

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. 05-336

JIM ELLIOTT,

Petitioner/Appellant,

vs.

THE MONTANA DEPARTMENT OF REVENUE
Respondent/Respondent,

and

MONTANA TAXPAYERS'
ASSOCIATION,

Intervenor.

BRIEF OF AMICUS CURIAE

On Appeal from the Montana First Judicial District Court, Lewis and Clark County,
The Honorable Thomas Honzel, Presiding

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STATEMENT OF THE ISSUES

Amicus appreciates the Court allowing her to submit the following brief which is limited to a discussion of the following two issues of importance to the jurisprudence of Montana Constitutional law.

1. Whether the district court erred by holding that Mont. Const. art. II, § 9 was preempted the confidentiality provision relating to federal tax returns because the Montana Department of Revenue (DOR) has incorporated, as a matter of administrative convenience, federal tax return information and procedures into the state tax return?

2. Whether the district court erred by failing to interpret § 15-13-551, MCA, in a manner consistent with Mont. Const. art. II, § 9?

STATEMENT OF THE CASE AND FACTS

Amicus defers to and relies upon the statement of the case and facts contained in the brief of Appellant Jim Elliott.

SUMMARY OF ARGUMENT

The district court erred by holding that Mont. Const. art. II, § 9, Montana's right to know provision, was preempted by application of the federal statute controlling confidentiality of *federal* tax information. This matter concerns access to state corporate tax information, not federal tax information. That the state

agency responsible for administration of the state tax uses federal tax procedures as an administrative convenience in calculating the state tax does not trigger federal preemption principles. To hold otherwise would seriously damage the breadth and strength of the protections guaranteed by the Montana Constitution. The Montana Constitution, not a federal statute defining release of federal tax information, controls release of state tax information.

Mont. Const. art. II, § 9 controls the interpretation and validity of § 15-31-511, MCA, on the confidentiality of corporate license tax information. The corporate tax information requested by Appellant is properly disclosed under § 9 because corporations do not have a constitutionally protected property interest in the tax information requested. Even if the tax information were a constitutionally protected property interest, in the balancing between the people's right to know and the minimal corporate interest in maintaining the secrecy of the tax information, the people's right to know prevails.

ARGUMENT

I. THE DISTRICT COURT ERRED BY RELYING UPON FEDERAL PREEMPTION PRINCIPLES.

The district court held that “[b]y tying its corporate income tax system to the federal system, Montana has subjected itself to the requirements of federal law.”

D. C. Doc. 34, Memorandum and Order, at 10. The district court then reviewed 26 U.S. C. §6103(p)(8) which prohibits sharing by the federal government of any information about a federal tax return with officials of any State unless the State adopts a confidentiality provision. Montana adopted such a confidentiality provision in 1993 by enacting § 15-31-511, MCA. Also, as a matter of administrative convenience and convenience for corporate taxpayers, DOR allows the state tax return to begin with information taken from line 28 of the federal tax return and incorporates other types of federal tax procedures and information into DOR's form for reporting state corporate license tax returns. Tr. At 56. The district court apparently held that because Montana had incorporated use of the federal tax form as a matter of administrative convenience, federal preemption prevented the disclosure of the information requested by Petitioner Elliott.

Preemption is disfavored and, in all cases where preemption is claimed, this Court begins with the presumption that the powers of the State has not been superseded by the federal act unless there is a clear and manifest purpose of Congress. Orr v. State, 2004 MT 354, ¶ 50, 324 Mont. 391, ¶ 50, 106 P.3d 100, ¶ 50. There are three ways in which a state law may be superseded by federal law. First, there may be express preemption when there is an express clause that state law will not apply in the area governed by the federal statute. Second,

congressional intent may be implied where it is reasonable to conclude that Congress intended to “occupy the field” by such comprehensive regulation that there is no room for supplementary state regulation. Lastly, conflict occurs when it is impossible to comply with both federal and state law because the state law stands as an obstacle to accomplishment and execution of the federal law. Orr, ¶ 51.

Preemption principles do not apply in this case. Section 6103 expressly addresses only the release of federal tax information, not state tax information. Nor is there any implication that the federal tax code precludes the release of state tax information. Section 6103 clearly applies only to federal tax information and does not preempt release of state tax information.

Only when a state decides to use federal tax return information as a matter of convenience in administering its own state tax is federal tax information incorporated into a state tax return. There is no requirement or mandate, however, that federal tax calculations or procedures be used in calculating state corporate tax. Indeed, as recognized by the district court, six states have allowed for disclosure of state tax information and not run afoul of the federal tax

confidentiality requirement.¹ D.C. Doc. 34, Mem & Order at 13. That there are six states which allow release of state tax information is significant. It means that the individual states have the discretion to calculate their state corporate tax returns without resorting to use of federal tax information or being affected by the confidentiality requirements of federal tax return information.

