STATE OF MINNESOTA

IN SUPREME COURT

A20-0021

Tax Court — Gildea, C.J.
Took no part, Moore, J.

YAM Special Holdings, Inc.,

Relator,

vs. — Filed: August 12, 2020
Office of Appellate Courts

Commissioner of Revenue,

Respondent.

Susan J. Markey, Barry A. Gersick, Maslon LLP, Minneapolis, Minnesota; and

Andrew T. Bernknopf, De Castro, West, Chodorow, Mendler & Glickfeld, Inc., Los Angeles, California, for relator.

Keith Ellison, Attorney General, Kristine K. Nogosek, John M. O'Mahoney, Assistant Attorneys General, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

Imposing Minnesota tax on an apportioned share of the income from the sale of a partial interest in a member of a unitary business does not violate the Due Process Clauses of the United States and Minnesota Constitutions because the income from the sale is business income of a unitary business and that unitary business has a sufficient connection to Minnesota to satisfy due process principles.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

The question presented in this case is whether the income from the sale of a partial interest in a business is subject to Minnesota corporate income tax. Relator YAM Special Holdings, Inc. sold a majority interest in its Go Daddy business and reported the gain from the sale as income that was not subject to Minnesota tax. The Commissioner of Revenue disagreed and assessed tax on an apportioned share of the income. YAM appealed. The tax court determined that Minnesota could tax an apportioned share of the income from the sale as unitary business income. *YAM Special Holdings, Inc. v. Comm'r of Revenue*, No. 9122-R, 2019 WL 6213168, at *8 (Minn. T.C. Nov. 12, 2019). Because we conclude that the gain from the sale is business income of a unitary business, we affirm.

FACTS

The facts are undisputed. YAM is an Arizona "S" corporation. Its principal place of business and commercial domicile is in Scottsdale, Arizona. Until the transaction at issue in this case, YAM's founder, Robert Parsons, was its sole shareholder. At all relevant times, YAM operated an internet-based business called Go Daddy, which provides internet domain names, website hosting, and related services to its customers. Customers accessed Go Daddy's business through its website—hosted by computer servers in Arizona—and through phone calls to its service facilities, which were located outside of Minnesota. Go

Daddy operated its business through 12 tax-disregarded wholly-owned U.S. subsidiaries and 9 foreign tax-disregarded subsidiaries.[1]

At all relevant times, YAM did not own real or tangible personal property in Minnesota nor did it employ any person based in Minnesota. YAM did not have any interest in any business entities or assets that were physically located in Minnesota. But about 1 percent of YAM's revenue came from transactions with Minnesota customers. Based on its Minnesota revenue, YAM reported Minnesota taxable income in 2010 of $56,829 and paid Minnesota $4,461 in taxes on that income.

On July 1, 2011, Go Daddy announced in a press release that "it ha[d] signed a definitive agreement to receive a strategic investment and enter into a partnership with [certain investors]." The chief executive officer of Go Daddy explained that Go Daddy was "partnering with [the investors] because of their technology expertise, their understanding of Web based businesses and because their values align with [Go Daddy's]." The chief executive officer and the investors believed that the partnership would "take the company to the next level, especially when it comes to accelerating international growth." One of the investors echoed these remarks, stating that "there is significant opportunity to expand the current portfolio of products and services as well as accelerate growth internationally."

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[1] If a business entity is disregarded, "its activities are treated in the same manner as a sole proprietorship, branch, or division of the owner." Treas. Reg. § 301.7701-2(a) (2019). In other words, YAM treated the income of the operating subsidiaries as the income of YAM itself. *See Ashland Inc. v. Comm'r of Revenue*, 899 N.W.2d 812, 814–15 (Minn. 2017).

YAM took several steps in anticipation of this transaction. Using its own funds, YAM paid all of its bank debt, about $51 million. YAM then formed two limited liability companies—Desert Newco, LLC and Go Daddy Operating Company LLC—as wholly-owned subsidiaries, and converted the 12 domestic subsidiaries into 12 wholly-owned limited liability companies. YAM contributed the 12 subsidiaries and its sole interest in Go Daddy Operating Company to Desert Newco. YAM also transferred its remaining liabilities to Go Daddy Operating Company. As a result of these steps, YAM became the sole owner of Desert Newco, Desert Newco became the sole owner of Go Daddy Operating Company, and Go Daddy Operating Company became the sole owner of the 12 subsidiaries, which were the active operating entities for the Go Daddy business.

