64,553

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF **FLORIDA**

BRUNNER ENTERPRISES, INC., a Delaware Corporation,

Appellant,

vs.

DEPARTMENT OF REVENUE OF **THE** STATE OF **FLORIDA,** et **al.,**

Appellee.

DOCKET NO, **AR-337**

APPEAL FROM A FINAL JUDGMENT ON
ENTRY OF MANDATE OF THE
CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

A. JUDGMENT APPEALED.

This is an appeal from a Final Judgment on Entry of Mandate entered by the Circuit Court of the Second Judicial Circuit of Florida. Appellant Brunner Enterprises, Inc., a Delaware corporation, was the Plaintiff below. Appellee Department of Revenue was the Defendant below. The Appellant Brunner Enterprises, Inc. is referred to as "Appellant," "the taxpayer," "Brunner," "Brunner Enterprises," or by its corporate name. The Appellee Department of Revenue of the State of Florida is referred to as "Appellee" or "the Department." References to the record on appeal appear as TR. Vol. ___, P. ___

B. BRIEF SUMMARY

In January, 1979, a summary judgment was entered in this cause in favor of the taxpayer based on Count I of its Complaint and the case of Stan Musial & Biggie's, Inc. v. Department of Revenue, 363 So.2d 375 (Fla. 1st DCA 1978) (subsequently reversed at 387 So.2d 365 (Fla. 1980)). TR. Vol. 11, P. 277. Following an appeal by the Department to this Court and certification of two questions to the Florida Supreme Court, the summary judgment in favor of taxpayer was quashed and the trial court was ordered to conduct further proceedings in accordance with the Florida Supreme Court's decision of November 20, 1980, Department of Revenue v. Brunner Enterprises, Inc., 390 So.2d 713 (Fla. 1980). In that decision, the Supreme Court answered the two questions certified to it relating to inclusion of certain income in Brunner's tax base. However, the Florida Supreme Court did not decide whether

application of the three-factor formula apportionment method to Brunner's income was constitutional.

In December, 1982, over two years after entry of the Supreme Court's Brunner decision, the Department filed its Motion to Enforce the Mandate in this cause, TR. Vol. III, P. 329-337. A hearing on issues of law was held and in February, 1983, the trial court ruled in favor of the Department as a matter of law, entered its Final Judgment on Entry of Mandate, and upheld the Department's corporate income tax assessment of $105,445.00 against Brunner. In its Final Judgment, the trial court said it was of the opinion that the Florida Supreme Court in its decision of November 20, 1980, had decided all issues against the taxpayer, and thus, nothing was left for the trial court to do but to enforce the mandate, enter final judgment in favor of the Department, and uphold the Department's corporate income tax assessment. TR, Vol. II, P. 374-381.

If the trial court's final judgment is affirmed, no court will have heard the taxpayer's evidence, consisting of affidavits, deposition testimony, and related documents, which supports Brunner's position that the Illinois-generated income should be excluded from Brunner's tax base and that application of three-factor formula apportionment to this income in unconstitutional.

C. COMPLETE CASE STATEMENT

This action was commenced on November 9, 1976, when the taxpayer filed its Complaint and Application for Permanent Injunction in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida. TR. Vol I, P. 1-123. The Department

filed an Answer, TR. Vol. I, P. 125-132, and thereafter certain Orders and Stipulations were entered relating to various questions. TR. Vol. I, P. 133-140. The taxpayer filed a Motion for Summary Judgment in November 1978, TR. Vol. 11, P. 141-142, and supporting Affidavits and two depositions were filed. TR. Vol. 11, P. 143-234. The depositions were taken at the instance of the Department. A hearing was held on the taxpayer's Motion for Summary Judgment and the Court heard argument with regard to Count I of the Complaint. Constitutional arguments were not made. On January 19, 1979, the trial court entered its Final Summary Judgment in favor of the taxpayer. TR. Vol. II, P. 277. The Department filed a Notice of Appeal to the District Court of Appeal, First District, and Directions to the Clerk for the record on appeal, TR. Vol II, P. 278-280.

On September 7, 1979, this Court entered its per curiam opinion affirming the Summary Judgment granted to taxpayer, but also certifying to the Florida Supreme Court as a matter of great public interest the following questions:

> Is the gain from an out-of-state sale of stock held by a foreign corporation doing business in Florida taxable under the Florida Corporate Income Tax Code, and if so, what method of computation should be used?

On October 2, 1979, the Department filed a notice invoking the certiorari jurisdiction of the Florida Supreme Court to review the Opinion of this Court. On November 20, 1980, the Florida Supreme Court quashed the decision of this Court and remanded the case for further proceedings. Subsequently, the Florida Supreme Court submitted its mandate to this Court. On December 17, 1980,

this Court entered its Order on Mandate to the Circuit Court. TR. Vol. III, P. 285-292.

On June 29, 1982, the United States Supreme Court issued its opinion in ASARCO, Inc. v. Idaho State Tax Commission, ___U.S.___, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), which decision governs the issues in this cause. On August 4, 1982, the taxpayer filed a Motion for Summary Judgment, TR. Vol 111, P. 305-319, based on the ASARCO decision. On December 16, 1982, over two years after the Florida Supreme Court's initial decision in this cause, the Department filed a Motion to Enforce the Mandate, TR. Vol. III, P. 329-337 and a Motion to Strike Plaintiff's Motion for Summary Judgment, TR. Vol. III, P. 320-328. Supporting and opposing memoranda were filed, TR. Vol. 111, P. 338-373. On December 28, 1982, the Circuit Court of the Second Judicial Circuit of Florida, the Honorable John A. Rudd, Sr., presiding, heard the pending motions and the legal issues. TR. Vol III, P. 385-421.

On February 8, 1983, the trial court entered its Final Judgment on Entry of Mandate in favor of the Department. TR. Vol. 111, P. 374-381. The trial court's decision was based on its view that the Florida Supreme Court's 1980 decision "mandated a decision in favor of the [Department]." TR. Vol. 111, P. 379. Thereafter, the taxpayer filed a timely Notice of Appeal to this Court, its Designation to Reporter, and Directions to the Clerk for the record on appeal, TR. Vol. III, P. 382-384. On April 8, 1983, the transcript of the Proceedings of December 28, 1982, were filed. TR. Vol. III, P. 385-421.

STATEMENT OF FACTS

A. FACTUAL OUTLINE

This case involves the Department's attempt to subject to corporate income taxation in Florida over $3,000,000.00 of income earned by Brunner on intangible personal property owned and held in the State of Illinois.

The intangible property generating this income had no connection or nexus with Florida. Nonetheless, the Department seeks to include over $3,000,000.00 of such income in Brunner's Florida tax base and to subject over 70% of it (69.8% for fiscal year ending 9/30/73 and 76.1% for fiscal year ending 9/30/74) to Florida corporate income tax by use of formulary apportionment. The Department's proposed action would result in over $2,100,000.00 of Brunner's Illinois-generated income being subject to Florida's 5% corporate income levy, producing a tax of $105,445.00

The property generating this Illinois income consisted of sales proceeds from dispositon of a 95% stock interest in the Suburban Trust and Savings Bank (hereinafter the "Bank") of Oak Park, Illinois (which Brunner was required to dispose of by order of the Comptroller of the Currency), interest from state and municipal obligations, interest on other obligations and dividends on stock. At all times relevant to this action, Brunner's commercial domicile was Illinois and all its intangible property was held in Illinois. Brunner's only connection with Florida during the period at issue was its registration to do business in the state and its ownership and operation of citrus groves in several Florida counties.

