4-29-2009

Parker v. Idaho State Tax Comm'n Appellant's Reply Brief Dckt. 35848

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 35848-2008

DAVID & KATHY PARKER Appellants, vs- IDAHO STATE TAX COMMISSION, ex rel., State of Idaho, Respondent.	)))))))))))	FILED - COPY APR 29 [illegible] Supreme Court ____ Court of Appeals ____ Entered on ATS by: ____

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT FOR THE COUNTY OF IDAHO

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ATTORNEY FOR THE RESPONDENT,
Idaho State Tax Commission

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 35848-2008

DAVID & KATHY PARKER	)
	)
Appellants,	)
	)
vs-	)
	)
IDAHO STATE TAX COMMISSION,	)
ex rel., State of Idaho,	)
	)
Respondent.	)
	)

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I) INTRODUCTION

The Parkers have had the opportunity to both read and contemplate the arguments presented by the Tax Commission in its Brief filed 8 April 2009. The Parkers will address the arguments presented in the order presented.

II) REBUTTAL ANALYSIS

At Page 2 of its Brief, the Tax Commission indicates that it requested Summary Judgment it its favor. However, when looking at the Record, the Parkers were the only party to actually file a Motion for Summary Judgment. ®. Vol. I, Pg 23-24). This technical difference may be important if and when this Court resolves any factual disputes; most importantly, because the Tax Commission did not move for Summary Judgment, the parties cannot be deemed to have agreed that there are no genuine issues of material fact which is generally the case when both parties move for Summary Judgment. See for example *McFadden v. Sein*, 139 Idaho 921, 923, 88 P.3d 740 (2004)(If parties rely on same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact; however, the mere fact that both parties move for Summary Judgment does not in and of itself establish that there is no genuine issue of material fact.). Even though the Parties filed a Joint Stipulation of Facts, some contested issues remained. For example, the Stipulated Facts specifically reserved the right, as subsequently raised by the Tax Commission, to further develop contested, determinative facts such as whether or not Mr. Parker had sufficient contacts with Idaho to meet Constitutional standards.

At Page 4 of its Brief, the Tax Commission argues that the Court Record contained conflicting inferences and that the District Court resolved said inferences in the Tax Commission's favor. With all due respect, the Parkers believe that the District Court's Order does not identify any inferences that it made or in whose favor it made those inferences. This is important for two reasons: (1) the Party against whom the inference was made would have the right to challenge the basis upon which the inference was made and whether or not it was reasonable; and, more importantly, (2) the Constitutional issues presented should be resolved on established fact, not undefined inferences.

For example, at Page 5 of its Brief, the Tax Commission argues that the District Court weighed Mr. Parker's statements against the other evidence in the record, found that there were conflicting inferences in the record and then determined that: Mr. Parker had an interest in income producing property located in Idaho and that half of the marital community was domiciled in Idaho. The Tax Commission then argues that the District Court then concluded that Mr. Parker had sufficient contacts with the state of Idaho to subject him to income tax in the state.

There are several problems with the Tax Commission's argument regarding these purported inferences. First, as discussed above, only the Parkers actually filed a Motion for Summary Judgment. Consequently, the analysis on Appeal should proceed on that basis[1]. Secondly, the District Court's Order does not state that it identified conflicting inferences, weighed Mr. Parker's statements against other evidence in the record or resolved any conflicting inferences either for or against any party. There is absolutely no stated factual basis whatsoever

[1]Even if it could be argued that the Tax Commission argued for Summary Judgment through its Rebuttal Brief, the Parties did not rely on the same facts, issues or theories. Therefore the Parties did not effectively stipulate that there was no genuine issue of material fact. To the contrary, the Tax Commission maintains in its briefing that Mr. Parker received Idaho-sourced income. And, specifically asked the District Court to allow further factual development on this very issue.

for the conclusory statement that Mr. Parker had an interest in income producing property located in Idaho. The District Court's Order does not identify either the property or how Mr. Parker had such an interest.

