

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 05-336

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

INTERVENOR'S RESPONSE BRIEF

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY, Cause No. CDV-2004-777

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STATEMENT OF ISSUES

1. Does 26 U.S.C. § 6103 preempt the State of Montana from publicly disclosing confidential income tax return information?
2. Do corporate income tax returns constitute confidential proprietary information entitled to protection against public disclosure under federal and state statutes, specifically, 26 U.S.C. § 6103(a) and section 15-31-511(1), MCA?
3. Are the corporate taxpayers whose confidential income tax return information is at risk of public disclosure entitled to an opportunity for hearing prior to any public disclosure of their confidential tax return information?
4. Are income tax returns “public documents” within the meaning of Art. II, sec. 9, of the Montana Constitution?

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the First Judicial District denying the petition of the Appellant, State Senator Jim Elliott (Senator Elliott), for the public disclosure of confidential tax return information submitted to the Respondent Department of Revenue (DOR) under the compulsion of law. The District Court held that the State of Montana was federally preempted from publicly disclosing such information by 26 U.S.C. § 6103(a), which expressly prohibits a state from disclosing federal income returns or federal return information, including taxpayer identity. Slip Op. at 9-11. The District Court also held that the confidential income tax return information sought by Senator Elliot

constituted confidential proprietary information protected against public disclosure by both Montana and federal law, in accordance with this Court's holding in *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, 319 Mont. 38, 82 P.2d 876. Slip Op. at 9. Finally, the District Court held that the affected taxpayers were entitled to be heard before their confidential income tax return information could be disclosed. Slip Op. at 15.

FACTS

In early 2004, Senator Elliott demanded from DOR, through the office of the Legislative Auditor, confidential income tax return information for the top 500 corporations doing business in Montana in 2002, ranked in terms of sales. Tr. 15, 33. DOR provided the requested confidential income tax return information to the Legislative Auditor, who in turn provided it to Senator Elliott in the form of spreadsheets with the identifying names removed. Petition ¶ 6; Tr. 15-17, 33. Senator Elliott publicly disclosed some of the confidential information in a newspaper column and newspaper articles that were published in newspapers across Montana. Petition ¶ 8.

Senator Elliott then asked for additional confidential income tax return information from DOR through the office of the Legislative Auditor. Petition ¶ 9. Because Senator Elliott had publicly disclosed some of the confidential tax information he had earlier received, DOR would not provide the requested information to the Legislative Auditor unless it agreed to maintain its confidentiality in accordance with section 15-31-511(4), MCA. Petition ¶ 9; Tr. 33-34. When the Legislative Auditor refused to agree to maintain the

confidentiality of the income tax return information being requested, DOR refused to provide it. Petition ¶ 9. Senator Elliott then asked DOR to provide him directly with the confidential income tax information he was requesting. Petition ¶ 10. DOR refused because of Senator Elliott's previous public disclosures of confidential income tax return information that it had provided to him through the Legislative Auditor. Tr. 33-34.

Senator Elliott demands, for the corporations he is targeting, the public disclosure of their names, sales in Montana, total sales, Montana property, total property, Montana payroll, total payroll, apportionment factor, adjusted taxable income, Montana taxable income before net operating loss, Montana taxable income, Montana tax liability, and the date the tax return was received. Petition ¶ 11.

Following an evidentiary hearing, the District Court entered its order denying Senator Elliott's request for the public disclosure of the confidential income tax return information he was demanding. Based upon the undisputed evidence at hearing, the District Court determined that the federal return is incorporated into the Montana return. Tr. 85-92; Slip Op. at 11. Not only is the federal return physically attached to the Montana return, but most of the entries on the Montana return are simply taken from the federal return. *Id.* Accordingly, the District Court held that federal law, specifically, 26 U.S.C. § 6103(a)(2), barred the public disclosure of the confidential income tax return information demanded by Senator Elliott. It also held that the confidential income tax return information sought by Senator Elliot constituted confidential proprietary information protected

against public disclosure by both Montana and federal law under the standard established by this Court in *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, *supra*, and that the affected taxpayers were entitled to be heard before their confidential income tax return information could be disclosed.

