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AN EVOLVING DEFINITION OF BUSINESS INCOME

Richard M. Baskett

I. Introduction

Montana levies a coporation license tax[1] for "the privilege of engaging in business in the state of Montana."[2] Although it is not an income tax,[3] the license tax is computed from net income.[4] Corporations operating both within and without Montana must divide their income:[5] the portion derived from sources within the state is taxed; the remainder is not.[6] To determine what portion is attributable to Montana, the corporate taxpayer must use an apportionment formula.[7] The formula, however, is applied only to business income;[8] nonbusiness income is assigned to a particular state, usually the state of the corporation's commercial domicile.[9] Because Montana often is not the corporate taxpayer's commercial domicile, business income is the more important source of corporation license tax revenues. In a recent case,[10] the Supreme Court of Montana contracted the meaning of nonbusiness income, and consequently expanded the meaning of business income, the primary income upon which Montana corporation license taxes are levied.

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1. Revised Codes of Montana [hereinafter cited as R.C.M. 1947], §§ 84-1501 to 1526 (Supp. 1977).
2. R.C.M. 1947, § 84-1501 (Supp. 1977).
3. Montana does have a corporate income tax. R.C.M. 1947, §§ 84-6901 to 6909 (Supp. 1977). *See* note 4 *infra.*
4. Montana has a double-barrelled tax; that is, Montana has both a corporation license tax, (R.C.M. 1947, §§ 84-1501 to 1526 (Supp. 1977)), and a corporation income tax (R.C.M. 1947, §§ 84-6901 to 6909 (Supp. 1977)). The corporation income tax is applied only if the corporation is not taxable under the corporation license tax. In R.C.M. 1947, § 84-6906 (Supp. 1977), the corporation income tax adopts by reference the allocation and apportionment provisions of the corporation license tax. Those provisions are discussed later in this note.
5. R.C.M. 1947, § 84-1503(1) (Supp. 1977). Small business corporations, however, are exempt from the allocation and apportionment requirement of R.C.M. 1947, § 84-1503(1). In general, a small business corporation is one that has 10 or fewer shareholders (R.C.M. 1947, § 84-1501.1 (Supp. 1977)), that does not own or rent real estate or tangible personal property within Montana, and whose gross annual sales do not exceed $100,000, (R.C.M. 1947, § 84-1501 (Supp. 1977)). Small business corporations pay a tax of one-half of one percent of gross sales made in Montana, but no less than $50. *Id.*

   Certain organizations are exempt from the corporation license tax. Labor organizations, fraternal lodges, charitable and religious organizations, business leagues, social clubs, and other organizations fall within this exemption. *Id.*
6. R.C.M. 1947, § 84-1501 (Supp. 1977).
7. R.C.M. 1947, § 84-1503(1)(a) (Supp. 1977).
8. R.C.M. 1947, § 84-1503(9) (Supp. 1977).
9. R.C.M. 1947, § 84-1503(4) (Supp. 1977).
10. Montana Dep't of Revenue v. American Smelting & Ref. Co., ____ Mont. ____, 567 P.2d 901 (1977), *appeal dismissed,* 98 S.Ct. 884 (1978).

Montana Law Review, Vol. 39 [1978], Iss. 2, Art. 8

II. Recent History of State Taxation of Interstate Commerce

State taxation of business has its roots in colonial America. In the seventeenth and eighteenth centuries, New England colonies taxed artisans and tradesmen according to rough estimates of the income produced by each trade.[11] The first modern state income tax was enacted by Wisconsin in 1911.[12] But the greatest development of such taxation began in 1959. That year, the United States Supreme Court decided *Northwestern States Portland Cement Co. v. Minnesota.*[13] For the first time, the Court held that states could tax a corporation's net income, even though that income was derived solely from operations in interstate commerce.[14] Mr. Justice Clark wrote the majority opinion of the Court:

> We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.[15]

Businesses that operated interstate generally were alarmed by the *Northwestern States* decision, because they suddenly faced compliance with several different state tax statutes and the attendant possibility of multiple taxation.[16] Within months of the decision,[17] Congress passed Public Law 86-272,[18] exercising for the first time its power under the commerce clause of the United States Constitution to limit state taxing power.[19] Public Law 86-272, however, is limited. It prohibits state income taxes to be levied on interstate business when the only business activities within the state are (1) solicitation of orders approved or rejected outside the state and filled by delivery from outside the state; and (2) sales within the state by individual contractors. The rest of interstate commerce is unaffected by Public Law 86-272.