After presenting its argument regarding inferences, the Tax Commission presents the District Court's conclusion, that Mr. Parker had "sufficient minimum contacts" with the state of Idaho to subject him to Idaho income tax, as the result of the District Court's weighing the evidence and resolving conflicting inferences. In addition to the argument presented above, neither the District Court's analysis nor the Tax Commission's argument addresses the ramifications of the Parties' stipulation that Mr. Parker was a Nevada domiciliary. At the risk of being too repetitive, please remember that the District Court denied the Tax Commission's Motion to Strike portions of Mr. Parker's Affidavit resulting in the admissibility of his statements that he had not received any benefit from Mrs. Parker's income, that there was no sharing of assets and his opinion that he did not have an obligation to file an Idaho income tax return based upon his personal knowledge. ®. Vol. I, Page 40). This admitted evidence directly addressed the filing issue because Mr. Parker testified that he had not received any Idaho-sourced income, in any form, including wages, dividends or property sale proceeds. ®. Vol. I, Page 25). Therefore, the District Court erred in failing to identify the basis for its statement regarding "sufficient minimum contacts" and in making such a statement without any supporting facts in the first instance; alternatively, the District Court could have granted the Tax Commission's request for further factual development on this issue.

Now, should the Tax Commission argue that such "sufficient minimum contacts" arise simply by operation of community law principles, then this underscores the problem with taxing

Mr. Parker's income in the first instance: application of a legal principle suddenly subjects non-residents to Idaho income tax on non-Idaho sourced income without any underlying factual minimum contacts, i.e. form over substance. Furthermore, without the appropriate factual foundation, general application the District Court's conclusion of "sufficient minimum contacts with the state of Idaho to subject him [Mr. Parker] to income tax in the state" at face value quickly opens the door to prohibitive over-reaching. The reasoning being that if such "sufficient minimum contacts" exist, then a taxpayer's entire income could be subject to Idaho tax because once established, there are, absent legislative action, no limits to the state imposing its tax. Therefore, as written, the Order implies that the only basis for the District Court's finding that Mr. Parker had "sufficient minimum contacts" with Idaho is the application of community property principles which the Parkers have addressed in their Opening Brief.

At Page 6 of its Brief, the Tax Commission argues that once it issues a Deficiency Determination, it is presumed to be correct and correspondingly the Parkers have the burden of proving it is erroneous. While this may be correct at the administrative level where the Tax Commission issues a written decision, it does not control at the District Court level. Idaho Code §63-3049(a) provides that, upon service of the Tax Commission, "the case shall proceed as other civil cases." Consequently, this Court will review the District Court's Order as an ordinary civil action, and will utilize the Tax Commission's administrative determination as merely an articulation of its position in this action. *Pratt v. State Tax Comm'n*, 128 Idaho 883, 884, 920 P.2d 400 (1996). Therefore, as the Parkers read the case law, the Tax Commission's Amended Decision is not entitled to any presumption of correctness and this Court's normal standards of review apply.

At Page 8 of its Brief, the Tax Commission presents two interesting arguments. First, it discusses the formation of the marital community and that, once created, it can only end when one spouse passes away or a divorce occurs. Then second argument is that I.C. §32-906 provides that income earned during marriage, regardless of source, is community property. We will now address each argument in turn.

The concept of a "marital community," as a separate entity, is a concept that, as far as Parkers' Counsel can ascertain, has lost viability with the passage of time; the current law focuses on the domicile of each spouse. However, if the Tax Commission continues to push the idea, then, with all due respect, the Parkers' analysis in its Opening Brief discussing application of *Asarco* and progeny to the marital community is relevant because the unitary business concept specifically looks at a business as a separate entity composed of several, distinct components. The Parkers invite the Tax Commission to discuss this concept and its viability at oral argument.

Regarding I.C. §32-906, neither the District Court nor the Tax Commission have articulated a rationale for applying Idaho community property law to a Nevada domiciliary when said domiciliary lacks "sufficient minimum contacts" with Idaho separate and apart from the bare application of I.C. §32-906. Assuming for purposes of this argument that Mr. Parker had Idaho-sourced income, his Idaho filing status would have been a non-resident reporting the Idaho-sourced income alone. Absent treating the "marital community" as a separate entity or without "sufficient minimum contacts" there is simply no basis for applying Idaho community property law to Mr. Parker. And, interestingly enough, the Tax Commission's position taken in its Brief regarding this issue appears contradictory with the position articulated in the Amended Decision; to wit: after quoting Nevada Revised Statute §123.220, the Tax Commission wrote "[t]herefore, the Commission concludes that the community property laws should govern the ownership of the income in question." ®. Vol. I, Page 22R). In other words, in its Amended Decision, the Tax Commission appears to state that the community law of each spouse's domicile should be applied but in its Brief on Appeal, in defending the District Court's Order, it argues that Idaho community property law should be applied to both spouses regardless of domicile.

