

IN THE SUPREME COURT
OF THE STATE OF MONTANA
Case No. 05-336

JIM ELLIOTT,)
)
Petitioner/Appellant,)
)
vs.)
)
THE MONTANA DEPARTMENT)
OF REVENUE,)
)
Respondent/Respondent,)
and)
)
MONTANA TAXPAYERS')
ASSOCIATION,)
)
Intervenor/Respondent.)

District Court Cause No. CDV-2004-777

APPELLANT'S REPLY BRIEF

FILED

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STATE OF MONTANA

ON APPEAL FROM THE MONTANA FIRST JUDICIAL
DISTRICT COURT, LEWIS AND CLARK COUNTY

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PREFACE

In DOR's Statement of the Case, it makes clear to this Court that Elliott, in his Opening Brief, included a document sealed by the District Court as an exhibit. (DOR's Response Brief at 2). As counsel for Elliott explained to this Court in its Motion to Correct Appellant's Brief, the attachment of such exhibit was not an intentional act to disclose a document sealed by the District Court. Rather, it was the excusable mistake of an attorney who was unaware that the District Court had made a post-trial minute entry sealing the document. The disclosure was inconsequential, in any event, because Elliott had shared the information with the Great Falls Tribune long before the trial of this case.

ARGUMENT

I. MONTANA CORPORATE TAX RECORDS ARE PUBLIC DOCUMENTS UNDER ARTICLE II, SECTION 9, OF THE MONTANA CONSTITUTION

Despite the District Court's determination otherwise, Intervenor asserts that corporate tax returns in the custody of the Department of Revenue (DOR) are not public documents subject to Article II, section 9, of the Montana Constitution. This argument is untenable in the face of the plain constitutional language and this Court's prior constructions of that language.

Intervenor begins with the argument that Article II, section 9, is so poorly written it would lead to absurd results if not re-written by the courts. The Framers,

says Intervenor, carelessly gave everyone in Montana the right to examine *all* documents, public and private, when they declared:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

MONT. CONST. art. II, section 9 (1972).

Elliott submits that any high school student called upon to diagram this sentence would find that the phrase “of all public bodies ...” modifies “documents” as well as “deliberations.” This language is clear and unambiguous.

This Court has interpreted Article II, section 9 in accordance with its plain terms. Indeed, Intervenor quotes this Court’s statement that section 9 applies to “documents generated or maintained by a public body which are somehow related to the functions and duties of that body.” *Becky v. Butte-Silver Bow Sch. Dist. #1* (1995), 274 Mont. 131, 138, 906 P.2d 193, 197. How Intervenor thinks it can reconcile this statement with its position in this case is unclear.

Intervenor argues that tax returns are not public records because they do not reflect the “inner workings or deliberations of government.” (Intervenor’s Response Brief at 21). But *Becky*’s definition of public documents does not require any particular thought process on the part of government officials. Even if it did, Elliott testified to the importance of the information he requested for exactly

that purpose. (Tr., 13:11-14:4). Montana law specifically contemplates the use of tax return information in the formulation of tax policy by requiring DOR to share that information with the Legislative Auditor. Section 15-31-511(4)(a), MCA. As Mr. Staley testified, when the Legislative Auditor's staff initially requested corporate tax information, "it was [my] job to give it to her." (Tr., 113:21-23). The State of Montana also uses this information by sharing it with other states to coordinate audits and develop tax policy. (Tr., 49:6-11).

Documents maintained by DOR in connection with its core function of enforcing the revenue laws fall squarely within the language of Article II, section 9, and this Court's elaboration of that language in *Becky*. DOR has wisely conceded this point, and Intervenor's attempt to dispute it should be rejected.

II. NOTHING PRECLUDES DISCLOSURE OF THE MONTANA CORPORATE PUBLIC TAX RECORDS AT ISSUE

There is a constitutional presumption under the Montana Constitution that all documents of every kind in the hands of public officials are amenable to inspection, regardless of legislation, special exceptions made to accommodate the exercise of constitutional police power, and other competing constitutional interests. *Great Falls Tribune v. Mont. Pub. Serv. Comm'n (Great Falls Tribune)*, 2003 MT 359, ¶ 54, 319 Mont. 38, ¶ 54, 82 P.3d 876, ¶ 54 (citation omitted). At their peril, both DOR and Intervenor have ignored this presumption, choosing

instead to argue that these very things support non-disclosure of the public corporate tax records at issue in this case.