Congress purposely limited the application of Public Law 86-272. It was passed in reaction to the *Northwestern States* decision,[20]

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11. Subcommittee on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong., 2d Sess. Vol. 1, 100 (1964).

12. *Id.*

13. 358 U.S. 450 (1959).

14. *Id.* at 452.

15. *Id.*

16. H.R. Rep. No. 1480, *supra* note 11, at 7.

17. *Id.* at 8. Public Law 86-272 was passed by Congress within seven months of the *Northwestern States* decision.

18. 73 Stat. 555 (1959) (codified at 15 U.S.C. §§ 381-84).

19. H.R. Rep. No. 1480, *supra* note 11, at 8.

20. [1959] U.S. Code Cong. & Ad. News 2548, 2549.

and was intended as a temporary measure until more comprehensive legislation could be enacted.[21] To that end, Public Law 86-272 directed the appropriate congressional committee to study state taxation of interstate commerce and to recommend legislation.[22] A subcommittee of the House Judiciary Committee, chaired by Representative Edwin E. Willis of Louisiana, made the study.[23] The committee recommended, among other things, federal legislation to insure uniformity in taxes states levied on the income of multistate business.

Following the Willis Committee report, several bills were introduced in Congress. H.R. 11798 was the first,[24] and it substantially adopted the recommendations of the Willis Committee. The bill would have prohibited states from taxing the income of an interstate company, unless it had a "business location" within the state. "Business location" was defined as renting or owning real property, or maintaining one or more employees whose permanent location was in the state. Moreover, H.R. 11798 adopted a two-factor formula for apportioning corporate income among the states. The two-factor formula would have been mandatory for any state that taxed foreign corporations engaged in interstate commerce. State governments opposed H.R. 11798, and business groups did not support it.[25] The bill subsequently was modified, but failed even then.[26] H.R. 11798 has been followed by several bills on the same subject, spanning more than a decade, and not one has passed Congress.[27]

Because federal legislation in the area of state taxation was considered an infringement on the states' sovereignty,[28] the states generally resisted Congress' attempts at legislation.[29] Consequently,

21. *Id.* at 2551.

22. Publ. L. No. 86-272, § 201, 73 Stat. 555 (1959).

23. The committee's report was published in four volumes, under three different report numbers: H.R. REP. No. 1480, 88th Cong., 2d Sess. (1964); H.R. REP. No. 565, 89th Cong., 1st Sess. (1965); H.R. REP. No. 952, 89th Cong., 1st Sess. (1965).

24. H.R. 11798, 89th Cong., 2d Sess. (1966).

25. J. HELLERSTEIN, STATE AND LOCAL TAXATION CASES AND MATERIALS 358 (3d ed. 1969).

26. H.R. 2158, 90th Cong., 1st Sess. (1967).

27. H.R. 16491, 89th Cong., 2d Sess. (1966); H.R. 2158, 90th Cong., 1st Sess. (1967); H.R. 2179, 91st Cong., 1st Sess. (1969); H.R. 7906, 91st Cong., 1st Sess. (1965); S. 916, 91st Cong., 1st Sess. (1969); H.R. 1538, 92d Cong., 1st Sess. (1971); S. 317, 92d Cong., 1st Sess. (1971); S. 1210, 92d Cong., 1st Sess. (1971); S. 1883, 92d Cong., 1st Sess. (1971); H.R. 1538, 92d Cong., 2d Sess. (1972); S. 3333, 92d Cong., 2d Sess. (1972); S. 4080, 92d Cong., 2d Sess. (1972); H.R. 977, 93d Cong., 1st Sess. (1973); S. 282, 93d Cong., 1st Sess. (1973); S. 1245, 93d Cong., 1st Sess. (1973); S. 2092, 93d Cong., 1st Sess. (1973); H.R. 9, 94th Cong., 1st Sess. (1975); S. 2080, 94th Cong., 1st Sess. (1975).