At Pages 9 and 10 of its Brief, the Tax Commission argues that because Mrs. Parker was an Idaho resident, requiring her to report and pay tax on her income derived from any source, including one-half of Mr. Parker's Nevada wages, comports with Due Process. In support of this argument, the Tax Commission places great weight on this Court's holding and analysis in *Herndon v. West*, 87 Idaho 335, 393 P.2d 35 (1964). The Tax Commission then argues that the Parkers have not set forth any rationale for applying Nevada community property law, other than the Oregon case which the Tax Commission asks this Court not to follow because the District Court found that half of the marital community was domiciled in Idaho.[2]

Herndon involved an Idaho resident who was also a partner in an Oklahoma partnership. The issue presented asked whether or not the taxpayer should report the income she received through the Oklahoma partnership on her Idaho resident income tax return. The Tax Commission correctly identifies this Court's holding that, as an Idaho resident, the taxpayer had to report her income from all sources. The *Herndon* analysis does not apply to the issues in this case because

[2]At this point, it appears that the Tax Commission and the District Court implicitly acknowledge that the concept of "marital community," as a separate and distinct entity apart from the two spouses, does not exist. To argue that one-half of the marital community is in Idaho is to argue that one of the spouses is domiciled in Idaho. The other one-half of the marital community is located in Nevada, Mr. Parker's domicile. Therefore, as the Oregon appellate court recognized, the domicile of each spouse does carry significance and should be recognized in any analysis.

Mr. Parker is not an Idaho domiciliary and it did not involve combination of principles of community law and residency. And finally, the *Herndon* opinion was rendered well before the seminal Commerce Clause case, *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Therefore, again with all due respect, the *Herndon* opinion does not resolve the issues involved in this case.

Turning to the Tax Commission's one sentence asking this Court not to follow the Oregon case discussed by the Parkers in their Opening Brief, the Tax Commission is correct in that the Parkers have argued that this Court should not follow its analysis. However, the Parkers do go on to argue that if this Court chooses to adopt that appellate court's reasoning regarding application of Nevada community property law, then this Court should reverse the District Court's Order and remand the case for further factual development on the issue of whether or not, under Nevada law, Mr. Parker's earnings should be considered his sole and separate property.

As the Tax Commission will recall, this is exactly what it did in its Amended Decision when it wrote that there was no writing between the Parties treating each party's income as their own sole and separate property, per Nevada Revised Statute §123.220. Because the District Court hears the Parkers' appeal *de novo*, and Mr. Parker's statements that he did not receive or rely on Mrs. Parkers' income remains admissible and uncontroverted evidence, should this Court adopt the analysis of *Keller v. Department of Revenue*, 642 P.284 (Ore. 1982), then this matter should be remanded to the District Court for evidentiary development of whether or not the Parties have *de facto* treated each Party's income as their respective sole and separate property.

Also at Page 11 of its Brief, the Tax Commission quotes the District Court's finding that:

"[w]here one of the spouses is a domiciliary of the taxing state, there is substantial nexus between the state and the marriage and the income tax is fairly related to the services provided to the resident spouse." See Page 44 of R. Vol. I. Again it appears that the District Court and the Tax Commission consider the "marital community" to be an entity separate and apart from the two spouses.

The Parkers submit that there are several problems with this finding. First, the concept of a "marital community" being a separate entity apart from the husband and wife is, and has been falling out of favor with the various state courts. And, the Parkers could find no recent reported Idaho decision acknowledging that either Idaho common law or statutory law recognizes a "marital community" as an entity separate and distinct from the two spouses. Second, if we apply the same logic to Mr. Parker, then one-half of the marital community would also be domiciled in Nevada because he is a Nevada domiciliary which would require, under the District Court's analysis as propounded by the Tax Commission, consideration of Nevada community property law. And finally, if the marital community does exists as a separate entity, then the Parkers' rationale for applying the *Asarco* unitary business analysis, discussed in their Opening Brief, has merit because, as with other unitary businesses transacting business in more than one jurisdiction, there must be a fair apportionment.

