



**LEVEL THE PLAYING FIELD FOR N.H. BUSINESSES WITH WORLDWIDE COMBINED REPORTING**

**COMMISSION ON WORLDWIDE COMBINED REPORTING FOR UNITARY BUSINESS UNDER THE BUSINESS PROFITS  
TAX  
RSA 77-A:23-b**

**Testimony of Thomas Oppel  
Representing the Coalition for a Prosperous America  
September 25, 2023**

Chairman Spilsbury and members of the Commission, thank you for the opportunity to testify before you today in support of New Hampshire adopting worldwide combined reporting and ending the water's edge provision.

I am Thomas Oppel, President of O2 Strategies, a strategic consulting firm based in Canaan, New Hampshire, and a small business person myself. I represent the Coalition for a Prosperous America, a nonprofit organization representing the interests of 4.1 million households across the political spectrum and economic sector, working together for a new and positive U.S. trade policy that delivers prosperity and security to America, its citizens, farms, factories and working people.

With me are Dan Collins, an independent contractor from the Upper Valley, and Pete Garre, who worked on business tax issues for the Department of Revenue Administration in the 1980s and 90s, each of whom will speak after me.

In its 1999 Caterpillar decision, the New Hampshire Supreme Court spotlighted the basic issue facing this commission today when it wrote: *"We point out that the water's edge method was adopted for the benefit of foreign businesses."* And the very next sentence in that decision, makes it clear that ending water's edge and adopting worldwide combined reporting is hardly unprecedented. The Court's decision noted that *"Prior to 1986, New Hampshire utilized worldwide combined reporting..."*

So the fundamental question this commission should ask itself is why New Hampshire businesses – contractors, store owners, craft breweries or any other domestic company – should be treated differently when it comes to their business tax liability than foreign enterprises. Obviously, we welcome all business to the state, whether domestic or foreign.

But why should New Hampshire's business tax structure privilege foreign companies? Since domestic companies employ more than nine out of ten Granite Staters, using the Global Business Alliance's own figures, why should they be forced to operate at an economic disadvantage?

And now that New Hampshire has moved to single sales factor in determining business tax liability, it is likely that the competitive disadvantage for domestic businesses – for Mom and Pop – could become worse.

Multinationals have the capacity, the global operations and the financial incentives to use accounting techniques, paper transactions and other tactics to shift profits to lower tax jurisdictions overseas. Water's edge provisions obscure the full picture of their activities in New Hampshire from DRA because companies are not required to account for their operations outside the U.S., beyond the water's edge. These techniques are legal, but they are anti-competitive and create a two-tier tax system that disadvantages home grown businesses whose activities are limited to New Hampshire and America.

Domestic based businesses do not share the accounting capacity or overseas resources. As a result, these companies pay more than their fair share to support state operations funded by businesses taxes or the state is shortchanged of revenue a taxation system with a level playing field would provide or, and this is the most likely outcome, we get a little of each bad outcome.

Frankly, that is already happening. A joint January 2019 study by the American Sustainable Business Council, US PIRG and the Institute on Taxation and Economic Policy approximated the cost of multinational profit shifting as potentially accounting for \$177 million dollars in lost revenue annually. This is revenue that could be used to relieve taxpayers either through direct tax cuts or by increasing aid cities and towns to relieve property taxes or to provide other services, such as support for public schools.

With worldwide reporting, companies must do it for their entire enterprise without regard to borders. This is what they do now for operations in every state in the U.S. And obviously any well-run business is doing this in every jurisdiction across the globe, although they are not sharing this data with New Hampshire.

Without world-wide combined reporting, New Hampshire-based businesses and the overwhelming number of Granite State workers they employ operate at a significant competitive disadvantages. And those are the companies who employ the vast majority of workers, workers and companies who are committed to their communities, and are critical contributors to the economic health and quality of life in our state.

Dan Collins, who's run his own business for nearly 30 years, can speak to that impact. And Pete Garre can explain how adopting worldwide combined reporting and ending water's edge, rather than being some novel or even radical scheme, will simply return New Hampshire business taxes to the structure that existed prior to 1986.

DAN COLLINS  
9/25/2023  
WWCR COMMISSION TESTIMONY

Good morning, everyone. Thank you for having me.

My name is Dan Collins. I'm a 50-year-old, self-employed residential painting contractor based in the Upper Valley area.

I sit before you today as a representative of small business owners. I've been a house painter full time since my mid-teens. By the age of 18, i was promoted to job site foreman. That's when i realized that my career was going to be as a tradesman.

At 24, i started working for myself. I have spent the last 26 years building a small business. In that time, i probably had upwards of 100 people work with me. I have built a home, raised a family, sent my daughter to college and taught my son a trade.

And for all of those 26 years, I've always paid my taxes.