This Court has stated that the only exception to the public's right to know pursuant to Article II, section 9, of the Montana Constitution, relates to information in which there is a privacy interest. *Great Falls Tribune v. Day*, 1998 MT 133, ¶ 31, 289 Mont. 155, ¶ 31, 959 P.2d 508, ¶ 31, *overruled* to the extent that corporate business entities have no constitutional privacy rights in *Great Falls Tribune*, ¶¶ 38-43. It is clear that no right of privacy exists in this case. The District Court correctly concluded so and both DOR and Intervenor have apparently now conceded this point. Therefore, the only remaining issue to be determined is whether DOR and Intervenor's arguments to this Court overcome the constitutional presumption that the public records at issue in this case are "amenable to inspection." *Great Falls Tribune*, ¶ 54.

A. Section 15-31-511(1), MCA, does not trump the Montana Constitution

Regardless of any statutes enacted by the Legislature, it is presumed that public records are open to public inspection. *Great Falls Tribune*, ¶ 54. Elliott has maintained all along that the prohibition from disclosing corporate tax information contained in § 15-31-511, MCA, should yield to the Montana Constitution. (12/15/04, Petitioner's Opening Brief in Dist. Ct., p. 6). DOR, in a ridiculous

attempt to convince this Court that it cannot declare § 15-31-511, MCA unconstitutional, maintains that Elliott has not asked this Court for such relief. While it is true that Elliott has encouraged this Court to interpret the statute narrowly and hold that the “as otherwise required by law” clause encompasses the Montana Constitution as it did in *Bozeman Daily Chronicle v. City of Bozeman Police Dept.* (1993), 260 Mont. 218, 224, 859 P.2d 435, 438, this does not mean that Elliott is “not challenging the constitutionality of the statute” as DOR contends. (DOR’s Response Brief at 11). It is Elliott’s position that § 15-31-511, MCA, does not preclude disclosure of the public tax records requested by Elliott because the public’s right to know, authorized by Article II, section 9 of the Montana Constitution, trumps the confidentiality provisions of the statute. Clearly, the issue of the constitutionality of the statute is properly before this Court.

Despite the fact that this Court held otherwise in *Bozeman Daily Chronicle*, DOR argues that an “otherwise required” clause does not apply to the constitution. DOR cites a 1917 Seventh Circuit Court of Appeals case in support of its argument and attempts to distinguish *Bozeman Daily Chronicle* on the grounds that Elliott has not challenged the constitutionality of a statute. As already shown, however, Elliott *is* challenging the constitutionality of the statute, at least to the extent it *de facto* precludes public disclosure of the state corporate tax records.

Moreover, even if this Court accepts DOR's argument, this Court may still legitimately consider the constitutionality of § 15-31-511, MCA, or even the broader constitutional arguments addressed by *Amicus Curiae*. This Court has repeatedly stated that it reserves to itself the power to examine constitutional issues that involve broad public concerns even if raised for the first time on appeal. *See e.g. Eastman v. Atlantic Richfield Co.* (1989), 237 Mont. 332, 337, 777 P.2d 862, 865 (this Court reserves to itself the power to examine constitutional issues that involve broad public concerns, and even if raised for the first time on appeal, can hear issue if alleged error affects the substantial right of litigant.)

Finally, regardless of the constitutionality of the statute, DOR clearly violated § 15-31-511(4)(a), MCA, when it refused to deliver the corporate tax information to the Legislative Auditor's Office. The statute clearly states that the confidentiality requirements do not apply to information provided to the Legislative Auditor. Section 15-31-511(3)(d), MCA. It was the Legislative Auditor's responsibility to keep any information confidential, not DOR's. Section 15-31-511(4)(a), MCA; see also 26 U.S.C. § 6103(p)(8)(B) (if state law requires disclosure to another state officer or employee, such disclosure is permitted). Thus, even assuming § 15-31-511, MCA, is not unconstitutional, it still did not justify DOR's refusal to provide the requested information to the Legislative Auditor. This is reason alone to order DOR to disclose the information to Elliott.