And finally, at Page 11 of its Brief, the Tax Commission writes that: "[j]ust as Kathy Parker is entitled to one-half of the community income earned in Nevada, David Parker is entitled to one-half of the community income earned in Idaho." In writing this, the Tax Commission appears to concede the Parkers' argument that each Party should be allocated one-half of each Party's wages.

At Page 12 of its Brief, the Tax Commission argues that the United States Supreme Court, in *McCarty v. McCarty*, 453 U.S. 210 (1981), held that each spouse in a marriage has a vested right in one-half of any property or income the couple acquires while domiciled in a community property state. Relying on this vested right concept, the Tax Commission presents that Mrs. Parker has a vested right to one-half of Mr. Parker's wages. However, each time the Tax Commission makes this argument, it fails to discuss the corresponding result that, applying the same vested rights analysis, Mr. Parker has a vested right to one-half of Mrs. Parker's wages. And, if consistently applied, the result is as argued for in the Parkers' Opening Brief: only one-half of each spouse's wages should be subject to Idaho income tax.

At Page 14 of its Brief, the Tax Commission argues that the Parkers have failed to establish the applicability of the Commerce Clause. The Parkers respond that the Tax Commission never raised this issue before the District Court nor did they appeal the District Court's analysis of the Parkers' Commerce Clause challenges and, therefore, should not be permitted to raise it for the first time on Appeal. See for example, *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123 (1992)(Generally, issues not raised below cannot be considered for first time on appeal.). If however, this Court determines to hear the issue, then the Parkers respectfully submit that since Mr. and Mrs. Parker are domiciliaries of separate states, the Commerce Clause is indeed implicated. See *Idaho State Tax Commission v. Stang,* 135 Idaho 800, 25 P.3d 113 (2001)(Commerce Clause analysis applied to disallowance of resident taxpayers' deductions for distributions from their IRAs.).

At Page 15 of its Brief, the Tax Commission argues that because Nevada does not have a state income tax, there is no real controversy and, therefore, this claim is non-justiciable. The

District Court's analysis and the Tax Commission's argument misses the point: the Commerce Clause analysis specifically considers what would happen if all the States applied the same challenged taxing formula, and not whether the other States have actually applied it. The United States Supreme Court's Commerce Clause analysis looks not to what the States have actually done; it looks to the result that would obtain if all the States applied the taxing formula then being challenged. At the risk of over-simplification, the Commerce Clause analysis is quite simple: If both Nevada and Idaho applied the Tax Commission's formula for calculating the Parkers' taxable Idaho income, then 150% of the combined community income would be taxed rather than 100%.

At Page 18 of its Brief, the Tax Commission argues that 'IRC §6015 cannot be used to preempt state community property laws to change the determination of Idaho taxable income." As authority for this statement, the Tax Commission cites *Ordlock v. C.I.R.*, 533 F.3d 1136 (9th Cir. 2008). However the Parkers submit that the *Ordlock* case does not apply to their case presently before the Court.

In *Ordlock* both husband and wife were California residents. The Ninth Circuit looked to California community property law which permitted creditors of one spouse to seek payment from community property. *Ordlock*, 533 F.3d, at Page 1138-1139. The Ninth Circuit did hold that Congress did not intend §6015 to pre-empt California community property law and, consequently, the court applied California's community property law and permitted the creditor to seek satisfaction from the parties' community property. In reaching this result, the Ninth Circuit affirmed the denial of the non-creditor spouse's claim for refund even though she had qualified for income tax relief under IRC §6015.

The Parkers do not seek preemption of Idaho community property law. Instead, for the reasons stated in this regard in their Opening Brief, they ask this Court to apply the principles of IRC §6015 and grant the marital community, should this Court determine that it exists as an entity separate and apart from the two spouses, relief from the Idaho income tax resulting from inclusion of one-half of Mr. Parker's Nevada wages. Such recognition could occur on a limited basis resulting from the filing concept of "married filing jointly." The Parkers respectfully submit that even if such a filing concept does create a "marital community" for income tax purposes, this still does not permit a constitutionally infirm method of calculating Idaho income tax.