As a locally based small business, I've never been afforded the opportunity to shift my profits elsewhere to reduce my tax bill. That puts me at an economic disadvantage with foreign companies and multi-nationals that can take advantage of those kinds of accounting techniques.

In our local municipality, I'm fortunate enough to sit on the select board, serve on the budget committee, a preservation committee as well as several subcommittees such as updating our master plan for economic growth and exploring options for a community center.

As a public official, i have both the honor and burden of setting the local tax rate. I feel it is my responsibility as an elected official to work as hard as I can to keep all residents of our community on the same playing field. We have a level playing in regards to property taxes. I would suggest we need a level playing with regards to business taxes as well.

With the potential revenue loss of \$177 million per year in the State of New Hampshire, I'm sure there are many municipalities in the Granite State that would benefit from revenue that is now being shifted elsewhere.

I would ask this commission to report favorably to the Legislature on ending waters edge and adopting worldwide combined reporting as the right step to create that level playing field.

Thank you for your consideration. I appreciate the opportunity to sit before you today.

My name is Peter Garre. I submitted the only amicus brief in the Caterpillar case. My amicus was over 30 pages. My testimony today is 6 pages long. I trust that I will be afforded the time to read it to the Commission.

I was a Business Profits Tax auditor with the Department of Revenue from 1980 to 1997. During that time, I traveled around the country to the headquarters of corporations that had operations in New Hampshire.

Most of the corporations that I visited were multi-form with a parent corporation and any number of subsidiaries operating in the US and foreign countries.

When I started in 1980, audits were conducted on separate accounting/ separate entity tax returns. For example, if the corporation that had operations in New Hampshire was a subsidiary, I audited only that subsidiary, as if it was a stand alone corporation with no connections to related subsidiaries or the parent corporation. In these audits, few adjustments were made to the tax base. Most of the audit adjustments concerned the apportionment formula - the percent of sales, payroll, and real property in New Hampshire to total sales, payroll, and real property.

Then the law changed in 1981 that allowed the department or corporations to employ the unitary combined method. Of course, corporations that benefitted, filed unitary tax returns to pay lesser amounts of Business Profits Tax. However, it was only upon audits that combined corporations paid more Business Profits Tax under the unitary method. It should be noted that New Hampshire adopted the unitary worldwide combined method before it had been tested in a lawsuit. That lawsuit, *Container Corp. v. California*, occurred in 1983

The purpose of the unitary combined method was to counteract the profit shifting that occurs between corporate members of a group of corporations controlled by a parent corporation. Inter-company transactions occur at prices determined by internal corporate accounting departments and international accounting firms - referred to as transfer pricing. The big four worldwide accounting firms are based in Britain and tax avoidance is their speciality.

A good example of profit shifting transfer pricing within the United States is Home Depot which formed a subsidiary in the State of Delaware. It was revealed in an Arizona lawsuit that the Delaware subsidiary had just 4 employees but reported profits of about \$4.7 billion dollars over three years compared to \$3.8 billion over the same period for Home Depot, the parent corporation. Profit shifting like this was and is a huge loss for separate accounting/separate entity states that utilizes the arm's length principle where inter-company are supposed to be the same as between unrelated companies.

If Home Depot was a foreign parent and had a similar subsidiary in Bermuda or Luxembourg, most likely no profits or diminished profits would be reported to and taxable by Uncle Sam or any state.

There are a number of documentaries that explain how multinational corporations avoid income taxes by shifting profits to tax havens. I recommend watching two: The Town that Took on the Taxman (a British production) and The Tax Free Tour (a Dutch production). Both are available free on YouTube - best to watch with closed captions on.

I do not know why the Business Profits Tax law was changed in 1981 but I suspect it was due to the US Supreme Court's 1980 Mobil Oil v. Vermont and Exxon v. Wisconsin decisions. New Hampshire Attorney General Tom Rath joined other states in an amicus brief that supported both Vermont and Wisconsin.

If you haven't read these decisions, I encourage you to do so. Both cases concerned separate entity tax returns filed by Mobil and Exxon. Although Mobil and Exxon were very profitable for the years in question, Mobil reported zero separate entity profits for two of three years and Exxon reported no separate entity profits for all four years in question. In both cases, the Vermont and Wisconsin employed the unitary business principle which the Court stated was the linchpin of apportionability. Both states won their case against these oil companies that had made hundreds of millions in corporate profits.

Vermont did not adopt unitary combination until many years later but when they did their reason was described in a well written Statement of Intent which said:

However, for some unknown reason, Vermont adopted the water's edge method which is counter to what was stated in the intent. It certainly did not "put all corporations doing business in Vermont on an equal income tax footing."