SUMMARY OF ARGUMENT

Federal law, specifically 26 U.S.C. § 6103(a)(2), expressly prohibits an employee of the State of Montana from publicly disclosing federal income tax return information. Federal tax return information is defined by federal law, and includes the identity of the taxpayer. 26 U.S.C. § 6103(b)(2). Montana has chosen to establish a state income tax that is directly tied to and interwoven with the federal income tax. Federal law mandates that a state like Montana, which requires attachment of the federal return to the state return form, enact a statute which protects against the disclosure of federal tax return information, including that information reflected on the state return form. 26 U.S.C. § 6103(p)(8). Accordingly, the District Court was correct in concluding that the State of Montana is federally preempted from allowing the public disclosure of confidential income tax return information, including taxpayer identity, as demanded by Senator Elliott.

Furthermore, this Court has specifically held that Art. II, sec. 9, of the Montana Constitution does not require the disclosure of confidential proprietary information if it is protected from disclosure by state or federal statute or constitution. *Great Falls Tribune* 2003 MT 359 at ¶ 38. Both federal and state statutes specifically protect against the disclosure of corporate income tax return

information. 26 U.S.C. § 6103(a); Mont. Code Ann. § 15-31-511(1). The District Court was therefore correct in its conclusion that these statutes impose constitutionally acceptable limits on the public disclosure of confidential income tax return information.

The District Court was also correct when it concluded that indispensable parties, namely those corporate taxpayers whose confidential tax return information was at risk of public disclosure, had not been given an opportunity to protect against the public disclosure of their confidential information. The District Court determined, “because the burden is on the taxpayer to establish the confidential proprietary nature of the information, the taxpayer should be given the opportunity to object before DOR or a court were to allow disclosure.” Slip Op. at 15.

It would have been unnecessary for the District Court to reach the federal preemption question, or the issue of indispensable parties, if it had correctly determined that income tax records were not public documents within the meaning of Art. II, sec. 9 of the Montana Constitution. By its express terms, the fundamental purpose of Art. II, sec. 9 is to allow the citizens of this state an opportunity to witness the deliberations of their government. To be a public document within the meaning of Art. II, sec. 9, the document must reflect or relate to the deliberations of government. The framers of the Montana Constitution expressly disavowed the notion that income tax records would be public documents within the meaning of Art. II, sec. 9: “The committee intends by this provision that the deliberations and resolution of all public matters must be subject

to public scrutiny. . . . I think it has come up time after time that we don't intend to open up the state income tax records." Mont. Const. Convention, Verbatim Transcript at 1670.

ARGUMENT

I. 26 U.S.C. § 6103 FEDERALLY PREEMPTS THE STATE OF MONTANA FROM PUBLIC DISCLOSURE OF CONFIDENTIAL INCOME TAX INFORMATION.

A. Montana has chosen to tie its state income tax to the federal income tax.

The State of Montana has chosen to establish a state income tax system that is inextricably tied to, and interwoven with, the federal income tax system. For example, Montana law defines the basic term "gross income" on the state tax return to mean: "all income recognized in determining the corporation's gross income for federal tax purposes." Mont. Code Ann. § 15-31-113(1) (emphasis added). Montana statutorily requires corporations subject to Montana's state income tax to provide a copy of their federal income tax return to DOR. Mont. Code Ann. § 15-31-506. In Montana, a corporation must file its federal income tax return as an attachment to its state income tax return. Tr. 44 ; Montana Taxpayers' Association (MTA) Ex. 2. Further, most of the entries on the Montana corporate tax form are taken directly from the attached federal income tax return. Tr. 85-92; MTA Ex. 2 and 3. (MTA Ex. 2 and 3 are attached as Appendices 1 and 2.)

B. 26 U.S.C. § 6103(a) and § 6103(p)(8) prohibit the State of Montana from disclosing federal tax return information that is contained on a state tax return form.