On December 16, 2011, the investors paid YAM roughly $899.5 million for 71.39 percent of the membership interest units in Desert Newco. That same day, Go Daddy Operating Company borrowed $750 million from bank lenders. The funds were used (1) to pay for the investors' transaction expenses ($46 million); (2) to pay for YAM's transaction expenses ($21.5 million); (3) "to buy out restricted stock units and stock options in" YAM ($368 million); (4) to provide "adequate working capital" for Go Daddy Operating Company and the 12 operating subsidiaries ($31.8 million); and (5) to pay a portion of the purchase price of the Desert Newco membership units ($279.8 million). Also on December 16, certain employee options in YAM were converted to options in Desert Newco, and Go Daddy Operating Company issued a $300 million promissory note to YAM.

As a result of the sale, YAM maintained a 28.61 percent membership interest and the investors maintained a 71.39 percent interest in Desert Newco. YAM distributed the net cash proceeds of the sale—$1.168 billion—to its sole shareholder, Parsons.

After the sale, an executive committee managed Desert Newco and the board of directors provided oversight. The committee consisted of three managers, two appointed by the investors and one appointed by YAM. The board included five investor members, one YAM member, the chief executive officer of Desert Newco, and an independent board member.

On YAM's 2011 federal income tax return, YAM treated the transaction as a sale of a share of the assets that comprised the Go Daddy business. Doing so resulted in a long-term capital gain of about $1.353 billion, offset by a long-term capital loss of $1.664 million. On its 2011 Minnesota income tax return, YAM treated the gain from the sale as income that was not subject to Minnesota tax; YAM also apportioned 1.0471 percent of its ordinary business loss to Minnesota.

The Commissioner determined that the gain on the sale was apportionable business income and assessed additional Minnesota income tax for 2011—approximately $1.247 million—on a portion of that gain, plus penalties and interest.[2] YAM appealed the Commissioner's assessment administratively, and the Commissioner affirmed the assessment.

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[2] The Commissioner also assessed additional income tax, and interest and penalties, based on YAM's 2009 and 2010 tax filings, but those assessments are not at issue in this appeal.

YAM then appealed the Commissioner's determination to the tax court, and YAM and the Commissioner each moved for summary judgment. *YAM*, 2019 WL 6213168, at *1. The tax court concluded that the income from the sale was business income subject to Minnesota tax. *Id.* at *8. Accordingly, the tax court granted the Commissioner's motion for summary judgment and denied YAM's motion for summary judgment. *Id.* YAM appeals and argues that the income from the sale is nonbusiness income that is not subject to Minnesota income tax.

ANALYSIS

This case comes to us from a final order of the tax court. Our court "review[s] the tax court's conclusions of law and interpretation of statutes de novo . . . and its findings of fact for clear error." *Antonello v. Comm'r of Revenue*, 884 N.W.2d 640, 643–44 (Minn. 2016) (citations omitted). We presume that the Commissioner's tax assessments are "valid and correctly determined." *F-D Oil Co. v. Comm'r of Revenue*, 560 N.W.2d 701, 704 (Minn. 1997). The taxpayer bears "the burden of demonstrating the incorrectness or invalidity" of the assessments. *Id.*

YAM argues that Minnesota cannot tax the income from the sale because that income is nonbusiness income. YAM's argument is based on two theories. YAM's first theory is that Minnesota does not have a sufficient connection with the sale and thus due process principles prevent Minnesota from apportioning the income for tax purposes. YAM's second theory is that the income from the sale is income derived from a capital transaction that solely serves an investment function and therefore it is nonbusiness income not subject to apportionment under Minn. Stat. § 290.17, subd. 6 (2018).

A.

Before turning to YAM's first theory—that due process principles prevent Minnesota from taxing the income from the sale through apportionment—we review the relationship between Minnesota corporate tax law and due process requirements. Under the Due Process Clause of the U.S. Constitution, a state may not impose an income tax on "value earned outside its borders."[3] *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (citation omitted) (internal quotation marks omitted). In the case of a business operating in more than one state, however, determining the "precise territorial allocations of 'value' is often an elusive goal." *Id.* As a result, Minnesota has adopted the unitary business principle and apportionment approach to determine the portion of the income that is subject to tax. *See* Minn. Stat. § 290.17, subds. 3–4 (2018); Minn. Stat. § 290.191, subd. 1(a) (2018); *see also Container Corp.*, 463 U.S. at 165 (discussing the unitary business principle and apportionment approach).