B. 26 U.S.C. § 6103 does not preclude disclosure

It is not disputed that 26 U.S.C. § 6103(a) protects federal corporate tax records from disclosure. What is disputed, however, is whether this statute protects the confidentiality of the state corporate tax records requested by Elliott. It is DOR and Intervenor's position that federal law somehow confers on corporate tax information a sacrosanct aura that bars DOR from disclosing *all* return information. This position is based on the fallacy that numbers, figures, and calculations retain "federal tax return" protection forever once placed on a federal return.

Simply because a state corporate taxpayer uses the same numbers and performs the same calculations for both a state and federal return, and for the sake of simplicity may prepare its federal return first, does not render the calculated numbers and figures inherently "federal." The information itself comes directly from the taxpayer; the fact that some of the same numbers go into the calculation of state and federal tax liability does not render the state tax return "federal" in character. DOR claims that even the name of the corporation is confidential information pursuant to 26 U.S.C. § 1603(b) which defines "return information." However, the statute provides that a federal "taxpayer's identity" is federal return information. The statute says nothing about a "state taxpayer's identity."

Both DOR and Intervenor claim that 26 U.S.C. § 6103(p)(8)(A) evidences Congress's view that disclosure of that federal tax information, even if contained on a state tax return, is precluded. However, Elliott has only requested Montana tax return information and has specifically requested information contained farther down the return, after state-specific adjustments have been made. Moreover, because Montana has its own unique provisions, such as the recycling deduction noted by certified public account Cynthia Utterback and the requirement that taxpayers "add back" certain income excluded from federal taxable income, federal taxable income cannot even be calculated with confidence based on the state information Elliott has requested. (Tr., 82:19-20, 104:12-22).

It is also worth noting that for many large corporations, the "federal" information used to calculate Montana tax liability is not the same as the information on the federal return filed with the IRS. Corporations affiliated with each other through complicated ownership relationships must follow separate state and federal rules regarding the "filing entity" that submits the return. When the filing entity under state law is different from the entity under federal law, the "federal" information used to compute state tax liability is actually generated solely for use on the state return. Known as a "pro forma" federal return, it is not filed with the IRS and serves the sole purpose of calculating a hypothetical federal taxable income to serve as a basis for state tax liability. Robert P. Strauss, *The*

Political Economy of Business Tax Return Policy, 8 State Tax Notes 873 (2/27/95), § 2.3.3 (attached as Appendix D, 12/15/04, Petitioner's Opening Brief to the Dist. Ct.).

Thus, the relationship between state and federal tax returns is attenuated and variable. Elliott's request for information is limited solely to state tax information located on a state return and conflicts with neither the letter nor the spirit of federal law.

Even assuming that 26 U.S.C. § 6103(a) somehow applied to the state corporate tax information at issue in this case, federal confidentiality provisions for federal tax returns do not preempt the public's right to know under the Montana Constitution. This argument is well elucidated by *Amicus Curiae* in her Brief.

Preemption is disfavored by this Court and there is a presumption against its applicability. *Orr v. State*, 2004 MT 354, ¶ 50, 324 Mont. 391, ¶ 50, 106 P.3d 100, ¶ 50. This presumption against preemption "can only be overcome by evidence of a 'clear and manifest' intent of Congress to preempt state law." *Orr*, ¶ 50 (citation omitted). No such intent is evidenced here.

As *Amicus* described, there are three ways in which state law may be preempted by federal law: express preemption, implied preemption, and conflict preemption. See *Orr*, ¶ 51. No express preemption exists here as there is no specific clause in the federal tax confidentiality provisions providing such. There is no implied

preemption because certainly Congress does not “occupy the field” of taxation. Last, there is no conflict preemption as it is possible to comply with both federal and state law requirements. 26 U.S.C. § 6103(a) requires *federal* return information to be confidential. Elliott is not requesting disclosure of any federal returns. In fact, prior to 1993, state law permitted disclosure of the information Elliott seeks. As this Court has stated, “the federal-state conflict must be actual and unavoidable, not merely possible.” *Favel v. American Renovation and Constr. Co.*, 2002 MT 266, ¶ 48, 312 Mont. 285, ¶ 48, 59 P.3d 412, ¶ 48 (citations omitted). Clearly, there is no actual conflict as state corporate taxpayer information was subject to disclosure for years while at the same time federal corporate taxpayer information was confidential.