Federal law expressly prohibits an employee of the State of Montana from publicly disclosing federal income tax returns or federal return information:

(a) General rule. Returns and return information shall be confidential, and except as authorized by this title---

...

(2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (1)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section.

...

shall disclose any return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.

26 U.S.C. § 6103(a). Federal law broadly defines the term “return information” to include such basic information as the taxpayer’s identity and the nature, source, or amount of its taxable income:

(2) Return information. The term “return information” means---
(A) a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

26 U.S.C. § 6103(b)(2). These provisions are specifically intended “to regulate and restrict access to tax returns and return information by the many government bodies and agencies that routinely had access to such information under former section 6103.” *Chamberlain v. Kurtz*, 589 F.2d 827-835-6 (5th Cir. 1979). *See also Church of Scientology of California v. Internal Revenue Serv.*, 484 U.S. 9, 16 (1987) (“One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than the [Internal Revenue Service]”).

A special federal requirement applies when a state requires attachment of the federal income tax return to the state income return:

- (8) State law requirements.** (A) Safeguards. Notwithstanding any other provision of this section, no return or return information shall be disclosed after December 31, 1978, to any officer or employee of any State which requires a taxpayer to attach to, or include in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, unless such State adopts provisions of law which protect the confidentiality of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return.

26 U.S.C. § 6103(p)(8)(emphasis added). Accordingly, when Montana chose to require attachment of the federal return, it obligated itself to protect against the public disclosure of federal return information reflected on the state return form.

Faced with these clear expressions of binding federal law, and the undisputed facts, the District Court correctly held that “by tying its corporate tax system to the federal system, Montana has subjected itself to the requirements of federal law.” Slip Op. at 10. The District Court necessarily held that the confidential tax information requested by Senator Elliott included federal return

information as defined by federal law, including the identity of the corporate taxpayer. *Id.*

C. 26 U.S.C. § 6103 federally preempts the State of Montana from disclosure of federal tax return information, including the taxpayer’s identity.

Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the constitution and laws of the United States are the supreme law of the land, and all conflicting state provisions are without effect. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Although preemption is not easily favored, this Court has recognized that “the purpose of Congress ‘is the ultimate touchstone’ in every preemption case.” *Sleath v. West Mont Home Health Svc.*, 2000 MT 381, ¶ 23, 304 Mont. 1, ¶ 23, 16 P.3d 1042, ¶ 23 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Congressional intent may be found explicitly in the statute’s language or implicitly in its structure and purpose. *Sleath*, 2000 MT 381, ¶ 24 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). “The claim that a federal statute controls is essentially an exercise in construing the federal statute. Once its meaning has been determined, application of the Supremacy Clause poses no novel constitutional problem.” 17A C. Wright, A. Miller, and E. Cooper § 4242 at 34 (2d ed. 1988).

This Court has recognized the three ways in which federal law may preempt state law. First, state law may be superseded by “express preemption” when Congress has included a specific preemption clause providing that state law will not apply in the area governed by the federal statute. *Vitullo v. IBEW, Local 206*, 2003 MT 219 at ¶ 14, 317 Mont. 142, 146, 75 P. 2d. 1250. Second, “field

preemption” exists when the scheme of federal regulation “is so pervasive or comprehensive that it is reasonable to infer that Congress intended to ‘occupy the field’ and leave no room for supplementary state regulation.” *Id.* Finally, “conflict preemption” manifests itself as an inability of state law to comply with federal law or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.*

Conflict preemption may be found even where there is neither express preemption nor implied field preemption. *Id.* Thus, in *Vitullo*, the court found the plaintiff union member’s wrongful discharge claim preempted by the federal Labor Management Reporting and Disclosure Act because application of the state’s wrongful discharge act would “interfere[] with the longstanding practice of union patronage” contrary to the overall purpose and objective of the federal law and “in direct conflict with the [unions’] democratic process that Congress sought to protect.” *Id.* at ¶ 27. Where the state law would frustrate the goals and objectives the federal statute seeks to promote, it is in “direct conflict” with the federal law and is preempted. *Id.* at ¶ 31.