Minnesota law defines a unitary business as "business activities or operations which result in a flow of value between them." Minn. Stat. § 290.17, subd. 4(b). When a trade or business is conducted partly within and partly outside of Minnesota, and that trade or business is part of a unitary business, "the entire income of the unitary business is subject to apportionment pursuant to section 290.191." *Id.*, subd. 4(a). Once the State determines

[3] Both the United States and Minnesota Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. We have recognized that "[t]he due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States." *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988).

that the trade or business is part of a unitary business, it applies an apportionment formula—based on a percentage of the business's Minnesota sales, property, and payroll—to determine the amount of business income subject to tax, Minn. Stat. § 290.191, subd. 2(a) (2018). Under Minnesota law, "[a]ll income of a trade or business is subject to apportionment except nonbusiness income." Minn. Stat. § 290.17, subd. 3.

The U.S. Supreme Court has upheld the unitary business principle and apportionment approach as constitutional, "subject to certain constraints." *Container Corp.*, 463 U.S. at 165. Under the Due Process Clause, a state may not apportion income arising out of interstate activities unless two requirements are met. 463 U.S. at 165–66. First, "a 'minimal connection' or 'nexus' " must exist "between the interstate activities and the taxing State." *Id.* (citation omitted). Second, there must be "a rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 437 (1980).[4]

These principles, the Court has explained, require that (1) the unitary business conducts some business in the taxing state, (2) the unitary business's out-of-state activities are "related in some concrete way to the in-state activities," and (3) the unitary business is united by "some bond of ownership or control." *Container Corp.*, 463 U.S. at 166. Accordingly, the sharing or exchanging of value between the in-state and out-of-state

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[4] The Due Process Clause also requires that a taxing state have a connection to the taxpayer. *See Allied-Signal, Inc. v. Director*, 504 U.S. 768, 778 (1992). But YAM does not argue that Minnesota does not have a connection to its business. Indeed, in 2011, Minnesota taxed the income that Go Daddy generated from sales to Minnesota customers, and YAM does not challenge that assessment.

activities must be more than "the mere flow of funds arising out of a passive investment or a distinct business operation." *Id.*; *see also Allied-Signal, Inc. v. Director*, 504 U.S. 768, 787 (1992) ("[T]he capital transaction [must] serve an operational rather than an investment function."). The Minnesota Legislature has codified these requirements. *See* Minn. Stat. § 290.17, subd. 4(a) ("If a trade or business conducted . . . *partly within and partly without this state is part of a unitary business*, the entire income of the unitary business is subject to apportionment pursuant to section 290.191." (emphasis added)); *id.*, subd. 6 ("Nonbusiness income . . . includes income that cannot constitutionally be apportioned to this state because *it is derived from a capital transaction that solely serves an investment function*." (emphasis added)).

With this background in mind, we turn to YAM's argument that taxing the income from the sale as business income violates due process principles.

B.

YAM's first theory is that Minnesota does not have a sufficient connection with the income it seeks to tax. As a result, YAM asserts, due process principles prevent Minnesota from apportioning the income to the State in order to tax it. *See* Minn. Stat. § 290.17, subd. 6 ("Nonbusiness income is income of the trade or business that cannot be apportioned by this state because of the United States Constitution or the Constitution of the state of Minnesota . . . .").

In response, the Commissioner argues that Minnesota has a sufficient connection with the 2011 sale income because the gain from the sale was generated by a unitary business that receives significant revenues from Minnesota customers. Imposing a tax on

an apportioned share of the income from the transaction, the Commissioner maintains, is consistent with due process requirements. We agree with the Commissioner.

As discussed above, the Due Process Clause requires the taxing state to have a minimum connection with the taxpayer's interstate activities and a rational relationship with the intrastate value of the taxpayer's business. *Container Corp.*, 463 U.S. at 165–66. Put differently, a state must have a connection with the activity it seeks to tax, even if it has a minimum connection to the taxpayer generally. When a taxpayer realizes a gain from the sale of an asset, "the relevant unitary business inquiry" is "one which focuses on the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the taxing State." *Allied-Signal*, 504 U.S. at 784–85.