Brunner disclosed the above-mentioned intangibles income to the Department in its Florida returns for fiscal years ending 9/30/73 and 9/30/74. Since the entire amount of such income was allocated to Illinois on Brunner's Illinois tax returns, the taxpayer subtracted the amount from income subject to corporate tax in Florida. The Department asserted a deficiency in corporate income tax against Brunner in the amount of $126,715.00 for fiscal years ending 9/30/73 and 9/30/74, which through informal conference was reduced to $105,445.00 ($86,070.00 and $19,375.00 for fiscal years ending 9/30/73 and 9/30/74, respectively) This asserted tax was based on (1) including the Illinois-generated intangibles income in Brunner's "tax base" for Florida purposes and (2) allocating the great majority of such income to Florida (69.8% for fiscal year ending 9/30/73 and 76.1% far fiscal year ending 9/30/74) by use of the three-factor formula method of apportionment. Brunner filed suit to contest this proposed assessment as arbitrary, unreasonable, and unconstitutional.

B. SUPPORTING FACTS AND TRANSCRIPT REFERENCES.

At all times material to this action, Brunner Enterprises, Inc. was a Delaware corporation having its principal place of business and commercial domicile in Illinois. Brunner was authorized to do business in Florida. TR. Vol I, P. 136; TR. Vol. 11, P. 147. It was active only in the states of Illinois and Florida. TR. Vol. 11, P. 225. Fred J. Brunner was the President, a Director, and the principal shareholder of Brunner Enterprises, Inc. Brunner employed a fiscal year ending on September 30. TR. Vol 11, P. 147. The primary years in question in this action are

fiscal years ending 9/30/73 and 9/30/74. The Department sought a deficiency for such years in the amount of $126,715, TR. Vol. I, P. 4, P, 57, which was subsequently reduced to $105,445. TR. Vol I, P, 109.

Brunner Enterprises, Inc. was originally incorporated in October, 1957 and at all times prior to December, 1971, it was primarily engaged in manufacturing rock bits in Illinois. Brunner Enterprises began its activity in Florida in 1962 when it bought an orange grove in Broward County. Thereafter the corporation purchased other citrus properties which were owned by Brunner or its subsidiaries. TR. Vol. II, P. 148-150.

Beginning in April, 1963, and ending in July, 1972, Brunner Enterprises acquired a 95% stock interest in the Bank at a cost of $3,273,033.68. On February 1, 1973, Brunner Enterprises sold its interest in the Bank on order of the Comptroller of the Currency for $6,056,750, realizing a capital gain of $2,783,716.32. TR. Vol. II, P. 150-152.

The Bank had no connection with Florida. No funds from the Florida citrus operations were used to purchase the Illinois Bank stock. TR, Vol. 11, P. 221-222. Further, the Bank did not finance or loan any funds to the Florida grove operation. The Bank also had separate legal counsel from that employed by the Florida citrus operation. TR. Vol. 11, P. 222. Finally, the Bank never held any mortgages on the Florida orange grove properties. TR. Vol. 11, P. 152.

At all times material to this action, Brunner owned intangible assets from which it derived interest, dividends, and

occasionally capital gains. These intangibles had no connection with Florida. From the date of their acquisition, all activities relating to such intangibles occurred in Illinois, including their physical presence, control over them, receipt of dividend and interest income from such intangibles, and all other ownership attributes and obligations. TR. Vol. 11, P. 152.

Brunner Enterprises sold its rock bit manufacturing assets to Brunner and Lay, Inc. in December, 1971. TR. Vol. 11, P. 150. Subsequent to its disposition of the manufacturing assets and stock in the Bank, the activities of Brunner in the State of Illinois have consisted primarily of providing accounting services to several related companies and managing the proceeds derived from sale of the manufacturing assets and the Bank stock. TR. Vol. 11, P. 152.

The Florida citrus operation was managed by Travis Murphy, who resided in Florida and had his office in Indiantown, Florida. Mr. Murphy had complete control over the groves' operations and had authority to make all noncapital expenditures, to purchase supplies, to hire and fire personnel, to set wage scales, to set prices for the citrus crop, and to determine to whom the crop was sold. TR. Vol. 11, P. 149. Mr. Murphy established production goals and planned and implemented programs designed to meet these goals. TR. Vol, 11, P. 144. Fred Brunner exercised only occasional review over the management and control of the Florida operation. TR. Vol. 11, P. 212-216, 227, 228.

From the inception of the Florida citrus operation in 1963, all requisite accounting work for the Florida groves has been

performed by Florida accountants and bookkeepers. They have handled all grove-related payables, receivables and payroll. Further, all regular day-to-day accounting journal entries were made in Florida, and all monthly budget and nonbudget reports were prepared in Florida. TR. Vol. 11, P. 148. The only role of the Illinois office of Brunner in the Florida citrus operation was to receive and review budget and non-budget reports for the Florida operation at the end of each month. Additionally, an annual audit was conducted and corporate tax returns were prepared by a CPA firm in Chicago. TR. Vol 11, P. 149.

There was no joint advertising program by Brunner Enterprise companies or subsidiaries. There were no joint efforts with regard to legal services. Furthermore, there were no joint efforts for exchanges of personnel and no joint effort in reqard to purchasing of supplies. TR. Vol. II, p. 225, 226. The only joint effort among the Brunner Enterprise companies was having one Illinois CPA firm prepare a Federal Income Tax return. TR. Vol. 11, P. 226.

Brunner Enterprises recognized the $2,783,716.32 long-term capital gain on sales of the Bank stock in its Federal Income Tax return for fiscal year ending September 30, 1973. TR. Vol. 31, P. 150. Pursuant to Illinois law, such gain was totally allocated to Illinois for tax purposes. During fiscal years ending 9/30/73 and 9/30/74, Brunner realized dividend income and interest from certain exempt and nonexempt obligations. This income was likewise allocated to Illinois. In computing its Florida corporate income tax base for the fiscal years ending 9/30/73 and 9/30/74, Brunner

subtracted such amounts from its Federal taxable income. TR. Vol. 11, P. 136-138. The Department assessed a deficiency against Brunner Enterprises in the amount of $105,445.00, and Brunner filed its Complaint asserting that it owed no additional tax. TR. Vol. I, P. 1-123.