Senator Elliott attempts to side step the entire federal preemption issue by blandly asserting that he “is not seeking any information contained in a federal return.” Elliott Brief at p. 15. His bland assertion is untrue. The information he seeks, such as taxpayer identity and taxable income, constitutes federal return information taken directly from the federal return and transferred to the state return form. Tr. 85-92; MTA Ex. 2 and 3.

Amicus, recognizing that what Senator Elliot has said is not true, takes a different approach - she asserts that it was unconstitutional for the State of Montana to tie its state income tax to the federal income tax and use federal return information. Amicus Brief at pp. 5-7. She argues, without factual support of any kind, that “DOR adopted federal procedures and calculations as a matter of administrative and taxpayer convenience.” *Id.* at 5. However, it was Montana's Legislature that enacted the system whereby Montana tied its state income tax to the federal income tax. Mont. Code Ann. §§ 15-31-113, 15-31-114, 15-31-506, 15-31-509. At no time was it contended in the District Court proceedings that it was unconstitutional for either DOR or the Legislature to require the attachment of the federal return to the state return. This Court does not consider, for the first time on appeal, issues not raised in the District Court. *Paulsen v. Flathead Conservation Dist.*, 2004 MT 136, ¶ 37, 321 Mont. 364, 91 P. 3d 569.

The District Court correctly concluded that the State of Montana is federally preempted from the disclosure of federal income return information, such as taxpayer identity and taxable income, included on the state return form. The State of Montana has chosen to tie its state income tax system to the federal income tax system. The Montana requirement that a corporation file its federal income tax return as part of its state return can not exist without compliance with 26 U.S.C. § 6103(a)(2) and § 6103(p)(8), which requires a state confidentiality provision such as section 15-31-511, MCA.

D. Senator Elliott’s Interpretation of section 15-31-511, MCA, directly conflicts with the requirements of 26 U.S.C. § 6103.

Senator Elliott urges a tortured interpretation of section 15-31-511, MCA, that would render the statute meaningless, while simultaneously violating the express provisions of 26 U.S.C. § 6103.¹ Specifically, although Senator Elliott admits that section 15-31-511, MCA, “provides for the confidentiality of corporate tax information,” he declares that “this statute cannot preclude disclosure of records which the Constitution requires be open to public inspection.” Elliott Brief at p. 17. Since Senator Elliott contends that corporate tax records are public documents which must be publicly disclosed, no documents would actually be protected against public disclosure under his interpretation of section 15-31-511, MCA. In effect, Senator Elliott urges a construction of the statute which renders it ineffectual and meaningless. It is well established that “this Court pays particular heed to the caveat that neither statutory nor constitutional construction should lead to absurd results, if reasonable construction will avoid it.” *Powder River County, et al. v. Department of Revenue*, 2002 MT 259 ¶ 70, 312 Mont. 198, 220, 60 P. 3d. 357.

In addition to eviscerating the confidentiality requirements contained in section 15-31-511, MCA, Senator Elliott’s reading of the statute is in “direct conflict” with federal law requirements. *Vitullo*, 2003 MT 219 at ¶ 31. 28 U.S.C. § 6103(p)(8), requires the State of Montana to adopt a statute to protect the confidentiality of, *inter alia*, any federal return information that is reflected on a

¹Amicus make the same argument. Amicus Brief at pp. 7-8.

state tax return. 28 U.S.C. § 6103(a)(2), prohibits an employee of the State of Montana from publicly disclosing such return information. In this case, the District Court specifically found that most of the corporate tax information sought by Senator Elliott was taken directly from the federal return. Slip Op. at p. 11. Additionally, most of the “state specific information” is really derivative from the federal information, and revealing it effectively reveals the protected federal return information. For example, Montana taxable income is the federal taxable income apportioned to Montana. If the Montana apportionment factor and the Montana taxable income is revealed, as demanded by Senator Elliott, federal taxable income has been effectively revealed.