YAM concedes that YAM and the operating subsidiaries formed a unitary business at the time of the sale. And the undisputed facts show that the operating subsidiaries—the asset—had a sufficient connection to Minnesota. YAM conducted the Go Daddy business through the operating subsidiaries, and Go Daddy received approximately 1 percent of its revenue from transactions with Minnesota customers. YAM paid Minnesota income taxes on this revenue. YAM then sold a partial interest in the 12 operating subsidiaries, which generated the income that Minnesota seeks to tax. The value of the operating subsidiaries was based, in part, on the success of YAM's business operations, which includes YAM's revenue generated from Minnesota sales. Accordingly, the tax court correctly concluded that the income generated from the sale of the partial interest in the operating subsidiaries was business income subject to apportionment. *YAM*, 2019 WL 6213168, at *8.

The Supreme Court's analysis in *Allied-Signal* supports our conclusion. There, the Court considered whether New Jersey could tax the income generated from Bendix Corporation's sale of a stock interest in ASARCO Inc.[5] *Allied-Signal*, 504 U.S. at 773. Bendix was a Delaware corporation that was domiciled and headquartered in Michigan but conducted business in all 50 states. *Id.* ASARCO was a New Jersey corporation that had its principal place of business in New York. *Id.* at 774. Bendix purchased 20.6 percent of ASARCO's stock through the open market. *Id.* It then sold the stock back to ASARCO, resulting in a gain of $211.5 million. *Id.* New Jersey sought to tax an apportioned sum of this income. *Id.*

The Court explained that New Jersey could tax an apportioned sum of the income under the unitary business principle if "the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the State" showed that the asset and the taxpayer formed a unitary business. *Id.* at 785. But the Court concluded that Bendix and ASARCO were not a unitary business because they were not functionally integrated or centrally managed, nor did they have economies of scale. *Id.* at 788. The Court held that the unitary business principle therefore did not apply. *Id.* at 788–79. Because New Jersey did not have a minimum connection with the sale, nor a rational relationship with the value it sought to tax, the income from the sale was not taxable as business income. *See id.* at 788–90.

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[5] Allied-Signal was the successor-in-interest to Bendix Corporation. *Allied-Signal*, 504 U.S. at 773.

In this case, the parties agree that YAM and the operating subsidiaries formed a unitary business. The sale of a partial interest in the operating subsidiaries generated income for the unitary business, which is subject to Minnesota tax. *See* Minn. Stat. § 290.17, subd. 4 ("If a trade or business conducted . . . partly within and partly without this state is part of a unitary business, the entire income of the unitary business is subject to apportionment pursuant to section 290.191."). Minnesota may therefore impose a tax on an apportioned share of the gain from the 2011 transaction.[6]

In urging us to reach the opposite conclusion, YAM asserts that the unitary business principle applies only when one of the entities that forms part of the unitary business is physically located in the state that seeks to tax the business income of the unitary business. YAM cites *Allied-Signal*, 504 U.S. 768, *Container Corp.*, 463 U.S. 159, and *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), to support its argument that a member of the unitary business must be physically located in the taxing state. We are not persuaded.

The cases YAM relies on do not stand for the proposition that a member of the unitary business must be physically present in the taxing state. YAM is correct that in

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[6] YAM also relies on general principles relating to judicial jurisdiction set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to argue that Minnesota does not have a sufficient connection with the 2011 transaction. But the Court has applied these principles in the tax context to conclude that taxing the income that is "reasonably attributable" to the business within the state is consistent with due process principles. *E.g.*, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 269–75 (1978). And as we have explained, a portion of the income from the sale is reasonably attributable to Go Daddy's business within Minnesota. Notably, an apportioned share of the gain from the transaction is approximately 1 percent, which is comparable to the percentage of YAM's 2011 revenue from transactions with Minnesota customers.

Allied-Signal, New Jersey sought to tax the income generated from the sale of ASARCO—an entity headquartered in New Jersey. 504 U.S. at 788. But the Court's conclusion that Bendix and ASARCO did not form a unitary business was based on a lack of integration and centralized management. *Id.* The Court did not address whether the unitary business principle applies when no member of the unitary business operates in the taxing state.