28. Boren, *Separate Accounting in Calfornia and Uniformity in Apportioning Corporate Income*, 18 U.C.L.A. L. REV. 478, 479 (1971).

29. Committee on Interstate Taxation, New York State Bar Association, *State Taxation of Interstate Business: An Evaluation of Developments During the Past Decade* (pt. 1), 41 N.Y.ST.B.J. 558, 560 (1969).

the states enacted legislation of their own. The Uniform Division of Income for Tax Purposes Act (UDITPA),[30] adopted by only a few states prior to the Willis Committee report,[31] is now law in most of the states that tax corporate income[32]—either as it was promulgated by the National Conference of Commissioners on Uniform State Laws in 1957, or as part of the Multistate Tax Compact, which incorporates UDITPA in article IV.[33] Montana adopted both UDITPA[34] and the Multistate Tax Compact.[35]

The Multistate Tax Compact became effective in 1967 when it was adopted by seven states. It now has nineteen members.[36] The Multistate Tax Commission, comprised of tax administrators from member states, has an audit staff which, upon request of a member state, audits multistate corporations.[37] Audits by the Multistate Tax Commission benefit both the states and the corporations. Audit expenses for the states are reduced, and the corporations are audited once by the Multistate Tax Commission, rather than several times by individual states.

Several of the nation's largest corporations[38] challenged the Multistate Tax Compact as violating the compact clause of the United States Constitution.[39] That clause says, in part: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."[40] The United States Supreme Court, however, upheld the Multistate Tax Compact in a 7-2 deci-

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30. 9A U.L.A. 449 (1965).

31. Only three states—Alaska, Arkansas, and Kansas—had adopted UDITPA. H.R. Rep. No. 1480, *supra* note 11, at 198-99.

32. Thirty-nine states levy direct corporate net income taxes; sixteen states levy franchise taxes measured by net income; and eleven states, including Montana, levy both. COMMERCE CLEARING HOUSE, STATE TAX HANDBOOK 652 (1977).

33. Twenty-nine state have enacted UDITPA, either as promulgated or with minor changes. MULTISTATE TAX COMMISSION, SEVENTH ANNUAL REPORT, App. B (1974).

34. R.C.M. 1947, § 84-1503 (Supp. 1977).

35. R.C.M. 1947, § 84-6701 (Supp. 1977).

36. As of February 28, 1978, the member states were as follows: Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. Vol. LV-No. 32 STATE & LOC. TAXES (P-H) ¶ 32.1 (Feb. 28, 1978).

37. Article VIII of the Multistate Tax Compact permits any party state to request the commission to perform an audit on its behalf.

38. The action was filed by United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and the Procter & Gamble Distributing Company. The lower court subsequently allowed Bristol Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Business Machines Corporation, International Harvester Company, International Paper Company, International Telephone and Telegraph Corporation, McGraw-Hill, Inc., NL Industries, Inc., Union Carbide Corporation, and Xerox Corporation to intervene as plaintiffs. International Business Machines and Xerox withdrew as intervenor plaintiffs before decision in the lower court. United States Steel Corp. v. Multistate Tax Comm'n, 98 S.Ct. 799, 805 n.7 (1978).

39. *Id.* at 805.