The doctrine of preemption is not applicable to this case and does not authorize DOR’s refusal to disclose public information to Elliott.

C. Corporate property interests, claims of trade secret, and claims of privilege do not justify DOR’s refusal to disclose the public tax records to Elliott

DOR makes new and contradictory arguments on appeal. First, DOR admitted to the District Court that it was not asserting a claim of trade secret. (1/31/05, DOR’s Brief to the Dist. Ct., p. 8). However, now on appeal, DOR argues that this is a basis for denying Elliott’s request for public records. (DOR’s Brief at 26-27). Next, DOR’s argument asserting that corporations enjoy a privilege, pursuant to

§ 26-1-810, MCA, against the public dissemination of tax records is a new argument on appeal not advanced by either DOR or Intervenor to the District Court and should not be considered.

It is well settled that a party may not change his or her theory on appeal because it is fundamentally unfair to fault a district court for failing to rule correctly on an issue which it was never given the opportunity to consider. *State v. Henderson* (1994), 265 Mont. 454, 458, 877 P.2d 1013, 1016; *Wright v. Mahoney*, 2003 MT 141, ¶ 14, 316 Mont. 173, ¶ 14, 71 P.3d 1195, ¶ 14. As such, DOR's new arguments on appeal should not be permitted. *See State v. Mallak*, 2005 MT, ¶ 31, 326 Mont. 165, ¶ 31, 109 P.3d 209, ¶ 31.

For the sake or argument, however, there is no evidence in the record to support a claim of trade secret, confidential proprietary information, or other property interest in the information Elliott has requested. Intervenor is an association of Montana taxpayers and has been a party to this lawsuit from the beginning. In fact, it moved to intervene specifically as a representative for Montana corporate taxpayers. (11/4/2004, Mont. Taxpayers' Assoc. Motion to Intervene, p. 2). If a valid argument existed regarding some sort of corporate property interest in the information Elliott seeks, Intervenor had every opportunity to present *evidence* to the District Court supporting such an interest. No evidence of trade secret or other confidential proprietary information was ever presented.

D. A police power exception to the public's right to know is not authorized or implicated in this case

DOR asserts that the right to know is subject to the state's police power. However, there is no authority of this Court delineating such an exception and, admittedly, DOR relies on language taken from cases where the constitutionally provided for privacy exception was at issue. As this Court is aware, the privacy exception in Article II, section 9 is the only textually specified exception to the right to know. If this Court were to announce a "police power" exception to the right to know, such an exception would be subject to strict scrutiny, a standard which is not supported by the record in this case.

It is instructive to compare the flimsy argument for corporate tax secrecy under the strict scrutiny standard to the argument that could be made for the precedents on which DOR relies. Even if one were to accept DOR's re-characterization of this Court's privacy cases as police power cases, cases such as *Worden v. Mont. Bd. Of Pardons & Parole*, 1998 MT 168, 289 Mont. 459, 962 P.2d 1157, and *Day*, do not support secrecy in this case. Protecting people's physical safety from violent attack is plainly a compelling state interest, and this Court found in those cases that confidentiality of certain information—such as prison security plans—served that interest. In each case this Court required that secrecy be strictly limited (narrowly tailored) to that which was necessary for the

purpose. Even accepting DOR's premise that these privacy cases should be re-written cannot justify DOR's conclusion in this case.

DOR contends that such a standard is met because the state's taxing power is a compelling state interest, however, that interest is not at stake in this lawsuit. DOR's police power argument relies on the assumption that the disclosure of the state corporate tax records to Elliott will alter its ability to enter into information exchange agreements with the IRS and other states and therefore its ability to effectively audit taxpayers. This argument is not realistic. Mr. Bucks testified on cross-examination that Montana's participation in the Multistate Tax Commission would *not* be jeopardized as long as the information disclosed was not obtained from the Commission and did not reveal information about its audits. (Tr., 79:4-18). Elliot has requested only that he be permitted to examine information on Montana corporate tax returns, which are submitted by the taxpayer to DOR. Even knowing whether and when an amended return was filed would reveal nothing about whether an audit was performed.