In 1983, the US Supreme Court decided the Container Corporation case which concerned employment of the unitary business principle across a group of related corporations. Container was a US based parent with both domestic and foreign subsidiaries. This was the first time that the Court approved unitary combined reporting on a worldwide basis. Unfortunately, the Court did not address unitary worldwide combined reporting with a foreign parent with US operations. The New Hampshire Attorney General at that time, Gregory Smith, joined with other states in an amicus brief in support of California and worldwide combined reporting. Foreign corporations, foreign business associations, and foreign governments filed amicus briefs in opposition. Foreign objections in the lawsuit concerning a US based multinational corporation.

After New Hampshire adopted the unitary business principle in 1981, it was the policy of Lloyd Price, DRA Commissioner, that we would not employ unitary combined reporting if the subsidiary was owned by a foreign parent. As a result of this policy, foreign owned corporations were allowed to continue to file separate accounting/separate entity Business Profits Tax returns.

I thought that this policy was wrong. The letterhead of the Department of Revenue is the Old Man in the Mountain surrounded by the words: Equity For All. Treating US subsidiaries owned by foreign parents one way on a separate entity basis and US subsidiaries owned by US parents another way on a worldwide basis was and is not equity for. It does not ring true.

In 1994, the US Supreme Court in their Barclays Bank decision found that it was constitutional for a state to employ the unitary worldwide method with a foreign parent. The vote was 7 to 2 in favor of California. In the companion case with a US parent, Colgate-Palmolive the vote was 9-0. New Hampshire Attorney General at that time, Jeffrey Howard, joined an amicus with other states in support of the worldwide method. Also, filing an amicus in support were United States Senators Byron Dorgan, Ted Stevens, Frank Murkowski, Judd Gregg, and Robert Smith.

I would like read two short sections from them now. First from the AG's brief: "To believe that multinational corporations do not maintain an advantage over independent corporations operating within a similar business sphere is to ignore the economic and political strength of the multinational giants. By attempting to treat those businesses which are in fact unitary as independent entities, separate accounting operates in a universe of pretense; as in Alice in Wonderland, it turn reality into fancy and then pretends it is the real world."

From the Senators' brief: "The unitary method of tax accountings is an integrated, conceptually fair basis of taxation which seeks to negate the intense complexities of intercorporate international tax accounting embodied in the arm's-length method. The arm's-length method treats each legal corporate entity as if it were real, while ignoring the identity of the whole enterprise. The unitary method identifies the income of the whole and then apportions that income according to the proportionate contribution of the taxing State."

After the Supreme Court's 1994 decision, New Hampshire did not repeal the water's edge method and return to the worldwide method.

After I left the Department of Revenue in 1997, I felt compelled to file an amicus brief in Caterpillar's lawsuit against the department. I disagreed with the Department's position and I disagreed with Caterpillar's position. Caterpillar argued that royalty and interest income from its foreign subsidiaries should not be taxable in NH, in other words, should not be in their pre-apportionment tax base. In the alternative, Caterpillar wanted more weight in the apportionment factors. Either way, Caterpillar wanted to reduce the amount they owed in Business Profits Tax.

I argued that the remedy was the worldwide combined reporting method that the US Supreme Court said was constitutional with either a US or foreign parent.

Caterpillar lost their case against the department. I do not know if my amicus brief played any part in the Court's unanimous decision where it stated: "We point out that the water's edge method was adopted for the benefit of foreign businesses."

How else can you interpret or restate "for the benefit of foreign businesses?" This is preferential tax treatment not for New Hampshire or Vermont or California corporations but British, French, and German corporations operating in our state and throughout our country. It would be like a Meals & Rooms Tax that offered a reduced tax rate or exemption for visitors from Canada or Spain. The legislature could pass this in order to attract more out-of-country visitors to New Hampshire. But would it be constitutional?

I suspect this is why the water's edge method was not changed back to worldwide after the Court's 1994 Barclays Bank decision. The State wants to attract foreign corporations to New Hampshire but at what expense? The DRA did not know what effect going from worldwide to water's edge would have on BPT revenues. The DRA does not know what effect going from water's edge back to worldwide would have on BPT revenues. All we do know is that foreign corporations do not like the worldwide method.

In House Bill 121-FN, Rep. Schamberg said that the 1986 change to the water's edge method was a mistake. I would go further and say that the change was and is unconstitutional. The water's edge method violates Equal Protection under the 14th Amendment. It is unlawful, a bad law that discriminates.

In prior cases, the court's have determined that corporations are persons and subject to equal protection under the 14th Amendment. I think of the water's edge method as affirmative action for foreign corporations to attract them to New Hampshire. Affirmative action is also referred to as positive discrimination. The water's edge method is positive discrimination in favor of foreign corporations. On the other side of that same coin is negative discrimination for our home grown US corporations. It is discrimination pure and simple. The US Supreme Court ruled earlier this year that affirmative action in college admissions was no longer valid.