There is simply no way that Senator Elliott’s interpretation of section 15-31-511, MCA, can co-exist with the express federal requirements contained in 26 U.S.C. § 6103(p)(8) and § 6103(a)(2). Accordingly, federal law preempts both Senator Elliott’s reading of Art. II, sec. 9 of the Montana Constitution and his reading of section 15-31-511, MCA.

E. No Other States Allow for the Public Disclosure of the Type and Breadth of Confidential Corporate Tax Information Sought by Senator Elliott.

In her argument against federal preemption, Amicus argues: “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.” Amicus Brief at 4-5. No one ever contended in the proceedings below that Montana had to tie its

state income tax to the federal definition of gross income and the federal tax return. Montana chose, legislatively, to do so. More to the point, the information cited by Amicus is misleading. None of the five states she cites allows the broad public disclosures demanded by Senator Elliott in this case.²

For example, although the State of Massachusetts requires the publication of a report of information contained on corporate tax returns, the applicable statute requires that the report “shall be available for public inspection only after the state secretary has expunged the name of the taxpayer and the location, including street address, of the taxpayer’s principal office.” Mass. Gen. Laws, ch. 62C, § 83(a)(I).

The West Virginia state corporate tax return contains a provision addressing the confidentiality of tax information, as follows:

CONFIDENTIAL INFORMATION. Tax information which is disclosed to the West Virginia State Tax Department, whether through returns or through department investigations, is held in strict confidence by law

2004 West Virginia Combined Corporation Net Income/Business Franchise Tax Instructions and Forms, p. 8, set forth in Appendix 3. Although West Virginia allows for the publication of name, address, and amount of tax credit asserted by each taxpayer, the amount of tax credit is published by broad category (i.e. “More than \$1.00, but not more than \$50,000”), and all other tax information is protected as confidential. W.Va.Code § 11-10-5s.

²Although Amicus claimed six states allowed public disclosure of state return data, she identified only five states. Amicus Brief, p. 5, fn. 1.

Arkansas statutorily declares the state tax records and files of the director of the Department of Finance and Administration to be confidential and privileged, and specifically exempt from disclosure pursuant to the Freedom of Information Act. Ark. Code Ann. § 26-18-303(a)(2)(A)(I)-(ii) and (B). Although Arkansas law contains a narrow exception for disclosure of state-based tax credits and rebates, the disclosure is not allowed if “such information would give an advantage to competitors or bidders or if such information is exempt from disclosure under any other provision of law.” Ark. Code Ann. § 26-18-303(b)(11).

The State of North Carolina requires the publication of an annual report containing information related to tax credits; however, this information is specifically limited to state-created tax credits adopted by the state legislature which have no relation to the federal tax scheme. N.C. Gen. Stat. § 105-129.6(c) (limiting the report to credits “allowed in this Article”).

Finally, the State of Wisconsin has adopted a statute that prohibits any person from divulging information derived from a state tax return. Wis. Stat. § 71.78(1). The State does allow a state resident to request limited state-specific tax information, including “the net Wisconsin income tax, Wisconsin franchise tax or Wisconsin gift tax reported as paid or payable in the returns filed by any individual or corporation, and any amount of delinquent taxes owed.” Wis. Stat. § 71.78(2). The state will not disclose such information, however, until the person seeking the information signs a statement setting forth the person’s address and reason for making the request and indicating that the person understands that such information may not be divulged, published, or otherwise disseminated. Wis. Stat.

§ 71.78(2) and (3). The State notifies the taxpayer about whom information has been requested within twenty-four hours of the request. *Id.*

Contrary to Amicus's representations, the five states she cites do not allow for the type of broad public disclosure of corporate tax information sought by Senator Elliott. Any interpretation of section 15-31-311, MCA, that allows for such disclosure would expressly violate the provisions of 26 U.S.C. § 6103.

II. CORPORATE TAX RETURNS CONSTITUTE CONFIDENTIAL PROPRIETARY INFORMATION PROTECTED FROM DISCLOSURE BY BOTH SECTION 15-31-311, MCA, AND 26 U.S.C. § 6103.