Because federal law does not require the use of federal tax procedures in calculating state corporate income or license tax, administration of the state corporate license tax is wholly within the administrative discretion of state officials. Indeed, Montana allowed release of the corporate tax information requested by Petitioner Elliott prior to the enactment of § 15-31-511, MCA, in 1993, apparently without any concern about confidentiality of the information.

Federal issues are injected into this matter only because DOR adopted federal procedures and calculations as a matter of administrative and taxpayer convenience. DOR may not now use the federal tax return information or procedures in the administration of the state corporate license tax if use of that information precludes the public's right to know. The Montana Constitution

¹The six states are: Massachusetts, M. G. L. A., ch. 62c, § 83(c)(2002); West Virginia, W.Va. Code § 11-10-5s(b)(1)(2003); Arkansas, A.C.A. § 26-18-303(b)(11) (2002); North Carolina, N.C. Gen. Stat. § 105-129.6(b)(2003); Wisconsin, § 71.78 (2002); see also "Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives, Lenter, Slemrod & Shackelford, 56 Nat. Tax Journal 4 (Dec. 2003).

necessarily controls the actions of state officials in enforcing and administering state law. State officials cannot be allowed to abrogate state constitutional protections by reference and incorporation of federal procedures. Such incorporation of less protective federal procedures by state officials is an unconstitutional act prohibited by the Montana Constitution.

The unconstitutionality of the actions by DOR is apparent when analogized to a different scenario, involving Montana's right of privacy provision and its enhanced protections with to protections against unreasonable searches and seizures. This Court has repeatedly held that Mont. Const. art. II, §§ 10 and 11, Mont. Const., afford greater protections to Montana citizens in the enforcement of state criminal laws than those protections provided by the United States Constitution. For example, in State v. Bullock, 227 Mont. 361, 901 P.2d 61 (1995), this Court held that the open fields doctrine, recognized as an exception to the warrant requirement under federal law, would not be allowed in Montana because of the enhanced right of privacy vested in Montana citizens. If the Montana Department of Justice nonetheless adopted federal search procedures as a matter of administrative convenience in cooperating with federal authorities, any search based upon federal agency guidelines in the enforcement of state law would be unconstitutional under the Montana Constitution. The adoption of federal

procedures by the state agency could not be considered to “preempt” Mont. Const. art II §§ 10 and 11. State officials whose duty is to enforce state law may not adopt the federal procedures that violate the Montana Constitution in the first instance, and then claim federal preemption.

DOR’s adoption of federal tax procedures violates the Montana Constitution to the extent that the federal confidentiality provisions violate the public’s right to know in Art. II, § 9. DOR’s exercise of administrative discretion is obviously bound by the provisions in the Montana Constitution, and it may not do indirectly what is prohibited directly. Just as the DOR or the Montana Legislature may not directly adopt a policy, rule or statute contrary to the Montana Constitution, they may not by reference indirectly adopt a policy, rule or statute contrary to the Montana Constitution, even if the source of the policy, rule or statute is federal law.

The district court therefore erred by deferring to the federal tax statute on confidentiality of tax information and effectively preempting the operation of the public’s right to know.

II. SECTION 15-31-511, MCA, MUST BE INTERPRETED IN TERMS OF THE RIGHT TO KNOW PROVISION IN THE MONTANA CONSTITUTION.

Section 15-31-511(1), MCA, provides “[e]xcept as provided in this section.

. . . or as otherwise provided by law” it is unlawful to divulge corporate license tax information. This Court has previously recognized that Art. II, § 9, Mont. Const. is included in the phrase “as otherwise provided by law” and may provide a legal basis for release of otherwise confidential information. See Allstate Ins. Co. v. City of Billings, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989).

The district court discounted the Allstate case as precedent because it dealt with balancing of the right of privacy provision in Art. II, § 10 with the right to know provision. D.C. Doc. 34, Mem & Ord at 12-13. That the Allstate case interpreted the right of privacy provision makes it no less significant or persuasive as precedent in this matter. Allstate recognized that the entire statute on the confidentiality of criminal justice information need not be invalidated under the right to know provision if it were recognized that the public’s right to know was an exception to the statute. If the reasoning in Allstate is not applied here, then §15-31-511, MCA must be declared unconstitutional.

Section 15-31-511, MCA, must be read in terms of the right to know because there is no constitutional interest that protects corporate tax information. The right to know provision in Art. II § 9 may be circumscribed only when the right against which it is balanced is “weighty and compelling.” State ex rel Smith v. District Court, 201 Mont. 376, 383, 654 P. 982, 986 (1982). Such “weighty

and compelling” rights must be constitutionally based, such as the right to privacy or, as in Smith, the right to an impartial jury. Section 15-31-511, MCA, does not embody a constitutionally protected interest.