ARGUMENT

A. INTRODUCTION

In the Florida Supreme Court's decision, Department of Revenue v. Brunner Enterprises, Inc., 390 So.2d 713 (Fla. 1980), the Court decided that: (1) gain from an out-of-state sale of stock may be taxable under the Florida Corporate Income Tax Code, and (2) that the method of computation used was to include the stock sale gain in the tax base as described in Section 220.12-.13, Florida Statutes (1973). The Supreme Court did not answer the question as to whether or not the three-factor formula method of apportionment (as prescribed by Sections 214.71 and 220.15, Florida Statutes (1973)) was constitutionally applied to Brunner's out-of-state intangibles income (See 390 So.2d 713, at 715). The recent United States Supreme Court decision of **ASARCO**, Inc. v. Idaho State Tax Commission, ___ U.S. ____, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), held that out-of-state income generated from intangibles is improperly included in a corporation's tax base and that the three-factor formula method of apportionment may normally not be applied to such income absent the existence of a unitary business.

The issues in this appeal are:

(1) Whether the law of the case established by the Florida Supreme Court as to the inclusion in tax base issue (pursuant to Sections 220.12-.13, Florida Statutes (1973)), should be changed as a result of **ASARCO**; and

(2) Whether the trial court erred in permitting the Department to apply the three-factor formula method of apportionment to Brunner's out-of-state intangibles income (a) without any proof of or findings relating to the existence of a unitary business as is required by **ASARCO**, and (b) without giving Brunner an opportunity to

present facts, testimony and documents justifying a deviation from use of the three-factor formula method of apportionment.

ASARCO presents such a clear statement of the law applicable to this cause that the "law of the case" should be changed and Brunner's out-of-state intangibles income should not be included in its "tax base." As such, this Court should reverse the Final Judgment on Entry of Mandate, and should direct that the trial court enter a Final Judgment in favor of the taxpayer based on ASARCO.

However, even if it is determined that the law of the case requires inclusion of the out-of-state income in Brunner's tax base pursuant to Section 220.12-.13, Florida Statutes, the Florida Supreme Court's decision in Brunner, 390 So.2d at 715, requires that the trial court give the taxpayer an opportunity to offer evidence justifying a deviation from use of the three-factor formula method of apportionment. Further, ASARCO requires that such out-of-state intangibles income not be made subject to the three-factor formula method of apportionment absent a clear and convincing showing of the existence of a unitary business. Brunner has been given no opportunity to show that the facts justify a deviation from use of the three-factor method of apportionment, either under the ASARCO standard or under the clear language of the Florida Supreme Court's Brunner decision. As such, the trial court has improperly entered a final judgment for the Defendant. This Court should reverse the Final Judgment on Entry of Mandate, and should direct the trial court to determine the constitutionality of applying the three-factor formula method of apportionment

to Brunner based on the law as set forth in ASARCO.

B. INCLUSION OF BRUNNER ENTERPRISES' OUT-OF-STATE GENERATED INTANGIBLES INCOME IN ITS TAX BASE IS UNCONSTITUTIONAL AS A VIOLATION OF THE DUE PROCESS CLAUSE.

1. TAX BASE ISSUE

Inclusion of Brunner Enterprises' Illinois income from interest, dividends, and sale of the Bank stock in its Florida tax base is unconstitutional. A review of the recent United States Supreme Court case of ASARCO, Inc. v. Idaho State Tax Commission, ___ U.S. ___, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), makes it clear that such income must be excluded from Brunner's tax base. The trial court refused to apply ASARCO to this cause though it clearly is on point because that trial court felt bound by the mandate of this appellate court which applied the Supreme Court decision in Department of Revenue v. Brunner Enterprises, Inc., 390 So.2d 713 (Fla. 1980), as the law of the case. Brunner acknowledges that the trial court is bound by a mandate, but it does not concede that the issues of this case were finally resolved by the prior Florida Supreme Court decision. In this appeal Brunner prays that this Court will take jurisdiction, review this case in light of ASARCO, and take whatever action the Court finds necessary to apply ASARCO as is clearly required to do equity and justice.

2. PRIOR DECISION OF FLORIDA SUPREME COURT

In November, 1980, the Florida Supreme Court issued its

decision in Brunner Enterprises, supra. The Supreme Court held that: (1) gain from an out-of-state sale of stock may be taxable under the Florida Corporate Income Tax Code, and (2) that the method of computation to be used was to include the stock sale gain in the tax base as described in Section 220.12-.13, Florida Statutes (1973). The decision was entered on November 20, 1980, that Court's mandate was entered shortly thereafter, and on December 17, 1980, this Court's mandate was entered, which directed that further proceedings be had in accordance with the Florida Supreme Court's decision. The Department took no action to enforce the mandate until December 1982, over two years after the decision was rendered. The Department, however, responded to interrogatories and filed other pleadings during this two year hiatus.

3. MANDATE

Normally when the Florida Supreme Court issues its judgment and mandate, the decision constitutes a final judgment in a case and compliance therewith by the trial court is a purely ministerial act. A trial court is not normally at liberty to depart from a mandate. Modine Mfg. Co. v. ABC Radiators, Inc., 367 So.2d 232 (Fla. 3d DCA 1979) cert. den., 378 So.2d 342 (1979). Brunner Enterprises has acknowledged that the trial court is bound by a mandate, but it does not concede that the issues of this cause were finally resolved by the prior Supreme Court decision. Indeed, it is clear that the trial court failed to consider the factual issues left open by the Florida Supreme Court's ruling.

The decision and mandate of the Supreme Court established the

law of the case as to inclusion of Brunner's out-of-state income in its Florida "tax base". Jones v. Knuck, 388 So.2d 328 (Fla. 3d DCA 1980). All points of law decided upon an appeal become "the law of the case", which cannot be reconsidered in subsequent proceedings in the lower courts or on a subsequent appeal to the same appellate court. McKinnon v. Johnson, 48 So. 910 (Fla. 1909); 3 Fla.Jur., Appellate Review §414, P. 566-568 (1978). However, there are a number of significant exceptions to this rule, see Beverly Beach Properties v. Nelson, 68 So. 2d 604 (Fla.), cert. den., 348 U.S. 816 (1953), and Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965), several of which apply in this case.

First, it is clear that like the legal concepts of res adjudicata and stare decisis, the law of the case to be applied can be changed when required to do equity and justice or for public policy considerations. Beverly Beach Properties, Inc., v. Nelson, supra. In commenting on the need to adopt a flexible approach to stare decis and res adjudicata, the Florida Supreme Court has said:

> In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be modified or discarded. Blind adherence to them gets us nowhere.

Wallace v. Luxmoore, 24 So.2d 302, at 304 (Fla. 1946).

A court should have less hesitancy in changing "the law of the case" in a cause before it than it would have in refusing to apply the doctrine of res adjudicata. Beverly Beach Properties, Inc., supra, at 607-608. As stated in that case:

> We may change "the law of the case" at any time before

> we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude.

Id. at 608.

The decision in Beverly Beach Properties, supra, is one example where changing the law of the case was appropriate. There reversal of the prior decision on a point of law was found mandatory for public policy considerations in order to give effect to the law of a sister state and its judicial orders, as required by the Full Faith and Credit Clause of the United States Constitution. See also Strazzulla v. Hendrick, supra, at 4.