Although this Court has held that a corporation does not have an individual right to privacy under Art. II, sec. 10 of the Montana Constitution, it has recognized that a corporation may still be protected from disclosure of trade secrets and other confidential proprietary information by federal or state constitutions or by statute. *Great Falls Tribune v. Montana Pub. Serv. Comm'n*, 2003 MT 359, ¶ 39, 319 Mont. 38, ¶ 39, 82 P.2d 876, ¶ 39. This Court specifically stated:

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 elsewhere in the federal or state constitution or by statute.*

Great Falls Tribune, 2003 MT 359, ¶ 39 (emphasis added). Indeed, if Senator Elliott convinces this Court that non-human entities are not entitled to maintain the confidentiality of their income tax records, the income tax returns filed by every partnership, trust, limited liability company, and corporation (whether or not publicly traded) become a matter of public record.

Senator Elliott takes issue with this Court's holding in *Great Falls Tribune*, and argues it was wrong to the extent it held that a state statute could operate to protect confidential corporate information from public disclosure. Elliott Brief at pp. 10-11. As the District Court recognized, however, *Great Falls Tribune* held just that – a corporation's confidential proprietary information could be protected from public disclosure by either state or federal constitution or state or federal statute. *Great Falls Tribune*, 2003 MT 359, ¶ 39 (“For example, a non-human entity may enjoy confidentiality of its property interests under Montana statutory law, such as the Uniform Trade Secrets Act . . .”). In fact, in *Great Falls Tribune*, this Court remanded the case to the PSC for a determination of whether a state statute – the Uniform Trade Secrets Act – protected against disclosure the confidential documents to which the media sought access in that case.

The Montana Taxpayers Association believes that the Court actually meant what it said. The Court in the *Great Falls Tribune* case was prescient -- it foresaw instances where state confidentiality statutes had to be respected. In the instant case, section 15-31-511, MCA, had to be enacted in order for the State of Montana to comply with 26 U.S.C. § 6103. Moreover, even Senator Elliott admits that the *Great Falls Tribune* reference to federal statutes must be correct. Elliott Brief at pp. 10-11. 26 U.S.C. § 6103 is just such a federal statute.

III. THE INDIVIDUAL CORPORATE TAXPAYERS ARE INDISPENSABLE PARTIES WHO SHOULD HAVE BEEN PROVIDED THE OPPORTUNITY TO OBJECT TO THE DISCLOSURE OF TRADE SECRETS OR OTHER CONFIDENTIAL PROPRIETARY INFORMATION.

In *Great Falls Tribune*, this Court placed upon the corporate entity the burden of seeking protection from disclosure of trade secrets or confidential proprietary information.

[D]ocuments filed by corporate entities with public agencies . . . are presumptively available for access by the public under Montana's Constitution. The burden rests with the filing entity to establish prima facie proof that the information is a discernible property right entitled to protection. When the state of Montana obtains access to private property in the form of genuine trade secrets or other confidential proprietary information by compelling its production with a governmental regulatory agency . . . the information's status as a trade secret or confidential proprietary information remains unchanged.

Great Falls Tribune, 2003 MT 359, ¶ 60 (emphasis added). The District Court correctly recognized that Senator Elliott's blanket request for confidential tax return information from hundreds of corporate taxpayers created an inherent problem in that it did not allow the affected taxpayers notice and opportunity to seek individual protection for what could be a trade secret or confidential proprietary information. Slip Op. at p. 15 ("Finally, because the burden is on the taxpayer to establish the confidential proprietary nature of the information, the taxpayer should be given the opportunity to object before DOR or a court were to allow disclosure").

Rule 19(a), M. R. Civ. P., sets forth the criteria for determining when the addition of a party is necessary:

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest

(Emphasis added.) In this case, each of the corporate taxpayers on the list that DOR created for the Legislative Auditor and Senator Elliott has an interest in protecting the confidentiality of their income tax return information, an interest they cannot protect if not joined as a party defendant in this case.