Assuming for purposes of this argument that a "marital community" exists as a separate entity, adoption of IRC §6015 would not conflict with Idaho law because it does not redefine "income" or provide for a deduction or credit. Rather the resulting in preemption, its application simply augments Idaho income tax law by providing relief from Idaho income tax that results from application of Idaho community property law.

At Page 18 of its Brief, the Tax Commission then argues that corporate income tax principles are inapplicable to the Parkers because the statutory method for taxing individuals is different from the statutory method for taxing corporations. As a general statement, the Parkers would agree. However, the Parkers disagree with such a broad proposition in this case because the Tax Commission, and the District Court, have identified the concept of "marital community" as an entity separate and apart from the two spouses, and proceeded with respective analysis based upon that proposition. Should this Court accepts such a proposition, then the corporate income tax principles regarding apportionment do indeed apply to this separate entity. However, if this Court determines, along with the various other states, that "marital community," as a separate entity, does not exist and that the focus should be on the domicile of the spouses, then corporate income tax principles probably should not apply.[3]

At Page 20 of its Brief, the Tax Commission argues that it filed Mr. Gunter's Affidavit to both protect its position and to rebut Mr. Parker's assertions that he (Mr. Parker) did not receive any Idaho-sourced income. More specifically, the Tax Commission asserts that Mr. Parker "owned" one-half of the Idaho income earned by Mrs. Parker and would be required to report that income. The Parkers have addressed what they perceive to be problems regarding the admissibility of Mr. Gunter's Affidavit, Paragraph 24, and simply refer this Court to that section of their Opening Brief.

With that said, Mr. Gunter simply speculates about Mr. Parker's Idaho-sourced income when he uses the word "appears." Either Mr. Parker has Idaho-sourced income or he does not; this determination should be factually based and not the result of allocation resulting from community property law. And, should this Court determine that resolution of whether or not Mr. Parker had Idaho-sourced income because of his direct ownership in an Idaho-based entity, as opposed to resulting from application of community property law principles, is required, then this Court should remand the case to the District Court for further factual development as requested by the Tax Commission before the District Court.

Continuing with its discussion of Mr. Gunter's Affidavit, at Page 25, the Tax Commission argues that Mr. Gunter determined that Mr. Parker had a separate filing requirement

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[3]In making this argument, the Parkers do not concede that Commerce Clause and Due Process principles do not apply. Specifically, if the marital community does not exist as a separate entity, then unitary business taxation principles probably should not apply because there is not a separate entity comprised of separate contributing components.

with the state of Idaho regardless of the issues in this case. Since Mr. Parker was not an Idaho domiciliary, the only basis for this statement is Mr. Parker's receipt of Idaho-sourced income which, as discussed above, must be factually based and not the result of arbitrary application of community law principles.

Having previously worked with Mr. Gunter, Parkers' Counsel readily acknowledges Mr. Gunter's expertise in discussing income tax issues. This does not, however, promote him to the position of being the arbiter of legal issues or finder of facts. In other words, it is for the District Court to analyze and determine whether or not Mr. Parker had a filing requirement because such determination constitutes a legal conclusion.

At Page 26 of its Brief, the Tax Commission argues that the audit schedules show that Mr. Parker received Idaho-sourced income from certain entities (Western Land & Development, LLC, and KPGMJC) in the amount of $13,122 and $19,506 which would have created an Idaho non-resident filing requirement. The Tax Commission then argues that the Parkers did not protest this determination before the Commission[4].

With all due respect, the Parkers did challenge this. In Paragraph V of their Petition for Judicial Review the Parkers allege that "[i]n issuing its Amended Decision the Commission erred by including the income earned by Mr. Parker while domiciled in the state of Nevada." The Parkers did challenge such inclusion when, in his Affidavit, Mr. Parker testified that he did not receive any Idaho-sourced income. The District Court, while not specifically addressing these

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[4] However, in the next paragraph, the Tax Commission apparently acknowledges the Parkers' objection when it argues that; "[d]uring the appeal before the district court, the only rebuttal to the audit schedules offered by the Parkers was David Parker's simple conclusion that he did not have an Idaho filing requirement, a conclusion without supporting facts or detail."

two entities, did state that: "[t]here is evidence in the record sufficient to conclude that during the years at issue, Mr. Parker had an interest in income producing property located in Idaho." ®. Vol. I, P. 43). Therefore, the Parkers did challenge this determination before the District Court and again on Appeal to this Court: The Parkers argue that the District Court failed to identify how it made this determination; i.e. whether this interest results from a factual basis or is simply the result of application of community property law.