A second common exception to the law of the case was recognized by the Florida Supreme Court in Strazzulla v. Hendrick:

> Another clear example of a case in which an exception to the general rule should be made results from an intervening decision by a higher court contrary to the decision reached on the former appeal, the correction of the error making unnecessary an appeal to the higher court. See In re Reamer's Estate, 1938, 331 Pa. 117, 200 A. 35,...; Louisville & N.R. Co. v. State (1914), 107 Miss. 597, 65 So. 881.

Id. at 4 (emphasis added). See also Wallace v. P.L. Dodge Mem. Hosp., 399 So.2d 114 (Fla. 3d DCA 1981), where the Court at footnote 1, page 116, outlines in detail many situations in which exceptions are made to "the law of the case".

The case of Louisville & N.R. Co. v. State, 65 So. 881 (Miss. 1914), cited with approval by Justice Roberts in Strazzulla, Supra, at 4, is particularly instructive. As in Brunner, Louisville & N.R. Co. involved the rights of a multistate corporation doing business in several states. That case involved an attempt by the State of Mississippi to penalize a corporation (by denying

it any further right to do business in the state) if the corporation exercised its right to remove to the federal court a lawsuit brought in state court. The Mississippi Supreme Court noted it was the third appearance of the case before the court, and that in its last decision it had upheld the statute based on its interpretation of certain United States Supreme court cases. The Mississippi Supreme Court then stated:

> Since then, however, the Supreme Court of the United States ... has held that ... a state has no such power over a corporation which is an instrumentality of interstate commerce, such as a railroad corporation engaged in operating a railroad doing both interstate and intrastate business; that the state's power over such a corporation is subject to certain limitations, one of which limitations is that it cannot deprive such a corporation of a right guaranteed to it by the federal Constitution, and since that Constitution guarantees to such a corporation the right, under certain circumstances, to remove a case from a state to a federal court, a state is without power to penalize it by prohibiting it from doing an intrastate business merely because it has exercised that right. This much is clear from the opinion rendered in that case and is sufficient to dispose of the one now under consideration.

Id at 881. (Emphasis added). Based on the intervening United States Supreme Court decision, the Supreme Court of Mississippi receded from the law of the case it had established in prior decisions and held the statute invalid. This principle is clearly applicable to Brunner's case.

As stated by Judge Learned Hand in Higgins v. California Prune & Apricot Grower, Inc., 3 F.2d 896, at 898 (2d Cir 1924), "'the law of the case' does not rigidly bind a court to its former decisions, but is only addressed to its good sense." Further, it is the duty of this Court to apply the latest pronouncements of the United States Supreme Court on Federal Constitutional ques-

tions. See Townsend v. Clover Bottom Hospital & School, 560 S.W.2d 623, at 625-626 (Tenn. 1978).

Based on the equities of this cause, the clear constitutional mandate of the United States Supreme Court in ASARCO and good common sense, this Court should apply the doctrine of ASARCO to this case, reverse the trial court's final judgment and enter a final judgment for Brunner based on ASARCO.

4. ASARCO

Subsequent to the Florida Supreme Court's Brunner decision, but prior to the Department's moving to enforce the mandate, the United States Supreme Court decided the case of ASARCO, Inc. v. Idaho State Tax Commission, ___ U.S. ___, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982). ASARCO dealt with the use of the three-factor formula method of apportionment as applied to the constitutionality of including in apportioned income gains from stock sales, interest and dividends earned out-of-state by a nondomiciliary corporation doing some business in the taxing state. Although the case focused principally on the issue of inclusion of income in the tax base, the reasoning for the ASARCO decision was based on the United States Supreme Court's view that the three-factor formula method of apportionment "is constitutionally permissible only in the case of a unitary business." 73 L.Ed.2d, n. 14 at 797. As such, ASARCO provides much needed guidance on issues relating to both tax base inclusion and use of the three-factor method of apportionment in the case of multistate corporations.

ASARCO, Inc. was a corporation that mined, smelted and refined various nonferrous metals, such as copper, gold, silver,

lead and zinc. It was incorporated in New Jersey, had New York as its commercial domicile and did some business in various locations. ASARCO's primary Idaho business was operation of a silver mine.

During the relevant tax years ASARCO received intangible income in the form of (a) capital gains from stock sales, (b) interest and (c) dividends from five corporations in which it had a majority ownership interest. (The same type of income is at issue in Brunner. TR. Vol I, P. 2-3). Each of the corporations which produced the intangible income was engaged in the mining, smelting, refining, fabricating of or selling nonferrrous metals; they were clearly engaged in businesses related to ASARCO's principal business. The Idaho State Tax Commission treated ASARCO's intangible income from these sources as subject to formulary apportionment. This determination was overruled by a trial court, but reinstated by the Idaho Supreme Court which held that subjecting such intangible income of ASARCO to state corporate income tax withstood constitutional attack. ASARCO took an appeal to the United States Supreme Court.

In analyzing the ASARCO facts, the Supreme Court reviewed the concepts developed in Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980), and Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980), and stated that "the linchpin of apportionability in the field of state income taxation is the unitary business principle." ASARCO, 73 L.Ed.2d at 795. The Court held that due process limitations would be satisfied if there is a "'minimal connection' between the interstate activities

and the taxing State, and a rational relationship between the income attributable to the state and the intrastate values of the business." ASARCO at 795. These due process limits are not "contravened by state apportionment and taxation of income that was determined by geographic accounting to have arisen from a different state so long as the intrastate and extrastate activities formed part of a single unitary business." ASARCO, at 795. (Emphasis in original.)

In rejecting Idaho's arguments for including the intangibles income as subject to apportionment the Court stated:

> We cannot accept, consistently with recognized due process standards, a definition of "unitary business" that would permit nondomicilary States to apportion and tax dividends "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State...."

ASARCO, at 802.

Based on these standards, the United States Supreme Court found that ASARCO's intangible income was not part of a unitary business and, thus, held it was not subject to tax in Idaho by way of formulary apportionment.

5. APPLICATION OF ASARCO

The Department has admitted that the issues in ASARCO and Brunner Enterprises are the same. TR. Vol. III, P. 371-372, 389. The Department delayed for two years the filing of any motion for final judgment based on the mandate and the Florida Supreme Court's decision of November 20, 1980. During such two years, however, the Department did file other pleadings. TR. Vol. 111, P. 298-299, 300-304. Now that the United States Supreme Court in

ASARCO has finally resolved the out-of-state intangibles issue against the state's interest, the Department has filed its motion to enforce the mandate and seeks to hang its hat on legal principles rejected by the United States Supreme Court, It is clear that Brunner falls within the parameters of the ASARCO decision. Brunner's activities in Florida and Illinois were of a non-unitary business nature. This Court is required to follow the latest pronouncements of the United States Supreme Court on Federal Constitutional questions. As such, Brunner should be afforded the protection that the United States Supreme Court made available in ASARCO.

6. BRUNNER **ENTERPRISES'** SEPARATE AND DISTINCT BUSINESSES.

During the relevant tax years Brunner operated two separate and distinct businesses -- active operation of Florida orange groves and managing assets in **Illinois** which produced income in the form of interest, dividends and capital gains on stock sales. TR. Vol. II, P. 147-153, 221-226, 230-231.

