp. The tax years at issue are 1955 through 1969.

The jurisdictional statement presents three questions. Two of these--whether inclusion of the Latin American subsidiaries' income in the California tax base results in impermissible double taxation under Japan Line and whether California's three-factor formula may be applied to international enterprises--are directly

Reproduced from the Collections of the Manuscript Division, Library of Congress

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

July 6, 1983

MEMORANDUM TO THE CONFERENCE

Re: No. 81-523 -- Container Corp. v. Franchise Tax Bd.

If there is no objection, I intend to instruct Henry Lind to make the following change on p. 35 of my opinion: From

"Third, none of the tax treaties into which the United States has entered covers the taxing activities of sub-national governmental units such as States,36/ and the Senate has on at least one occasion, in considering a proposed treaty, attached a reservation declining to give its consent to a provision in the treaty that would have extended the restriction against apportionment taxation to the States.37/"

to

"Third, the tax treaties into which the United States has entered do not generally cover the taxing activities of sub-national governmental units such as States,36/ and in none of the treaties does the restriction on non-arms'-length methods of taxation apply to the States. Moreover, the Senate has on at least one occasion, in considering a proposed treaty, attached a reservation declining to give its consent to a provision in the treaty that would have extended that restriction to the States.37/"

The new wording is prompted by a correspondent who points out that certain provisions of certain tax treaties do apply to the States.

Sincerely,

*Bill* /pd

W.J.B., Jr.

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 6, 1983

Re: 81-523 - Container Corporation of  
America v. Franchise Tax Board

---

Dear Bill,

I shall await the dissent in this case,  
if there is one.

Sincerely yours,



Justice Brennan

cc: The Conference

cpm

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 23, 1983

Re: 81-523 - Container Corporation of  
America v. Franchise Tax Board

---

Dear Bill,

Please join me.

Sincerely yours,



Justice Brennan

cc: The Conference

cpm

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 20, 1983

Re: No. 81-523-Container Corporation of America v.  
Franchise Tax Board

Dear Bill:

Please join me.

Sincerely,

*T.M.*  
T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 20, 1983

Re: No. 81-523 - Container Corp. v. Franchise Tax Board

Dear Bill:

In this case, I am the one who is all for States' rights. I join Parts II-V, inclusive, of your opinion. I have problems with some of the phraseology and expressions in Part I and so do not join that Part. Is Part I really necessary? If it could be eliminated, I would join your opinion in its entirety.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 21, 1983

Re: No. 81-523, Container Corporation of America  
v. Franchise Tax Board

Dear Bill:

With the few changes you are making in Part I of the opinion, I am glad to join the opinion in its entirety.

Sincerely,



Justice Brennan

cc: The Conference

January 26, 1983

81-523 Container Corporation v. Franchise Tax Board

Dear Chief:

I will be glad to write a dissent in the above case.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice O'Connor

Mike: You have the substance of all we need say in your bench memo. If you have taken one of Rives' opinions for the Court, I suggest that you give it priority over Container Corp.

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 3, 1983

81-523 Container Corp. v. Franchise Tax Board

Dear Bill:

In due time, I will circulate a dissent.

Sincerely,

*Lewis*

Justice Brennan

lfp/ss

cc: The Conference

1st draft

No. 81-523

Container Corp. v. Franchise Tax Board

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

From: Justice Powell

Circulated: JUN 22 1983

Recirculated: \_\_\_\_\_

JUSTICE POWELL, dissenting.

The Court's opinion addresses the several questions presented in this case with commendable thoroughness. In my view, however, the California tax clearly violates the Foreign Commerce Clause--just as did the tax in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). I therefore do not consider whether appellant and its foreign subsidiaries constitute a "unitary business" or whether the State's apportionment formula is fair.

With respect to the Foreign Commerce Clause issue, the Court candidly concedes: (i) "double taxation is a constitutionally disfavored state of affairs, particularly in the international context," ante, at 32; (ii) "like the tax imposed in Japan Line, [California's tax] has resulted in actual double taxation," ante, at 26; and therefore (iii) this tax "deserves to receive close scrutiny," ante, at 28. The Court also concedes that "[t]his case is similar to Japan Line in a number of important respects," ante, at 26, and that the Federal Government "seems to prefer the [arm's-length] taxing method adopted by the international community," ante, at 26-27. The Court identifies several distinctions between this case and Japan Line, however, and sustains the validity of the California tax despite the inevitable

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

From: Justice Powell

Circulated: JUN 23 1983

Recirculated: \_\_\_\_\_

JUN 23 1983

pp. 1-2, 5-9

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-523

CONTAINER CORPORATION OF AMERICA,  
APPELLANT *v.* FRANCHISE TAX BOARD

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA,  
FIRST APPELLATE DISTRICT

[June —, 1983]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins,  
dissenting.

The Court's opinion addresses the several questions presented in this case with commendable thoroughness. In my view, however, the California tax clearly violates the Foreign Commerce Clause—just as did the tax in *Japan Line, Ltd. v. County of Los Angeles*, 441 U. S. 434 (1979). I therefore do not consider whether appellant and its foreign subsidiaries constitute a "unitary business" or whether the State's apportionment formula is fair.

With respect to the Foreign Commerce Clause issue, the Court candidly concedes: (i) "double taxation is a constitutionally disfavored state of affairs, particularly in the international context," *ante*, at 32; (ii) "like the tax imposed in *Japan Line*, [California's tax] has resulted in actual double taxation," *ante*, at 26; and therefore (iii) this tax "deserves to receive close scrutiny," *ante*, at 28. The Court also concedes that "[t]his case is similar to *Japan Line* in a number of important respects," *ante*, at 26, and that the Federal Government "seems to prefer the [arm's-length] taxing method adopted by the international community," *ante*, at 26-27. The Court identifies several distinctions between this case and *Japan Line*, however, and sustains the validity of the California tax despite the inevitable double taxation and the

5

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 9, 1983

Re: No. 81-523 Container Corp. v. Franchise Tax Bd.

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 3, 1983

No. 81-523 Container Corp. of America v.  
Franchise Tax Board

Dear Bill,

I will wait to see the dissent before deciding whether to join your opinion. At Conference I voted tentatively to reverse on the foreign commerce ground.

Sincerely,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 22, 1983

Re: 81-523 Container Corp. v. Franchise Tax Board

Dear Lewis,

Please join me in your dissenting opinion.

Sincerely,



Justice Powell

Copies to the Conference