Immediately following its statement regarding Mr. Parker's interest, the District Court concludes that: "Mr. Parker has sufficient minimum contacts with the state of Idaho to subject him to income tax in the state." ®. Vol. I, P. 43). Missing from this determination is the identification of the basis for Mr. Parker's minimum contacts: is it the result of application of community property principles; is it the result of him having an undefined one-half interest in the separate entity referred to as the "marital community;" or, is it the result of Mr. Parker actually receiving income from Idaho entities in which he actually has an ownership interest. The Parkers submit that, depending upon the basis for the District Court's conclusion, there is a difference between them.

Taking the Parkers' objections in sequence, we begin with the Tax Commission's Amended Decision. In the Amended Decision, the Tax Commission wrote: "[t]he representative for the petitioners contends that the income should be deemed to be the separate property of each of the spouses according to which one was named as the owner of the account or other instrument giving rise to the income." ®. Vol. I, P. 20). In response, the Tax Commission then determined: "[i]n attributing certain interest income from financial institutions, the petitioners originally reported some of this as being attributable solely to Idaho. The attribution of this income was not changed by the auditor. The income as community property should be attributed equally to each spouse and to the domicile of each of the petitioners." ®. Vol. I, P. 21).

As the Parkers read this language the Tax Commission did not determine which entities were actually Idaho-sourced entities. However, assuming that it did determine that the "financial institutions" were Idaho-sourced, then the Tax Commission appears to have acted in an inconsistent manner. Residents, pursuant to *Herndon v. West, supra*, report all of their distributive share of partnership and/or Sub-Chapter S income. Non-Residents report their share only if the payor entity is an Idaho entity. Rather than applying these principles, the Tax Commission, relying on community property law, unspecified as to whether Idaho or Nevada, attributed one-half of the income to each spouse. This resulted in Mr. Parker's one-half being attributed to Nevada when it should have been attributed to the spouse who actually owned the interest in the paying entity.

Next, contrary to Mr. Gunter's Affidavit, as the Parkers read the Amended Decision it does not specifically identify which entities were Idaho entities. Furthermore, Mr. Gunter does not state why Western Land and KPGMJC are Idaho based entities and how he knows such. Without such determination, simply applying community law principles produces the same conceptual issue that the Parkers object to regarding the wages.

If the District Court relied upon mere legal fictions, i.e. marital community existing separate and apart from the spouses and/or community property principles, to allocate one-half of the income to Mr. Parker, then the mere application of such, without more, does not establish Mr. Parker's "minimum contacts" with Idaho. If Mr. Parker actually did receive Idaho sourced income because the payors were Idaho entities, then, applying the District Court's analysis and the Tax Commission's argument, then Mr. Parker would have an independent filing requirement. Once this filing requirement existed, Mr. Parker would then be required to include one-half of Mrs. Parker's income, based upon community law principles, with one-half of his income. Therefore, as the Parkers understand the Tax Commission's conclusion, the end result would be that the combined income of both parties would be subject to Idaho income tax simply resulting from Mr. Parker's, even though a non-resident, filing requirement arising from his allocated receipt of Idaho sourced income. However, the Tax Commission's actual assessment of additional Idaho income tax was not based upon these arguments.

To the contrary, Mr. Parker testified in his Affidavit that he did not receive any Idaho-sourced income. The District Court overruled the Tax Commission's Motion to Strike his Affidavit and the Tax Commission did not Appeal that ruling. Therefore, should this Court determine that this issue is necessary for resolving the issues in this case, then the case should be remanded to the District Court for further factual development.

Next, the Parkers read Mr. Gunter's Affidavit as advocating a position contradictory to the Tax Commission's position articulated in the Amended Decision. The Amended Decision states that such income should be attributed equally to each spouse and to the domicile of each of the petitioners (emphasis added). This means that, as applied to Mr. Parker, this income is attributed to Nevada and, consequently, cannot serve as a jurisdictional basis requiring Mr. Parker to file an Idaho non-resident income tax return.