The principal Illinois asset which produced over $2,700,000 of income on disposition was a controlling interest in the Bank. The Bank and the Florida orange grove operations were two totally separate and distinct business operations and were not part of a single unitary business. One can hardly conceive of a more classic example of two businesses that are totally separate and distinct from each other.

During the relevant tax years, Brunner also received income from state and municipal obligations (exempt from federal income tax) and other interest income. TR. Vol. I, P. 52 and 56. All

documentation regarding and indicia of ownership relating to the state and municipal tax exempt obligations and other assets producing interest income were located in Illinois and were not a part of the Florida citrus operation of Rrunner. Due to the nature of the payor of these obligations (principally states and municipalities), the requisite degree of integration with the citrus operations in Florida could not exist. As indicated by the United States Supreme Court in ASARCO:

> We cannot accept, consistently with recognized due process standards, a definition of "unitary business" that would permit nondomiciliary States to apportion and tax dividends "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State...."

ASARCO, 73 L.Ed.2d at 802. Brunner's interest income from intangibles was not in any way integrated with the Florida citrus grove operations.

Finally, during the relevant years Brunner received dividends from various companies. TR. Vol. I, P. 52 and 56 respectively. All documentation and indicia of ownership relating to the stock producing this intangible income were located in Illinois, (TR. Vol 11, P. 152), and the Department has produced no evidence to support its assertion that this dividend income should be included in the tax base and be subject to tax in Florida under formulary apportionment.

In ASARCO, the United States Supreme Court noted:

> "[f]ormulary apportionment, which takes into account the entire business income of a multistate business in determining the income taxable by a particular state, is constitutionally permissible only in the case of a unitary business.

ASARCO, 73 L.Ed.2d n. 14 at 787. The Court stated further that:

> [i]n order to exclude certain income from the apportionment formula, the company must prove that "the income was earned in the course of activities unrelated to the [activities] in that State."

Id. at 797.

Brunner has shown that its Florida orange groves and Illinois business operations were "separate and distinct businesses" within the meaning of ASARCO. If ASARCO's operations, which included receipt of interest, dividends and capital gain income from various subsidiaries (all of which were intimately involved in activities relating to nonferrous metals) qualified for "separate and distinct business" status, it is clear that the facts of Brunner call for such "separate and distinct business" treatment. As such, this Court should apply ASARCO to this cause, the Final Judgment on Entry of Mandate of the trial court should be reversed, and a Final Judgment should be granted to Brunner based on ASARCO.

7. CONCLUSION: TAX BASE ISSUE.

The Department has argued that the Florida Supreme Court's decision and mandate in 1980 "finally resolved" the "tax base" issue against Brunner Enterprises. If the issue was finally resolved in 1980, why then did the Department wait two years to move to enforce the mandate and collect the tax?

While the Department delayed for two years filing its motion to enforce the mandate, Brunner acted promptly after entry of the United States Supreme Court's decision in ASARCO (June 29, 1980), and on August 4, 1982, filed its motion for summary judgment in

this cause. The taxpayer should not now be prejudiced by the Department's delay in moving to enforce the mandate.

The United States Supreme Court has spoken on an issue of extreme importance not only to the taxpayer but to all multistate corporations doing business in Florida and across the nation. It would be inequitable and unjust to construe the status of this case as requiring entry of a judgment in favor of the Department, especially in light of the Department's delay and the fact that no court has ever ruled on the factual questions which exist in this case.

When litigation arises, it is the duty of the taxing authority and the courts to construe taxing statutes and ambiguities strongly in favor of the taxpayer or citizen and strictly against the taxing authority. Leadership Housing, Inc. v. Department of Revenue, 336 So.2d 1239 (Fla. 4th DCA 1976); Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979).

For the reasons set forth above, the Final Judgment entered by the trial court to enforce the mandate should be reversed, and final judgment should be entered in favor of the taxpayer based on ASARCO. Alternatively, the Final Judgment should be reversed and the case remanded for further proceedings consistent with ASARCO.

C. APPLICATION OF THE THREE-FACTOR FORMULA METHOD OF APPORTIONMENT TO BRUNNER ENTERPRISES' OUT-OF-STATE GENERATED INTANGIBLES INCOME IS UNCONSTITUTIONAL AS A VIOLATION OF THE DUE PROCESS CLAUSE.

1. APPORTIONMENT ISSUE

Brunner contends its income from interest, dividends and sale of the Bank stock should not be included in its Florida tax base. However, even if this Court determines such inclusion is proper, the Department's application of the three-factor formulary method of apportionment to Brunner's Illinois-generated intangibles income is unconstitutional and violates the due process clause of the Fourteenth Amendment. The three-factor apportionment method is improper because there is not a sufficient nexus between Brunner's activities in the taxing state (citrus groves) and the amount of income that the state seeks to tax. ASARCO, supra.

The Department seeks to subject to taxation in Florida over $3,000,000.00 of Illinois-generated intangibles income. By use of the three-factor formula method of apportionment, the Department would subject almost 70% of such income to tax in Florida for the fiscal year ending 9/30/73, and over 76% of such income to tax in Florida for the fiscal year ending 9/30/74. Allocation of such a large percentage of Brunner's Illinois-generated intangibles income is neither reasonable nor constitutional.

In its Brunner decision, the Florida Supreme Court did not make a determination as to whether the three-factor formula method of apportionment was constitutionally applied to Brunner. The

Supreme Court said the taxpayer would have an opportunity to "show the requisite constitutional dimension which under Roger Dean justifies deviation from the three-factor formula..." 390 So.2d, at 715. The reference is to Roger Dean Enterprises, Inc. v. Department of Revenue, 387 So.2d 358 (Fla. 1980). The trial court erred by failing to give Brunner any opportunity to show this "requisite constitutional dimension."

In this appeal Brunner prays that this court will (1) hear this cause, (2) rule that the apportionment issue was not previously decided by the Florida Supreme Court, (3) hold that under Roger Dean and ASARCO the Department is precluded from subjecting Brunner's Illinois-generated intangibles income to the three-factor apportionment method and (4) require the Department to recompute Brunner's corporate income tax for the years in question in an equitable and constitutional manner pursuant to the guidelines of Roger Dean, ASARCO and Florida's relief provision, Section 214.73, Florida Statutes. The Department's subjection of 70% of Brunner's Illinois-based income to corporate income taxation in Florida should not be affirmed as the law of this state.

2. PRIOR DECISION OF FLORIDA SUPREME COURT.

In its Brunner decision, the Florida Supreme Court decided two issues. It held (1) that gain from an out-of-state sale of stock could be taxable under the Florida Corporate Income Tax Code, and (2) that the method of computation to be used was to include the stock sale gain in the tax base. The Court did not, however, decide that the Department properly applied the three-factor formula method of apportionment to Brunner's income. The Court stated:

> Even if the taxpayer can show the requisite constitutional dimension which under Roger Dean justifies deviation from the three-factor formula, the out-of-state gain must be included in the tax base, i.e., the federal taxable income. §§ 220.12, 220.13, Fla. Stat. (1973).