Senator Elliott argues that it is not necessary to join the affected taxpayers as parties because none of them have complained about the possible disclosure of their confidential tax information. Elliott Brief at p. 20. No one, except DOR, knows who is on the list of taxpayers which was prepared for the Legislative Auditor and Senator Elliott. How would the taxpayers at risk know they should complain if they aren't named as parties? Once this Court imposed upon corporations the burden of proof it imposed in the *Great Falls Tribune* case, it became incumbent upon the Montana courts, and Montana administrative agencies, to provide warning fair and an opportunity to meet that burden.

IV. CORPORATE TAX RETURNS ARE NOT “PUBLIC DOCUMENTS” WITHIN THE MEANING OF ARTICLE II, SECTION 9 OF THE MONTANA CONSTITUTION.

The District Court incorrectly concluded that income tax records are public documents within the meaning of Art. II, sec. 9 of the Montana Constitution. Slip Op. at p. 7. If it had correctly held that income tax records are not public

documents, it would not have had to make the rulings which Senator Elliott has appealed to this Court.

Art. II, sec. 9 of the Montana Constitution reads in its entirety:

Right to know. 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.

The word “document” in Art. II, sec. 9 cannot be interpreted literally and outside of the context of the section, as it would lead to an absurd result - a holding that every person in the state of Montana has the right to examine the documents of every other person in the state of Montana. A “document” within the context and meaning of Art. II, sec. 9, is one which relates to the deliberations of government.

This Court has begun to recognize the need for contextual boundaries around the meaning of “documents” within Art. II, sec. 9. In *Becky v. Butte-Silver Bow Sch. Dist. #1*, 274 Mont. 131, 138, 906 P. 2d 193, 197 (1995), the Court held:

Although “documents of public bodies” is not defined in the Montana Constitution, it must reasonably be held to mean documents generated or maintained by a public body which are somehow related to the function and duties of that body.

(Emphasis added.) *See also* 45 Op. Att’y Gen. No. 17 (1993) (“‘Documents of public bodies,’ though not defined in the Constitution, must reasonably be taken to mean documents generated or held by a public body or somehow related to the function and duties of the public body”).

The Court’s decision in this case similarly must respect the need for a contextual boundary around the word “document” in Art. II, sec. 9. The confidential tax returns filed by corporations, limited liability companies,

partnerships, and trusts to comply with Montana's income tax laws were not prepared by the DOR. They are the ministerial application by the taxpayer of a non-discretionary statutory tax code enacted by the Legislature. Nor does DOR deliberate upon the returns. Its function is simply to audit them and insure compliance with the same non-discretionary statutory tax code. All deliberations on tax policy take place before the Legislature, including Senator Elliott. Tax returns do not reflect, in any way, the inner workings or deliberations of government contemplated by the delegates of the constitutional convention who crafted Art. II, sec. 9:

The committee intends by this provision [Art. II, Sec.9] that the deliberations and resolution of all public matters must be subject to public scrutiny....I think it has come up time after time that we don't intend to open up the state income tax records. (emphasis added)

Mont. Const. Convention, Verbatim Transcript at 1670.

Article II, sec. 9, was intended as a noble provision, one which insures the openness of government deliberations. An interpretation of this section that requires the public disclosure of confidential income tax information, submitted under compulsion of state and federal statutes that profess to maintain the confidentiality of the information, corrupts the nobility of the provision.

CONCLUSION

The District Court properly denied Senator Elliott's petition for the public disclosure of confidential income tax information submitted by taxpayers under compulsion of federal and state laws which insure the confidentiality of the information they require to be submitted to DOR.

Dated this _____ day of October 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **INTERVENOR'S RESPONSE BRIEF** was served upon the following by mailing a true and correct copy thereof on this _____ day of October 2005, addressed as follows:

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing is proportionally spaced using 14 point Times New Roman font and contains 5577 words.

Dated this _____ day of October 2005.

John Alke