And, this method shows illustrates inconsistency by the Tax Commission in addressing community property law. When the Tax Commission identified financial institution income as community property, conceptually no different from the Parkers' wages, a consistent application of the Tax Commission's method would have resulted in one-half of each spouse's wages being attributed to the domicile of each spouse. This would have resulted in one-half of Mrs. Parker's wages being attributed to Nevada. This the Commission did not do.

At Page 26 of its Brief, the Tax Commission argues that attorney fees should be assessed against the Parkers for presenting a frivolous and groundless argument. The Parkers disagree. This case represents a case of first impression for Idaho which the Parkers have pursue in good faith. And finally, the *Herndon* case does not address the issues presented in this case.

III) CONCLUSION

This case results from combination of statutory law imposing Idaho income tax on all sources received by Idaho residents with principles of community property law. Unlike other states or at the federal level, neither Idaho statutory nor common law address resolution of the inherent conflicts arising from arbitrary application of these two bodies of law. The Tax Commission's Amended Decision, as affirmed by the District Court for different reasons, impermissibly combines certain aspects of both bodies of law to achieve the most favorable tax results for the state of Idaho.

Focusing on the specific Order being appealed from, the District Court made several conclusions to which the Parkers object. These have been discussed both in their Opening Brief and in this Reply Brief. The Parkers submit that the Constitutional problems involved in this case arise from the Tax Commission's impermissible combination and interpretation of statutory language and judicial opinion in order to achieve the economic result most favorable to the state of Idaho.

When this Court considers and discusses the possible solutions presented by the Parkers, they submit that the following supports their argument that this Court should adopt one of the proposed solutions bearing in mind that Constitutional issues are purely questions of law over which this Court exercises free review. *Meisner v. Potlatch Corp.*, 131 Idaho 258, 260, 954 P.2d 676 (1998). "An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality. Page 4 of *Lochsa Falls, LLC v. State*, 2009-ID-0408.090 (Supreme Court, 7 April 2009). When a statute and rule "can be reasonably interpreted so that there is no conflict between them, they should be so interpreted rather than interpreted in a way that results in a conflict." Page 4 of *State v. Johnson*, 2008-ID-R0627.001 (26 June 2008).

Recognizing these principles, the Parkers respectfully submit that the District Court erred in the following manner and, when appropriate, recommends certain corrective action: (1) the District Court should have excluded ¶24 of Mr. Gunter's Affidavit in conducting its analysis and rendering its Decision; (2) the District Court erred in characterizing §6015 as an "exemption" and, as such, its relief could not be incorporated into Idaho income tax law. Relying on its prior precedent, this Court should hold that the equitable relief provided by §6015 is incorporated by means of I.C. §63-3002, and, should this Court determine that "marital community" exists as a separate entity, that it provides such equitable relief to the Parkers and other taxpayers similarly situated. (3) Alternatively, this Court can hold that the Tax Commission's method of subjecting Mr. Parker's Nevada wages to Idaho income tax violates Due Process and/or Commerce Clause protections. As proper relief, the Court should then hold that the proper method of addressing the Parkers' situation is this: apply community law principles and apportion one-half of Mrs. Parker's income to Nevada and one-half of Mr. Parker's Nevada income to Idaho; or, alternatively, subject 100% of Mrs. Parker's Idaho wages to income tax based on residency and exclude all of Mr. Parker's Nevada wages due to lack of nexus. (4) Alternatively, this Court could adopt the analysis reflected in the *Keller* holding, and remand the matter for a factual determination as to whether or not Mr. Parker had separated from Mrs. Parker as contemplated by Nevada community property law.

Respectfully submitted this 29th day of April 2009.

Lawrence G. Sirhall, Jr.
LAWRENCE G. SIRHALL, JR.
Attorney for the Parkers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29th day of April 2009, I caused to be served a true and correct copy of the foregoing to the following in the manner described below

Lawrence Allen	___ U.S. Mail
Deputy Attorney General	___ Facsimile
800 Park Blvd.	
Plaza IV	___ Overnight Mail
Boise, Idaho 83702	✓ Hand Delivery

Lawrence G. Sirhall, Jr.