40. U.S. CONST. art. I, § 10, cl. 3.

sion.[41] The compact, the Court said, did not increase the power of the states so as to encroach upon federal supremacy, and, therefore, was not repugnant to the compact clause.[42]

III. Separate Accounting Versus Apportionment

Taxpayers subject to the Montana corporation license tax may account for their income by one of two methods: separate accounting[43] or apportionment.[44] Separate accounting is based on the assumption that, even though the taxpayer's income is earned in several states, the portion earned in the taxing state can be separated from the rest.[45] In other words, the in-state portion of a business is treated as an entity distinct from the out-of-state portion. Income from in-state operations is computed, expenses from in-state operations are deducted, and the remainder is taxed. But separate accounting often does not reflect reality. One part of a business is usually so connected with the other parts that to consider them separately is misleading, perhaps impossible.[46] Consequently, the license tax statutes allow separate accounting only in limited circumstances.[47]

Apportionment,[48] in contrast to separate accounting, does not

41. 98 S.Ct. at 816.
42. *Id.* at 812.
43. R.C.M. 1947, § 84-1503(1)(a) (Supp. 1977).
44. R.C.M. 1947, § 84-1503(1)(b) (Supp. 1977).
45. H.R. Rep. No. 1480, *supra* note 11, at 160.
46. *Id.* at 163-67.
47. Separate accounting is required for some corporations, but they definitely are the exceptions. R.C.M. 1947, § 84-1503 (Supp. 1977) requires allocation and apportionment for *any* corporation that has income from business activity both within and without the state, unless the taxpayer's activities in Montana are separate and distinct from operations outside the state. The business conducted within Montana must neither depend upon nor contribute to the business conducted outside the state.
48. An extensive list of readings on apportionment is gathered by Gary Boren in a footnote to a law review article written by him. That list is reproduced here:

> G. Altman & F. Keesling, Allocation of Income in State Taxation (2d ed. 1950); House Comm. on the Judiciary, State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong., 2d Sess. (1964); W. Beaman, Paying Taxes to Other States (1963); A. H. Cohen, Apportionment and Allocation Formulae and Factors Used by States in Levying Taxes Based on or Measured by Net Income of Manufacturing, Distributive and Extractive Corporations (1954); J. Wilkie, Allocation of Multistate Income Under State Corporation Net Income Taxes, March 29, 1956 (University Microfilms, Ann Arbor); Dane, *A Solution to the Problems of State Taxation of Interstate Commerce,* 12 Vill. L. Rev. 507 (1967); Hartman, *State Taxation of Corporation Income From a Multistate Business,* 13 Vand. L. Rev. 21 (1959); Hellerstein, *Recent Developments in State Tax Apportionment and the Circumspection of a Unitary Business,* 21 Nat'l Tax J. 487 (1968); Lynn, *Formulary Apportionment of Corporate Income for State Tax Purposes: Natura Non Facit Saltum,* 18 Ohio St. L.J. 84 (1957); Rudolph, *State Taxation of Interstate Business, the Unitary Business Concept and Affiliated Corporate Groups,* 25 Tax. L. Rev. 171 (1970); Silverstein, *Problems of Apportionment in Taxation of*

treat the in-state portion of a taxpayer's business as though it were distinct from the rest. Instead, apportionment recognizes that frequently the success of one business location of a company depends on the success of the others.[49] By this method of accounting, the income of the entire business is "apportioned" to the taxing state by a formula in the following manner:

$$\frac{\frac{\text{Mont. property}}{\text{Total property}} + \frac{\text{Mont. payroll}}{\text{Total payroll}} + \frac{\text{Mont. sales}}{\text{Total sales}}}{3} \times \begin{array}{c}\text{Total}\\ \text{apportionable}\\ \text{Income}\end{array} = \begin{array}{c}\text{Income}\\ \text{apportioned}\\ \text{to Montana}\end{array}$$

This formula is accurate only to the extent that property, payroll, and sales determine earnings. Few businesses are so simple that their success or failure turns solely on these three factors; but then this formula is not intended to include everything that might influence the earnings of a business. Nor is it required to be so precise. Perfection is not demanded of an accounting method as long as it