What would our Founding Fathers say about the State of New Hampshire, one of the original 13 British colonies that became a member state of the United States of American after the war against Britain for independence, against taxation without representation in Britain's parliament? What would Madison or Hamilton say about an American State that passed a tax law that granted preferential tax treatment to foreign corporations? To British, French, German corporations avoiding US taxes that grants them an extra advantage in the US marketplace - competing against US corporations. What would they say?

Make no mistake. Multinational corporations of all stripes work to avoid corporate income taxes. They lobby to lower tax rates, to change the apportionment formula in their favor, and above all reduce the tax base. If the tax base can reduced to zero, then it doesn't matter what the tax rate is or what the apportionment formula is.

I'd be willing to bet that there are a number of foreign based corporations that operate in New Hampshire that have never paid any Business Profits Tax. The GAO - the federal government's General Accountability Office - has reported that over 70% of foreign controlled corporation in the US have paid zero income taxes. This is why a number of US based multinational corporations have moved to a foreign country in a tax inversion. Multinational corporation go to great lengths to avoid taxes.

The Business Profits Tax playing field is not level. The BPT law has to change to make it level. It can be changed to move forward with unitary worldwide combined reporting for all corporations big and small, US or foreign based, or it has to move backwards to the way it was from 1970 to 1981 where corporations filed separate accounting/separate entity tax returns and the arm's length principle ruled over the unitary business principle.



Big business would like that, a full return to the arm's length method. If New Hampshire did that, it would be the most tax friendly state in the entire country. No general sales tax, no earned income tax, and the best possible corporate income tax law. The new and improved New Hampshire Advantage.

Imagine being the clerk at the Vermont Department of Revenue in the 1970's when he or she opens a letter from the Mobil Oil Corporation and finds a check made out to the State of Vermont for \$25. The initial reaction of that person must be thinking that this is some kind of joke. Mobil Oil has gas stations in Vermont and many states and is making hundreds of millions in corporate profits.

And, yet here is a check for \$25 from the oil company to help pay for Vermont's public schools, public roads, public health, and the many other functions that the Vermont government provides. The clerk enters the check into their system and sees that Mobil Oil also paid \$25 in the previous year. At that time, Vermont had a minimum corporate income tax of \$25 and that is what Mobil Oil paid to Vermont for each of the two years.

The Vermont Department of Revenue conducted an audit of those two years, 1971 and 1972 plus 1970 where Mobil Oil paid the State of Vermont \$1,872.

Vermont audited Mobil Oil which resulted in an additional assessment of \$76,419. Mobil Oil protested, maintained that their Vermont tax returns were correct and filed a lawsuit that went all the way up to the US Supreme Court. The court record showed that Mobil Oil had millions in Vermont sales and owned millions in Vermont property.

Mobil Oil lost its case and it was in this decision where the Court stated "...the linchpin of apportionability in the field of state income taxation is the unitary business principle."

It is that principle that overrules the arm's length principle. The arm's length principle allows multinational corporations to shift profits from one state or one country to another. The water's edge method retains the arm's length principle but only for multinational corporations. The worldwide method is the only way to overcome the arm's length method.

In my Caterpillar brief, I argued that the Commerce Clause is the bulldozer that can and should make the playing field level and that is up to the New Hampshire Supreme Court to decide whether or not that bulldozer will be fired up and operated to flatten down this terribly uneven, unlevel, and unjust playing field of taxation in the global economy.

I hindsight, I think that I should have also argued that the water's edge method violates Equal Protection under the 14th Amendment. If the State of New Hampshire does not return to the worldwide method, I can only hope that a lawsuit will occur to test the water's edge method and find that it violates Equal Protection and/or the Commerce Clause.

A lawsuit like the 1997 case against the State's Interest & Dividends tax. Ernest Smith was the lead plaintiff in a successful lawsuit against the 70 year old tax. His lawyers argued that the I&D law was flawed and violated the Commerce Clause and Equal Protection. Per the Court's decision, "Prior to oral argument before this court, the State withdrew its commerce clause defenses based upon the US Supreme's Court's recent decision in *Fulton Corp. v Faulkner*." Justice Souter delivered the unanimous decision of the Court.

The NH Supreme Court decided Smith's case on just the Commerce Clause. Unfortunately, it did reach or rule on the Equal Protection argument.

Finally, I would like to quote Adam Looney, a Dartmouth grad and former deputy assistant secretary for tax analysis at the United States Treasury Department. He said that in effect the United States is paying foreign investors to take over our companies with our own tax dollars. (NYTimes article)

For the Commission, I have a copy of the amicus brief joined by NH AG Jeffrey Howard and a copy of the amicus brief by the US Senators in the Barclays Bank case. I also have a copy of the NY Times article. I can provide a copy of my Caterpillar brief at a later date if the Commission would like a copy.