There is also no evidence that the minimal disclosure requested here would have any negative impact on voluntary, non-audited compliance with the tax code. While some have speculated as much, it is at least likely that corporations would be more compliant if they knew their tax payments could be scrutinized by interested members of the public, or that they would use fewer technically legal but

“abusive” tax avoidance strategies if public knowledge might tarnish their public image. *See generally*, Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 *Cap. Univ. L. Rev.* 373, 443-44 (Spring 1993) (attached as Appendix A, 12/15/04, Petitioner’s Opening Brief to the Dist. Ct.).

Further, there is no evidence that, prior to the secrecy statute enactment in 1993, Montana’s ability to collect revenue was affected in any way. There is no reason to believe a different result would occur should DOR be ordered to provide Elliott the public documents he has requested. Thus, the evidence is that blanket secrecy serves no discernable purpose and actually impedes the development of good tax policy. DOR’s refusal to disclose the corporate tax records to Elliot was not narrowly tailored to serve any compelling state interest, especially considering the dearth of evidence that disclosure would actually harm the interest DOR has identified.

III. JOINDER OF EACH CORPORATE TAXPAYER IS NOT REQUIRED

Both DOR and Intervenor argue that each corporate taxpayer must be joined because it is their burden to establish the confidential proprietary nature of the information Elliott seeks. This argument is misplaced. These corporations are not *seeking* protective orders or other protective measures for their tax returns. Thus,

the language in *Great Falls Tribune* is not relevant to the issue of whether each corporate tax payer must be joined. What is relevant, however, is this Court's statement that "[w]hile a party should be joined if his presence is deemed necessary for the according of complete relief, it must be noted that complete relief refers to relief as *between the persons already parties*, and *not* as between a party and the absent person whose joinder is sought." *Mountain West Bank, N.A. v. Mine and Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 32, 314 Mont. 248, ¶ 32, 64 P.3d 1048, ¶ 32 (emphasis added) (citing *Mohl v. Johnson* (1996), 275 Mont. 167, 171, 911 P.2d 217, 220). Thus, joinder of every state corporate taxpayer is not required.

Intervenor argues that these corporations have not sought protective orders because "[n]o one, except DOR, knows who is on the list of taxpayers which was prepared for the Legislative Auditor and Senator Elliot." This is not true. As DOR itself reported, the information given to Elliott for TY 2002 was reported in the *Great Falls Tribune*. (DOR's Response Brief at 7). State corporate tax information was released to the public and yet no corporations whose information was published objected to the disclosure or sought a protective order for any further disclosure.

Furthermore, if DOR had followed the proper procedure for an agency faced with a request for public documents that may be protected from disclosure as outlined in *Worden*, then these corporations would have been notified. It would be


impractical to now require joinder of every corporate taxpayer in Montana, and moreover, it would be unfair. Intervenor has been a party to this lawsuit from the beginning and, as an association that represents Montana corporate taxpayers, it has had every opportunity to notify its corporate members of any possible interests they may have in its outcome. It has also had every opportunity to present *evidence* in support of its argument that these corporate taxpayers have a protectable interest in the information Elliott has requested. It has failed to do so. DOR and Intervenor's attempt to delay the resolution of this case by proposing that all corporate taxpayers must be joined as parties should not be permitted.

CONCLUSION

Nothing bars disclosure of the public information requested by Elliott in this case. The Court should reverse the District Court's denial of Elliott's petition to obtain public documents and order DOR to provide the state corporate tax information requested by Elliott to Elliott himself or to the Legislative Auditor's Office.

Respectfully submitted this 28th day of October, 2005.

MELOY TRIEWELER



PETER MICHAEL MELOY
ROBIN A. MEGUIRE

CERTIFICATE OF COMPLIANCE

I certify that the foregoing document is double-spaced in a proportionately spaced font, 14 point-size, and that it contains 3,748 words according to the Word Count feature in the word processing software.



PETER MICHAEL MELOY
ROBIN A. MEGUIRE

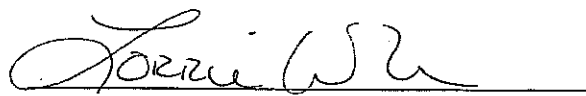
CERTIFICATE OF SERVICE

This is to certify that on the 28th day of October, 2005, a true and exact copy of the foregoing document was served by U.S. mail, postage prepaid, and by facsimile on opposing counsel at:

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