Multistate Business, 4 TAX. L. REV. 207 (1949); Watson, *Allocation of Business Income for State Income Tax Purposes*, 25 MINN. L. REV. 851 (1941); Wilkie, *Uniform Allocation of Income From Unitary Business*, 37 TAXES 437 (1959) (based on Wilkie thesis). On the Uniform Division of Income for Tax Purposes Act, *see* Lynn, *The Uniform Division of Income for Tax Purposes Reexamined*, 46 VA. L. REV. 1257 (1960); Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 747 (1957); Wilkie, *Uniform Division of Income for Tax Purposes*, 37 TAXES 65 (1959). On California corporate income tax approaches, see CALIFORNIA SENATE, REPORT OF THE SENATE INTERIM COMM. ON STATE AND LOCAL TAXATION, PT. III STATE AND LOCAL TAXATION IN CALIFORNIA: A COMPARATIVE ANALYSIS 127 (1951); Huff, *California Franchise Tax Board Study of NCCUSL Uniform Division of Income Act*, in NAT'L ASS'N OF TAX ADM'RS, REVENUE ADMINISTRATION 1965, PROCEEDINGS OF THE 33RD ANN. CONFERENCE 50; Keesling & Warren, *The Unitary Concept in the Allocation of Income*, 12 HAST. L.J. 42 (1960); Keesling & Warren, *California's Uniform Division of Income for Tax Purposes Act* (pts. 1-2), 15 U.C.L.A. L. REV. 156, 655 (1967); Wahrhaftig, *Allocation Factors in Use in California*, 12 HAST. L.J. 65 (1960); Note, *Taxation: Allocation of an Interstate Business Under the California Franchise Tax: The Unitary Business*, 54 CALIF. L. REV. 430 (1964).

Boren, *Separate Accounting in California and Uniformity in Apportioning Corporate Income*, 18 U.C.L.A. L. REV. 478, 478 n.1 (1971). Some additional articles not mentioned in Boren's footnote are: Committee on Interstate Taxation, New York State Bar Association, *State Taxation of Interstate Business: An Evaluation of Developments During the Past Decade* (pts 1-2), 41 N.Y.ST.B.J. 558, 662 (1969); Committee on Interstate Taxation, New York State Bar Association, *Proposals for Improvement of Interstate Taxation Bills* (H.R. 1538 and S. 317), 25 TAX LAW. 433 (1972); Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423 (1976); Keesling, *A Current Look at the Combined Report and Uniformity in Allocation Practices*, 42 J.TAX. 106 (1975); Note, *Developments in the Law—Federal Limitations on State Tax'n of Interstate Commerce*, 75 HARV.L.REV. 953 (1962); Note, *State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity*, 11 COLUM. J. L. & SOC. PROB. 231 (1975).

49. Keesling & Warren, *The Unitary Concept in the Allocation of Income*, 12 HASTINGS L.J. 42, 43 (1960).

is " 'fairly calculated' to assign to the taxing state that portion of the net income 'reasonably attributable' to the business done there."[50] The three-factor apportionment formula has repeatedly withstood that test,[51] and now is employed by the great majority of states that impose taxes on or measured by the income of corporations.[52]

As mentioned before, not all corporate income is apportioned—only business income. Nonbusiness income is allocated; that is, it is assigned in its entirety to a particular state. Since nonbusiness income is not subject to apportionment by the three-factor formula, classifying income either as business or nonbusiness can significantly shift a corporation's income from one state to another.