The Florida Supreme Court then remanded the case for further proceedings.

What taxpayer but Brunner could have been referred to when the Court stated that "the taxpayer" might be able to show a "requisite constitutional dimension" to justify a deviation from use of the three-factor formula method? Appellate courts do not choose their words lightly, and where a particular direction or holding is implicit in a decision rendered, it is no longer open for discussion or consideration, Sax Enterprises, Inc. v. David and Dash, Inc., 107 So.2d 612 (Fla. 1958), and the lower court should follow the appellate court's instructions.

The Supreme Court's decision to determine the two issues referred to above, but to remand to the lower court for a determination as to whether the taxpayer could show that "requisite dimension" to justify a deviation from the three-factor formula method of apportionment, is consistent with the procedural history of the case.

This case was initially heard by Circuit Judge Charles E. Miner, Jr. who ruled in favor of Brunner on a motion for summary judgment based on Count I of the Complaint and Stan Musial & Biggie's, Inc. v. Department of Revenue, 363 So.2d 375 (Fla. 1st DCA 1978), (which was subsequently reversed at 387 So.2d 365 (Fla. 1980)). The only legal argument made at the summary judgment hearing before Judge Miner was that income from the out-of-state

sale of stock, interest and dividends should be excluded from the tax base of a foreign corporation doing business in Florida.

This Court affirmed the summary judgment. On certification of the two questions referred to above as a matter of great public interest, the Florida Supreme Court reversed that decision and remanded for further proceedings. Where a trial court has decided a case on one of several grounds urged and on appeal the appellate court reverses the decision, the appellate court will remand the cause for decision by the trial court on the other grounds. Miami Beach v. Schauer, 104 So.2d 129 (Fla. 3d DCA 1958), cert. dism., 112 So.2d 838 (Fla. 1959). This is what should have, but did not, occur when the trial court heard this case in December, 1982.

On remand the trial court should have considered the facts relied upon by taxpayer and available to the court by way of affidavit, deposition and documents clearly demonstrating that Brunner could show the "requisite constitutional dimension" under Roger Dean to justify a deviation from the three-factor formula method of apportionment. The legal issues mentioned above were not decided by the Florida Supreme Court in its Brunner Enterprises decision. Further, no court has yet examined taxpayer's facts to determine if the "requisite constitutional dimension" exists to justify a deviation from the three-factor method. Finally, no court has yet considered the extent to which the relief provisions of Section 214.73, Florida Statutes, should be employed if application of the normal three-factor method of

apportionment is found unconstitutional. As such, the trial court's decision is in error and should be reversed.

3. FLORIDA **CORPORATE INCOME** TAX

The taxpayer has argued that the Supreme Court's Brunner **de-**cision determined the two issues referred to above but left the apportionment question for determination by the trial court on further proceedings. This position is consistent with the multi-step computation approach required by the Florida Corporate Income **Tax** Code, Chapter **220**, Florida Statutes, **(1973)**.

The Florida corporate income tax is a tax of 5% on a corporation's "net income." **§220.**ll, Fla.Stat. **(1973)**. "Net income" is defined by Chapter **220** as the taxpayer's share of adjusted federal income for the year apportioned to Florida under **S220.15,** Fla. Stat. **(1973),** less a **$5,000** exemption. 5220.14, Fla.Stat. **(1973)**.

Thus, computation of the tax on "net income" can be broken down into four basic steps:

(1) Determination **of** "adjusted federal income," which is a taxpayer's taxable income for federal tax purposes, with some adjustments. **§220.12,** Fla.Stat. **(1973)**. (This is referred to as the "tax base." See Fla. Admin. Code Ch. **12C-1.15(1),** which provides, in pertinent part, that "[t]he terms 'base' or 'tax base' in the first sentences of Sections **214.71, 214.72** and **214.73** (apportionment statutes) shall mean adjusted federal income as defined in Code Section **220.13"**).

(2) **Apportioning** the tax **base** to Florida in accordance with Chapter **214**, Part IV **(as** directed by **S220.15,** Fla.Stat. **(1973)**).

(3) Reduction by the $5,000 exemption.

(4) Multiplied by the 5% tax rate.

The Brunner Supreme Court decision ruled that out-of-state gain from a stock sale must be included in the federal taxable income tax base under sections 220.12 and 220.13 (step 1); it did not, however, decide that the three-factor formula apportionment method sought to be used by the Department of Revenue (in step 2) was constitutional. The Florida Supreme Court contemplated the possibility that the facts of this case could require a deviation from the three-factor method or that the three-factor method could be found unconstitutional as applied to Brunner's facts. 390 So.2d at 715. In the event that the three-factor formula method was found unconstitutional, one of the alternate methods set forth in S214.73, Fla.Stat. (1973), would have to be employed by the Department,

4. MANDATE,

It is no answer to say that the Florida Supreme Court issued its decision and mandate and, ergo, all issues are finally resolved against Brunner Enterprises.

It is well recognized that a trial court cannot depart from a mandate of a higher court. Schetter v. Schetter, 330 So.2d 150 (Fla.4th DCA 1976). However, the Department's application of this principle to the case at bar is an oversimplification that does not do justice to the facts and is erroneous as applied to the Florida Supreme Court's decision in Brunner.

The extent to which a lower court should follow a mandate of an appellate court is governed by (1) the opinion issued by the higher court and (2) the issues that were decided by the higher court. Florida Air Conditioners, Inc, v. Colonial Supply Co,, 390

So.2d 174 (5th Fla. DCA 1980). To the extent a higher court has not decided an issue, on remand for further proceedings the issue remains open for decision by the lower court. Second, if a higher court decides only one of several issues in a cause, its decision on that issue does not dictate a result in the cause on other issues. See Miami Beach v. Schauer, supra.

Finally, if all the issues in this cause were "finally resolved" by the Florida Supreme Court in its 1980 Brunner decision, why then did the Department wait two years to enforce the mandate and seek collection of the tax?

The Department's position that the Brunner decision and mandate dealt with all the issues in this case appears to be a recent revelation. The taxpayer prays that this Court will hear this issue and rule that ASARCO, supra, prevents the Department from subjecting Brunner's out-of-state intangibles income to the three-factor apportionment formula.

E. TESTING THREE-FACTOR FORMULA **APPORTIONMENT PRIOR** TO ASARCO.

In its Brunner decision, the Florida Supreme Court referred to "the taxpayer" having an opportunity to "show the requisite constitutional dimension which under Roger Dean [would justify a deviation] from the three-factor formula" method. 390 So.2d at 715. This language clearly demonstrates that the Supreme Court did not finally resolve the three-factor apportionment issue.

The Supreme Court looked to Roger Dean as the test for apportionment. In Roger Dean Enterprises, Inc. v. Department of Revenue, 387 So.2d 358 (Fla. 1980), the Florida Supreme Court

indicated that the three-factor formula method of apportionment was the normal method of apportioning income of a multistate corporate taxpayer to Florida. Roger Dean, however, also indicated that the three-factor method was not the exclusive approach available. 387 So.2d at 363. It stated, however, that there was a strong presumption in favor of the normal three-factor apportionment method. Roger Dean, at *363*.