Respondent DOR and the Intervenor Montana Taxpayers Association argued in the court below that corporate tax information was a “property” interest such as a trade secret or confidential business information. Notably, however, there was no evidence submitted by DOR or the Intervenor to support this argument. Consequently, the district court made no finding or conclusion that the record supported the conclusion that corporate tax information necessarily contains a legally recognizable, much less a constitutionally protected, “property” interest. The district court did not find that the corporate tax information was either a trade secret or confidential business information. Indeed, the district court stated, “A good argument can be made *the information does not constitute a property right* and that requiring disclosure would not constitute a ‘taking’ of property.” D.C. Doc. 34, Mem & Ord at 14 (Emphasis added).

The district court was concerned, however, that the presence of federal and state statutes which treated corporate tax information as confidential reflected a congressional or legislative recognition that corporate tax information contained a “property interest”. It does not necessarily follow, however, that because section

15-31-511, MCA, provides for the confidentiality of corporate tax information, the Montana Legislature believed there was a property interest involved in such information. At the time the confidentiality provision was adopted, there still existed a corporate right of privacy. It could just as readily be thought that the Legislature was acknowledging a corporate right of privacy in 1993, or that the Legislature adopted such a provision simply as a matter of policy without consideration of the recognition of a property interest. Nonetheless, the legislative motivation behind section 15-31-511, MCA, is speculative and largely immaterial.

In reading a property interest into section 15-31-511, MCA, the district court was apparently troubled by and trying to reconcile language from this Court's decision in Great Falls Tribune v. Montana Public Service Comm'n, 2003 MT 359, 319 Mont. 38, 82 P.3d 876. The district court quoted the following from the Great Falls Tribune case:

While non-human entities do not enjoy privacy rights under the right of privacy provision of the Montana Constitution, nothing in Article II, Section 9 requires disclosure of trade secrets and other confidential proprietary information where the data is protected from disclosure in the federal or state constitutions or by *statute*.

D.C. Doc. 34, Mem & Ord at 8-9, quoting Great Falls Tribune, ¶ 39 (Emphasis added). The district then reasoned that because corporate tax information was considered confidential under a "statute," the statute should prevail over the

public's right to know.

The quote from Great Falls Tribune was misconstrued and misapplied by the district court. The "statute" referred to in the quote could not be a "statute" that runs contrary to the Montana Constitution. The reference to "statute" in the above quote was made in the context of a discussion of statutes defining legally recognized property interests, such as the statutes on trade secrets. There is no such statute defining corporate tax information as a property interest.

Even if a property interest were read into section 15-31-511, MCA, it does not follow that disclosure of the corporate tax information would constitute a "taking" under due process. It is well settled that a state may adopt reasonable restrictions on private property and not every injury to property constitutes a "taking" in the constitutional sense. Pruneyard Shopping Center v. Robins, et alia, 447 U.S. 74, 82 (1980). The United States Supreme Court has recognized "in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example." Penn Central Transportation v. New York City, 438 U.S. 104, 124 (1978). Thus, even if corporate tax information involves a property right it is not necessarily a *constitutionally protected* property interest. Nothing in the record supports the conclusion or finding that any interest associated with

corporate tax information is so real, substantial and definable that its disclosure would constitute a “taking.”

As such, there is no real constitutional property interest that effectively counterbalances the public’s right to know in this case. The public’s right to know may be abrogated only by a competing constitutional interest that is “weighty and compelling.” No such weighty or compelling interest is involved in the confidentiality of corporate tax information and the public’s right to know prevails.

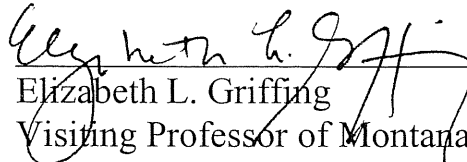
CONCLUSION

Federal preemption principles do not operate here to curtail state constitutional protections. If preemption principles were allowed to dominate this case, the breadth and strength of the protections in the Montana Constitution would be placed in great jeopardy. Unnecessarily restrictive federal procedures could be adopted by state officials that would effectively circumvent the greater liberties, freedoms and protections afforded by the State Constitution.

Also, §15-31-511, MCA, must be read in terms of the public’s right to know. This section does not create a constitutionally protected property interest in corporate tax information, as thought by the district court. As such, the public’s right to know is not counterbalanced by any competing constitutional interest and

mandates release of the information.

Respectfully submitted this ⁷⁵15 day of August, 2005.


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CERTIFICATE OF SERVICE

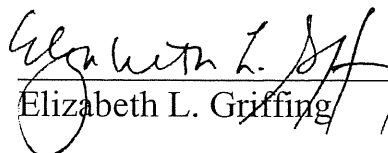
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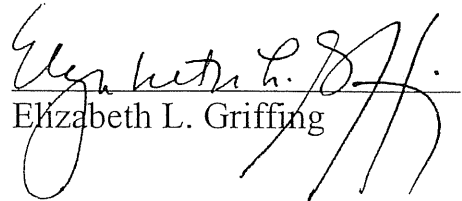
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this amicus brief is printed proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count is not more than 5,000 words, not averaging more than 280 words per page.


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