IV. MONTANA DEPARTMENT OF REVENUE v. AMERICAN SMELTING & REFINING CO.[53]

Asarco,[54] a New Jersey corporation, has world-wide operations that mine, smelt, refine, manufacture, buy, and sell nonferrous metals and minerals.[55] In Montana, Asarco's principal operation is a smelter in East Helena.[56] The smelter processes lead ore and concentrate, then ships it to Asarco units in other states for refining and sale.[57]

In 1972, Montana requested the Multistate Tax Commission audit Asarco for the tax years 1967 through 1970. The audit disclosed that Asarco had classified certain income as nonbusiness, which the auditors reclassified as business income. Accordingly, the

50. Butler Bros. v. McColgan, 315 U.S. 501, 506 (1942).

51. *See, e.g.*, Bass, Ratcliffe & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 133 (1920); Butler Bros. v. McColgan, 315 U.S. 501 (1942); Edison Cal Stores, Inc. v. McColgan, 30 Cal. 2d 472, 183 P.2d 16 (1947).

52. These states have the three factor apportionment formula of property, payroll and sales or receipts: Alabama, Alaska, Arizona, Arkansas, California, Colorado (3 factor option), Connecticut, Delaware, District of Columbia, Florida (sales factor unequally weighted), Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York (sales factor weighted), North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wisconsin (sales factor unequally weighted).

States with two or less apportionment formula factors: Colorado (property and receipts if three factors not elected), Iowa (sales factor), West Virginia (property and payroll). Vol. LV-No. 21 STATE & LOC. TAXES (P-H) ¶21.1 (Nov. 29, 1977).

53. ___ Mont. ___, 567 P.2d 901 (1977), *appeal dismissed*, 98 S.Ct. 884 (1978).

54. Asarco was incorporated in 1899 under the laws of New Jersey as the American Smelting and Refining Company. The present name, ASARCO Incorporated, was adopted in April, 1975. ASARCO Incorporated 1976 Annual Report.

55. ___ Mont. at ___, 567 P.2d at 903.

56. *Id.*

57. *Id.*

auditors included the income in the apportionment formula. Asarco contended the auditors erred in their classification.[58]

The contested income included royalties, rents, interest, and capital gains, which the Supreme Court of Montana held was business income.[59] For the first time, the court approved the UDITPA definition of business income, a definition that allows Montana to tax much income that previously was beyond its reach. The holding of the *Asarco* case will have much significance for foreign corporations conducting part of an interstate business in Montana.

V. Business Income—What Is It?

Royalties, rents, interest, and capital gains all have one thing in common: they result from holding tangible or intangible property. Such income historically has been regarded as nonapportionable.[60] Although a state has nearly plenary power to tax,[61] it can reach only such income as relates to activities or property within the state.[62] Property is taxed at its situs;[63] income from property customarily has also been taxed at the situs of the property.[64]

UDITPA modifies the historical treatment of income earned from tangible and intangible property. Rents and royalties from real or tangible personal property, capital gains, interest, dividends and patent or copyright royalties may still be allocated, but only to the extent that they constitute nonbusiness income.[65] They are not nonbusiness income per se; in fact, they are business income insofar as they arise in the regular course of the taxpayer's business.[66] Whether income arises from holding property no longer determines whether it is allocable:

> [T]he labels customarily given to types of income—interest, rents, royalties, capital gains—cannot be relied upon to tell us whether the income is business or nonbusiness income. The rele-

58. *Id.* at 907.
59. *Id.*
60. Keesling & Warren, *The Unitary Concept in the Allocation of Income*, 12 Hastings L.J. 42, 42 (1960).
61. Madden v. Kentucky, 309 U.S. 83, 93 (1940).
62. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959). *See* notes 13-15 *supra* and accompanying text.
63. R.C.M. 1947, § 84-201 (Supp. 1977).
64. Keesling & Warren, *supra* note 60, at 42.
65. R.C.M. 1947, § 84-1503(4) (Supp. 1977).
66. R.C.M. 1947, § 84-1503(2)(a) defines business income:

> "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

vant inquiry is whether the income arises in the main course of the taxpayer's trade or business. Thus, interest income from the investment of temporarily idle funds would be nonbusiness income, whereas interest income from trade accounts receivable would be business income. Similarly, if the taxpayer holds a patent on an item which it manufactures and sells and it also licenses other manufacturers to use the patent for a royalty, the royalty income would be business income.[67]

UDITPA looks to the relation the income has to the taxpayer's business. The nature of the taxpayer's business determines the income that is apportionable and that which is not. Whether the income is interest, rents, royalties, or anything else is irrelevant in determining whether it is business or nonbusiness income.