In spite of the presumption favoring use of three-factor apportionment, both the statutory scheme of the Florida Corporate Income Tax and the Department's regulations effective for Brunner's tax years at issue indicate that an alternative approach is available if the normal three-factor method is unreasonable or unconstitutional. That statutory relief is set forth in Section 214.73, Florida Statutes (1973) and it is to be applied where three-factor apportionment is unworkable, unreasonable or unconstitutional.

Section 214.73, Florida Statutes (1973), provided as follows:

> Apportionment; other methods -- If the apportionment methods of §§214.71 and 214.72 do not fairly represent the extent of a taxpayer's tax base attributable to this state, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's tax base, if reasonable,:
>
> (1) Separate accounting;
> (2) The exclusion of any one or more factors;
> (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's tax base attributable to this state; or
> (4) The employment of any other method which will produce an equitable apportionment.

The Department's administration regulations in effect for 1973 and 1974 also indicated that cases could exist in which three-factor apportionment was inappropriate. Florida Administrative Code, Chapter 12C-1.15(4) (1973) provided in pertinent part:

> (4) General Method
> (a) Taxpayers who have income from sources within and without Florida are taxable upon the adjusted federal income apportioned to Florida in accordance with Part IV of Chapters 214, F.S.
> Where the Florida activities are a part of a unitary business carried on within and without Florida, the portion of the taxpayer's income subject to tax in Florida will generally be determined by a three-factor formula of property, payroll and sales.. ,

(Emphasis added). This regulation indicated that the three-factor method would usually be employed when a "unitary business" was found, then went on to define the concept "unitary business."

Under the Department's own regulations, where a unitary business was not found, certain cases would justify use of the relief provision of Section 214.73, Florida Statutes (1973), in lieu of the normal three-factor method of apportionment. Florida Administrative Code Chapter 12C-1.15(6), provided:

> Section 214.73 permits a departure from the apportionment methods of Sections 214.71 and 214.72, only in limited and specific cases. Section 214.73 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment provisions contained in Sections 214.71 and 214.72.

Brunner involves an unusual factual situation with unique and nonrecurring facts (the sale of bank stock pursuant to the Comptroller of the Currency's order), which produces incongruous results under three-factor apportionment. The Department is

attempting to subject to corporate income taxation in Florida over $3,000,000.00 of Illinois-generated intangibles income. (Over $2,700,000.00 of this income consisted of sales proceeds from disposition of a 95% stock interest in the Bank (located in Oak Park, Illinois). The Department has used three-factor apportionment to attribute the great bulk of this Illinois-generated intangibles income to Florida (70% for fiscal year ending 9/30/73 and 76% for fiscal year ending 9/30/74). Attribution of such a large percentage of Brunner's Illinois income to Florida is patently unreasonable and unconstitutional, even under Roger Dean. A brief analysis of Roger Dean Enterprises, Inc., supra, will make this apparent.

Roger Dean involved a West Virginia corporation that held an interest in two Chevrolet dealerships, one in Palm Beach and one in West Virginia. Each dealership was run in the corporate form, with Roger Dean Enterprises, Inc. owning a 100% stock interest in the Palm Beach dealership (Roger Dean Chevrolet, Inc.), and a 50% interest in the West Virginia dealership (Dutch Miller Chevrolet, Inc.).

The transaction which generated the disputed income was Roger Dean Enterprises' sale of its 50% interest in Dutch Miller Chevrolet for $349,217. The Department of Revenue included this income in Roger Dean Enterprises' tax base and subjected it to corporate tax in Florida based on three-factor apportionment. Roger Dean contested this treatment, but the Florida Supreme Court found the facts in the case sufficient to tax this income. However, the Court did note that:

> [t]he relief provision should be used where the statute reaches arbitrary or unreasonable results so that its application could be attacked successfully on constitutional grounds.

387 So.2d 358, at 363.

The trial court erred in refusing to consider whether Brunner's facts justify a deviation from three-factor apportionment based on the Roger Dean standard. A review of the affidavits, documents and deposition testimony clearly reveals that such a deviation is required in this case, and that Brunner's facts are quite different from Roger Dean.

First, Brunner did not constitute a unitary business. It involved ownership and operation of Florida orange groves and a stock interest in an Illinois bank. Roger Dean Enterprises, Inc., by contrast, involved a holding company and several subsidiaries, each of which were intimately involved in automobile dealerships. Second, Roger Dean Enterprises' commercial domicile was Florida, thereby creating a strong nexus with the state and giving it a justification for subjecting all of the corporation's income to tax. By contrast, Brunner's commercial domicile was in Illinois, and its activities in Florida were limited to ownership and operation of orange groves. Finally, under the ASARCO standard Roger Dean would probably be considered a unitary business; Brunner would not.

As such, had the trial court tested the facts, documents, testimony and affidavits of Rrunner, it would have found that under the Roger Dean standard three-factor apportionment was unconstitutionally applied to Rrunner, and that Brunner is one of

those rare cases that justifies use of the relief provisions of section 214.73, Florida Statutes.

The Department has argued use of the relief provision is inappropriate because it would require exclusion of the Illinois income from Brunner's tax base, which it asserts is in conflict with the Supreme Court's mandate. TR. Vol. 111, P. 357-358. This is incorrect and misleading. While the "separate accounting" sought by Rrunner would have this result, the relief provision is not limited to separate accounting. It also includes the possibility of (a) excluding one or more factors, (b) including one or more additional factors to fairly represent the taxpayer's tax base to the state or (c) the employment of any other method to arrive at an equitable apportionment.

Since the institution of this lawsuit in 1976, the taxpayer has repeatedly prayed for relief under several subsections of section 214.73, Florida Statutes, TR. Vol. I, P. 22-26; TR. Vol. 111, P. 349. All this taxpayer asks is that the amount of its Illinois-generated intangibles income attributed to Florida bear some reasonable relationship to the facts. Apportionment of this income to Florida at the rate of 70% for fiscal year ending 9/30/73 and 76% for fiscal year ending 9/30/74 is not reasonable and it should not be upheld as constitutional.

The Florida Supreme Court's Brunner decision did not finally resolve the constitutionality of the Department's applying three-factor apportionment to Brunner's Illinois income. Further, no court has yet to consider either (1) whether Brunner's facts justify a deviation from the three-factor formula method of

apportionment under Roger Dean or (2) Brunner's prayer for application of one of the forms of relief under Section 214.73, Florida Statutes. As such, the apportionment issue has not been finally resolved by the Supreme Court's mandate. Further, ASARCO, v. Idaho State Tax Commission, ___ U.S. ___, 102 S.2d 3103, 73 L.Ed.2d 787 (1982), is now the law that must be applied to these issues.