The Court similarly did not address the issue in *Container* or *MeadWestvaco*. In *Container*, the Court concluded that a corporation and its overseas subsidiaries formed a unitary business based on a number of factors, including the supervisory role the corporation played, but did not consider the corporation's location.[7] 463 U.S. at 179. And in *MeadWestvaco*, the Court expressed no opinion as to whether the corporation or its asset formed a unitary business. 553 U.S. at 30. Because the cases YAM relies on do not support its argument that the unitary business principle applies only when a member of the unitary business is physically present in the taxing state, that argument fails.

YAM also relies on cases concerning tax-paying trusts in which our court, and the Supreme Court, concluded that the trusts did not have sufficient contacts with the taxing state and were therefore not subject to tax. In *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, the Supreme Court held that the presence of in-state beneficiaries, on its own, does not establish sufficient contacts with the state. 588 U.S. ___, 139 S. Ct. 2213, 2220–21 (2019) (explaining that the trust made no distributions

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[7] In *Amoco Corp. v. Commissioner of Revenue*, we declined to apply the factors set forth in *Container* for determining whether the taxpayer was engaged in a unitary business. 658 N.W.2d 859, 870 (Minn. 2003) ("[W]e cannot ascertain a valid reason to apply a standard different from that articulated by the legislature.").

to any North Carolina resident, the trust was administered in different states, the trustee made no investments in North Carolina, and the settlor did not reside in North Carolina). And in *Fielding v. Commissioner of Revenue*, we determined that sufficient contacts did not exist because the trusts received their income from assets outside of Minnesota and because the trustees had almost no contact with the State. 916 N.W.2d 323, 333–34 (Minn. 2018).

These cases are inapposite. As the Commissioner notes, the *Kaestner* Court expressly limited its holding "to the specific facts presented" and those facts did not include a business that received approximately 1 percent of its revenues from transactions with residents of the taxing state. 588 U.S. at ___, 139 S. Ct. at 2221. And in *Fielding*, we explained that "[t]he State cannot fairly ask the Trusts to pay taxes as residents in return for the existence of Minnesota law and the physical storage of trust documents in Minnesota." 916 N.W.2d at 334. In this case, Minnesota seeks to tax YAM, not as a resident trust, but as an entity that conducts its business partially within the State, and by imposing tax on only an apportioned share of the income from the 2011 sale. YAM's reliance on these trust cases is therefore misplaced.

Based on our analysis, we conclude that taxing an apportioned share of the income from the 2011 sale does not violate the Due Process Clauses of the United States and Minnesota Constitutions because it is business income of a unitary business and the unitary business has a sufficient connection to Minnesota to satisfy due process principles.

C.

YAM's second theory is that the income from the 2011 sale is income "derived from a capital transaction that solely serves an investment function," Minn. Stat. § 290.17, subd. 6, because, in YAM's view, the sale served no operational function and occurred outside of the ordinary course of business. According to YAM, the entire purpose of the sale was for YAM's "sole shareholder, and a few key employees, to sell their interests and profit from their investment." YAM maintains that it incurred substantial new debt and a net reduction of $6.7 million in working capital for the Go Daddy business and that the proceeds from the sale were not reinvested in regular business operations. YAM argues that the income is therefore nonbusiness income under Minn. Stat. § 290.17, subd. 6. And if the income from the sale is nonbusiness income, YAM asserts, Minnesota cannot apply the apportionment formula to tax the income from the sale. *See* Minn. Stat. § 290.17, subd. 3.

In response, the Commissioner asserts that the example of nonbusiness income in Minn. Stat. § 290.17, subd. 6, does not establish a separate test for nonbusiness income. Rather, the Commissioner argues, the statute codifies the standard set forth in *Allied-Signal*, 504 U.S. 768, "for determining whether income from a capital transaction meets constitutional requirements." In the alternative, the Commissioner argues that YAM has failed to carry its burden to show that the income from the transaction served an investment function.

Section 290.17, subdivision 6, in relevant part, provides:

> Nonbusiness income is income of the trade or business that cannot be apportioned by this state because of the United States Constitution or the Constitution of the state of Minnesota and *includes income that cannot constitutionally be apportioned to this state because it is derived from a capital transaction that solely serves an investment function*.

(Emphasis added.)