Including income from tangible and intangible property within the definition of business income is quite important to a state such as Montana. Business income, wherever earned, is apportionable. If the corporation has property, payroll, or sales here, Montana will tax part of the income. Nonbusiness income, on the other hand, must be allocated, usually to the taxpayer's commercial domicile. Montana is not the commercial domicile for very many corporations, especially the multinational conglomerates. Therefore, whether the income is business income or nonbusiness income usually determines whether Montana can tax part of it.

Asarco does not hold that all income from tangible and intangible property is business income, but that the income must arise in the regular course of the taxpayer's business. Although the court found certain royalties, rents, interest, and capital gains to be business income,[68] the relation of the income to Asarco's regular course of business was easy to see.[69] The parameters of business income are not apparent from *Asarco*. That will be left to future cases.

The scope of business income could become quite broad—so broad that almost nothing would be considered nonbusiness income. Obviously, income with no relation to the regular course of the

67. Keesling & Warren, *California's Uniform Division of Income for Tax Purposes Act* (pt. 1), 15 U.C.L.A. L. Rev. 156, 164 (1968).

68. ___ Mont. at ___, 567 P.2d at 907.

69. The Supreme Court of Montana found certain royalties, rents, interest, and capital gains to be business income. The royalty income arose from two sources: mine royalties and patent royalties. The mine royalties arose when Asarco leased a mine that it had previously operated. The patent income arose from devices developed by Asarco for use in its mines and plants. The rental income arose primarily from homesites rented to employees working near Asarco mines and plants. The interest income arose from liquid securities, which the court said were readily available for meeting company obligations. Finally, the capital gains arose from the sale of stock issued by corporations engaged in the business of either producing metal ore or manufacturing the refined product into goods. Asarco used the stock for such purposes as gaining access to raw materials or access to potential customers for its refined metals. ___ Mont. at ___, 567 P.2d at 907.

taxpayer's business is beyond the taxing jurisdiction of the state. But does such income even exist? It is a point of dispute.

Additionally, the Montana Department of Revenue has recently adopted the Multistate Tax Commission Allocation and Apportionment Regulations.[70] The regulation defining business and nonbusiness income provides, in part:

> [A]ll income which arises from the conduct of trade or business operations of a taxpayer is business income . . . unless clearly classifiable as nonbusiness income.
>
> . . .
>
> [T]he critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of a particular trade or business. In general, all transactions and activities of the taxpayer which are dependent upon or contribute to the operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be arising in the regular course of, and will constitute regular parts of, a trade or business . . . .[71]

Income is presumed to be business income until clearly shown otherwise. The regulations have been attacked as including too much within the meaning of business income,[72] but whether they do or do not has yet to be considered by the Supreme Court of Montana.

VI. CONCLUSION

Undoubtedly, *Asarco* is only the first of many cases that will reach the Supreme Court of Montana on issues relating to the allocation and apportionment of income. The definition of business income is only one facet in this disputed area, but it is an important facet in that the definition of business income determines to what income the apportionment formula may be applied.

Asarco does not define business income. A definition limits; it sharply demarcates the boundaries of a thing. *Asarco* sets no boundaries. Quite the contrary, it leaves great room for expanding the breadth of business income. How far the meaning of business income will expand remains for the court to decide.

70. ADMINISTRATIVE RULES OF MONTANA, §§ 42-2.6(4)-S61740 to S62040.

71. ADMINISTRATIVE RULES OF MONTANA, §§ 42-2.6(4)-S61750.

72. Peters, *Revised Multistate Tax Commission Regs Define "Business" and "Nonbusiness" Income*, 40 J. TAX. 122 (1974).