6. ASARCO.

In ASARCO, the United States Supreme Court held that the State of Idaho could not constitutionally include within the taxable income of a non-domiciliary parent corporation (ASARCO) doing some business in the State a portion of intangible income (dividends, interest and capital gains from stock sales), that the parent received from subsidiary corporations having no other connection with the State. The focus in ASARCO, as in Brunner, is a due process concern. Generally, a state may not tax value earned outside its borders. See, e.g., Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77 (1938). The broad question is has the state given anything for which it can ask a return? Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940). Has Florida given anything which justifies subjecting over 70% of Brunner's Illinois income to tax in this State? We submit it has not.

As indicated in ASARCO, there must be a 'minimal connection' between the interstate activities and the taxing state, and some rational relationship between the income attributable to the state and the intrastate values of the enterprise. ASARCO, at 795. There is clearly no such rational relationship in this case. Due

process limitations generally will not be contravened by three-factor apportionment (even where the income was determined by geographic accounting to have arisen from a different state) "so long as the intrastate and extra-state activities formed part of a single unitary business." ASARCO at 795. (Emphasis in original). See also ASARCO, n. 14, at 802. The Supreme Court stated further that:

> 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....

ASARCO at 802.

Clearly, the United States Supreme Court in ASARCO did not approve of a state's subjecting to three-factor apportionment out-of-state income of a non-domiciliary multistate corporation when the subject income was not part of a unitary business conducted both within and without the state. In ASARCO, the Supreme Court's remedy for the constitutional problem was to exclude the subject income from ASARCO's tax base in Idaho. The 1973 and 1974 income Brunner received from stock sales, dividends, and interest should be excluded from its Florida tax base under Sections 220.12 and 220.13, Florida Statutes (1973). However, even if this income is includable under the Florida Supreme Court's decision and mandate, Brunner still must be given the opportunity to show the "requisite constitutional dimension" which justifies deviation from three-factor apportionment. If such a dimension can be shown under

ASARCO, then some equitable apportionment method must be used under the relief provision.

A detailed review of the components of the three-factor formula method of apportionment will demonstrate why use of this method cannot constitutionally be applied to Brunner. For the years at issue (fiscal years ending 9/30/73 and 9/30/74), application of three-factor apportionment resulted in allocating to Florida 69.894% of Brunner's income for fiscal year ending 9/30/73, and 76.160% of Brunner's income to Florida for fiscal year ending 9/30/74, calculated as follows:

	9/30/73 Apportionment Formula		
Factor:	Property	Payroll	Sales
In Florida:	3,418,972.64	165,376.27	545,083.43
Total	4,396,127.11	310,109.43	734,243.00
Percentage In Florida Divided by Total	.777724	.533284	.74237
Times weighted Fraction	25%	25%	50%
Florida Factors	.19443	.13332	.37119

Total Florida Factor .69894

	9/30/74 Apportionment Formula		
Factor:	Property	Payroll	Sales
In Florida:	3,390,799.50	158,555.18	909,969.00
Total	3,895,316.74	305,471.79	1,098,429.00
Percentage In Florida Divided by Total	.870481	.519050	,82843
Times weighted Fraction	25%	25%	50%
Florida Factors	.21762	.12976	.41422
Total Florida Factor			.76 160

TR. Vol. I, P. 51, 55, 112-113. These factors used by the Department to allocate over 70% of Brunner's Illinois-based income to Florida do not contain any element which reflects the capital gain income from sale of the Bank stock or other stock sales, dividend income or interest income derived from Illinois. Thus, while the Department argues that this intangible, out-of-state income must be included in Brunner's tax base, the Department has denied Brunner the right to include such income (as out-of-state originating) in any calculations of sales, property or in any other manner that would result in equitably apportioning Brunner's income to Florida.

The inequity is obvious. In fiscal year ending 9/30/73, Brunner had federal taxable income of $2,294,942.00 (Form IL 1120, Part I, TR. Vol, I, P. 36) which included $2,774,562.00 base income allocabls to Illinois, the great bulk of which was from the sale of the Bank stock. For this period Florida seeks to impose

its corporate income tax on over $1,700,000.00 of this income even though "sales" in Florida for the period (without considering the deductible cost of those sales) totalled only $545,083.00. TR. Vol. I, P. 109-112.

The Department's own regulations in effect for 1973 and 1974 included provisions to remedy the inequities of three-factor apportionment. The relief provisions of Section 214.73, Florida Statutes, were to be applied in unusual factual situations where it would be inequitable to use three-factor method. However, the Department rarely, if ever, permits a taxpayer to use the relief provisions. One can hardly imagine a more classic case of an unusual and non-recurring factual situation justifying such relief than a sale in one year of a corporation's 95% interest in a bank (as a result of an order from the Comptroller of the Currency).

7. CONCLUSION: APPORTIONMENT ISSUE

The taxable income relating to the sale of the Bank stock and the other intangible income must be excluded from Brunner's tax base for the relevant tax years as a result of ASARCO. If the Court finds, however, that such income must be included in the tax base, the Court should order that the Department employ 214.73, Florida Statutes (1973), to equitably apportion Brunner's income among Florida and the other states. Clearly, under both Roger Dean and ASARCO, this is a case which justifies a deviation from normal three-factor apportionment. In this reqard, since the Department is adamant about including the intangible income of Brunner in its tax base pursuant to Section 220.12 and 220.13, Florida Statutes, the very least the Court should do is to require

the Department to include such intangible income in the denominator of the sales factor of the three-factor apportionment formula.

CONCLUSION

In its prior decision in this cause, the Florida Supreme Court decided two "tax base" issues. It decided no issues regarding the constitutionality of applying three-factor apportionment to Brunner's Illinois-based income. That issue was left open for the trial court.

In **ASARCO**, the United States Supreme Court held that three-factor apportionment is normally not appropriate except in the case of a unitary business. As such, it ruled that inclusion of out-of-state intangibles income, such as Brunner's, in another state's tax base is inappropriate in the absence of a unitary business. It also stated that use of three-factor formulary apportionment is usually inappropriate to tax such out-of-state intangibles income.

The decisions in ASARCO are directly on point and require reversal of the trial court's ruling, This Court should reverse the Final Judgment on Entry of Mandate and should direct that the trial court enter a Final Judgment in favor of the taxpayer based on **ASARCO** and the Department's improper inclusion of Brunner's Illinois income in its tax base. However; even if this Court finds that inclusion of Brunner's Illinois-based income in its tax base was proper under the Florida Supreme Court's mandate, this Court should (1) reverse the Final Judgment on Entry of Mandate, (2) direct that both Roger Dean and ASARCO prevent the Department from subjecting Brunner's Illinois-based income to three-factor apportionment, and (3) require the Department to recompute Brunner's Illinois-based income in an equitable manner under the relief provision of Section 214.73, Florida Statutes.

DATED THIS 16th day of May, 1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF APPELLANT has been furnished to LARRY LEVY, General Counsel, Department of Revenue, 104 Carlton Building, Tallahassee, Florida 32301 and to JOSEPH C. MELLICHAMP, 111, Assistant Attorney General, Department of Legal Affairs, LL04, The Capitol, Tallahasee, Florida 32301 by HAND DELIVERY this 16th day of May, 1983.

ROBERT S. HIGHTOWER