We agree with the Commissioner that subdivision 6 codifies the standard set forth in *Allied-Signal*, which we adopted in *Hercules Inc. v. Commissioner of Revenue*, 575 N.W.2d 111 (Minn. 1998). In *Allied-Signal*, the Court explained that, when a payee corporation receives an investment from a payor corporation, "the payee and the payor need not be engaged in the same unitary business as a prerequisite to apportionment in all cases." 504 U.S. at 787. Although "the existence of a unitary relation between the payor and the payee is one means of meeting the constitutional requirement," it is not the only means. *Id.* If "the capital transaction serve[s] an operational rather than an investment function," a state may apply an apportionment formula to tax the transaction. *Id.* ("[F]or example, a State may include within the apportionable income of a nondomiciliary corporation the interest earned on short-term deposits in a bank located in another State if that income forms part of the working capital of the corporation's unitary business, notwithstanding the absence of a unitary relationship between the corporation and the bank."). The Court later clarified that the question of whether an asset serves an operational function is part of the inquiry in determining whether the asset was a unitary part of the business being conducted in the taxing state. *MeadWestvaco Corp.*, 553 U.S. at 29.

In *Hercules*, we adopted the standard set forth in *Allied-Signal*. *Hercules*, 575 N.W.2d at 116. In that case, we considered whether the gain Hercules realized from the sale of its stock in Himont—a corporation it had helped to create a few years earlier—was apportionable to Minnesota. *Id.* at 112–13. At the time of *Hercules*, section 290.17, subdivision 6, provided:

> For a trade or business for which allocation of income within and without this state is required, if the taxpayer has any income not connected with the trade or business carried on partly within and partly without this state that income must be allocated under subdivision 2. Intangible property is employed in a trade or business if the owner of the property holds it as a means of furthering the trade or business.

Minn. Stat. § 290.17, subd. 6 (1996). Applying this provision, we concluded that the sale of the stock was nonbusiness income and not apportionable to Minnesota. *Hercules*, 575 N.W.2d at 115–16. We explained that Hercules had "carried the Himont stock on its books for more than four years as an investment, not as an asset," and that it had sold the stock in direct response to a hostile takeover threat. *Id.* at 115. Unlike other cases in which the gain generated from the sale of an intangible asset was used to pay operating expenses, Hercules did not need the proceeds as operating funds. *Id.* Accordingly, we held that the gain was nonbusiness income. *Id.* at 116.

Even if we had determined that the gain was business income, we explained that due process principles prevented Minnesota from taxing the gain through apportionment. *Id.* Those principles require a showing that either "the taxpayer and the corporation that was the source of the income have a unitary business relationship, or that *the intangible asset served* '*an operational rather than an investment function*.' " *Id.* (quoting *Allied-*

Signal, 504 U.S. at 787 (emphasis added)). Because Hercules and Himont were not a unitary business, and because Hercules treated the stock as an investment rather than as a repository for working capital, we concluded that apportioning the income from the sale would violate the Due Process Clause of the U.S. Constitution. 575 N.W.2d at 116–17.

One year after our decision in *Hercules*, the Minnesota Legislature amended section 290.17, subdivision 6, to its current form. Act of May 25, 1999, ch. 243, art. 2, § 23, 1999 Minn. Laws 2054, 2078 (codified as Minn. Stat. § 290.17, subd. 6 (2018)). Subdivision 6 now provides that income of a trade or business cannot be apportioned if "it is derived from a capital transaction that solely serves an investment function." Minn. Stat. § 290.17, subd. 6. This provision codifies what we explained in *Hercules*: If a taxpayer and the corporation that was the source of the income do not have a unitary business relationship, and if the income from the sale serves an investment function, rather than an operational function, Minnesota cannot apportion the income. 575 N.W.2d at 116.

As explained above, this provision does not apply to YAM and its operating subsidiaries because YAM concedes that they form a unitary business. And because the income generated from the transaction is business income of that unitary business, Minnesota may tax that income through apportionment. Minn. Stat. § 290.17, subd. 4(a).[8]

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[8] YAM also argues that if we conclude that the income from the sale is nonbusiness income, the income is not subject to Minnesota tax. Under Minn. Stat. § 290.17, subd. 2(c) (2018), Minnesota may tax certain types of nonbusiness income "to the extent that the income from the business in the year preceding the year of sale was allocable to Minnesota." Because we hold that the income from the sale is business income, we do not reach this argument.

CONCLUSION

For the foregoing reasons, we affirm the decision of the tax court.

Affirmed.

MOORE, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.