

1978

State Tax Commission of Utah v. Warren S. Wright : Brief of Appellant

Utah Supreme Court

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Warren S. Wright; Pro Se Appellant;
Attorney for Plaintiff; Bruce M. Hale;

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE TAX COMMISSION,
STATE OF UTAH

Plaintiff and Respondent,

vs.

WARREN S. WRIGHT,

Defendent and Appellant,

Supreme Court Number 15931

BRIEF OF APPELLANT

Appeal from the Judgement of the Third District Court.

The Honorable Judge David K. Winder.

Warren S. Wright, Pro Se
Appellant,
3090 South 1200 West
Salt Lake City, Utah 84119

Attorney For Plaintiff
Bruce M. Hale,
236 State Capital Building
Salt Lake City, Utah 84114

FILED

SEP 6 1978

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<u>Page</u>
LIST OF REFERENCES	iii
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION OF THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	
POINT I -- That portion of the present Utah State Income Tax which bases tax rates on marital status and per- sonal life style is an unreasonable and arbitrary Legislative classification.	3
POINT II-- That portion of the present Utah State Income Tax which bases tax rates on marital status and per- sonal life style is a "special law" which is pro- hibited by the Constitution.	14
POINT III- That portion of the present Utah State Income Tax which bases tax rates on marital status and per- sonal life style denies one equal protection and benefit of the law.	14
POINT IV- That portion of the present Utah State Income Tax which bases tax rates on marital status and per- sonal life style is a usurpation of "Fundamental Rights" which is prohibited under the Constitution.	15
POINT V -- That portion of the present Utah State Income Tax which bases tax rates on marital status and per- sonal life style is a denial of religious freedom and rights of conscience.	17
SUMMARY	19
CERTIFICATE	20
APPENDICES	21

LIST OF REFERENCES

Individual Income Tax Act of 1973 (Title 59-Revenue and Taxation)

Utah Code: 59-14A-5; 59-14A-72; 59-14A-75; 59-14A-76

Constitution of the State of Utah:

Article 1, Section 24

Article 1, Section 2

Article 1, Section 27

Article VI, Section 26

Minutes of Tax Revision Committee, 1967-68 (on file in the State Capital archives).

S. 21, 38th Legislature 1969.

Federal Tax Court, Vivien Kellems, Docket No. 427-70, 6-27-72.

U.S. Court of Appeals, 2nd Circuit, Vivien Kellems, Docket No. 72-2122, 4-4-73.

Plessy v Ferguson (1896)

Brown v Board of Education (1954)

STATEMENT OF THE NATURE OF THE CASE

The issue involved in this case centers on the constitutionality and moral justification of the classifications based on marital status and personal life style which were created by the Individual Income Tax Act of 1973.

It is the contention of the Appellant that such are unnecessary, unreasonable, and arbitrary as it requires individuals (with the same amount of taxable income) to pay personal income tax at variable rates based on circumstances that are irrelevant to the need for any such distinction.

DISPOSITION OF THE LOWER COURT

Defendent's Motion to Dismiss the Warrent of Judgement of the Tax Commission of the State of Utah was denied as the judge had no authority to do otherwise.

RELIEF SOUGHT ON APPEAL

Appellant requests the Court to:

1. Reverse the decision of the Lower Court from which appeal is being made.
2. Order the Utah State Tax Commission to refund overpayment made by appellant in the amount of \$494.36.
3. Declare that portion of the 1973 Income Tax Law which sets differential tax rates based on marital status and personal life style as an unreasonable and arbitrary classification and, therefore, unconstitutional.

If the Court does not see fit to do the above, appellant requests that the Court order that current tax law be made consistent whereby all taxes paid within the State of Utah (i.e., sales and property), be collected or assessed at variable rates based upon the marital status or personal life style of the taxpayer as is now provided by the State Income Tax.

STATEMENT OF FACTS

As a result of the enactment of the Individual Income Tax Act of 1973 which created a differential in income tax rates based on circumstances of marital status and personal life style rather than on income itself, appellant has refused to voluntarily pay the tax differential which is not amount above whatever the lowest rate may be (in this case, married, filing jointly) on the same taxable income amount.

From 1974 through 1977 the appellant has petitioned the Tax Commission under provision of Section 59-14A-72 of the Utah Code, for a "redetermination of deficiency" with the intent of providing the means whereby appellant could apply to the Utah State Supreme Court (59-14A-76) for a "writ of certiorari or review for the purpose of having the lawfulness of such decision inquired into and determined."

During this period of time the Tax Commission refused to provide due process by contending that the only point at issue was an error in "mathematical computation" (59-14A-75) which therefore prevented application to the Supreme Court for review.

In March of 1978 the Tax Commission was persuaded by the appellant to have issued a warrant for delinquent income tax in the amount of \$482.79 and to appear in Court to answer concerning his property.

This was done with the intent of allowing for due process and providing a means for appeal to the Utah State Supreme Court.

On May 31, 1978 the appellant appeared in the Third Judicial District Court on a Supplemental Proceeding. His Motion to Dismiss the judgement filed by the State Tax Commission was denied.

A Designation of Record on Appeal was filed with the Clerk of the Third District Court on June 28, 1978.

ARGUMENT

POINT I: That portion of the present Utah State Income Tax which bases tax rates on marital status and personal life style is an unreasonable and arbitrary Legislative classification.

The most important and most valid point in the argument for the relief sought by the appellant is based on Article I, Section 24 of the Constitution of the State of Utah which states in summary that "all laws of a general nature shall have uniform operation."

Appellant proposes to establish that:

1. The Income Tax of the State of Utah is a law of general nature.
2. That there is no justifiable basis for differential treatment in tax rates based on marital status and personal life style circumstances and that such is unreasonable and arbitrary.
3. That there is no fair reason for the income tax law (as it presently exists) to not apply it equally in extension to those it leaves untouched.

The Individual Income Tax law of the State of Utah is general in nature and universally applicable as evidenced by Section 59-14A-5 of the Utah Code which states that "...a tax is hereby imposed on the State taxable income, as defined in Sections 59-14A-10 and 59-14A-11, of every resident individual, and every nonresident individual..."

Except for its progressive nature (based on increased taxable income) the State Income Tax until 1973 was also universally applicable in its rate structure to all persons with the same taxable income.

As a result of the changes in income tax law in 1973 the uniform operation of the law ceased, even though its general nature continued. This in and of itself should be sufficiently convincing to establish that the present law is contrary to general constitutional intent as is stated in Section 24 that "...all laws shall operate uniformly wherever uniform laws can be enacted." The State income tax can be enacted to operate uniformly as it obviously did prior to 1973.

Section 24 continues that the "...object and purposes of law present touchstone for determining proper and improper classification," and that "one who assails legislative classification as arbitrary has burden of proving it to be such."

What then was the object or purpose of the creation of these classifications where there were none, and where they were already operating uniformly? It is assumed that if there were no justifiable purpose for the classifications then they would be arbitrary, and furthermore, if there were no reasonable differentiation between classes as relating to the purposes to be accomplished by the income tax law, then they would again be arbitrary.

Obviously the basic intent of the 1973 Income Tax Act was to parallel the Federal Income Tax law for purposes of administrative convenience. The appellant does not deny this to be a legitimate objective. However, in the creation of various tax rate structures where one pays more than another with both having the same taxable income, then the question of fairness immediately arises, especially when nothing of substance changed in the circumstances of the two individuals from one year to the next (i.e., 1972 to 1973).

It is evident that legislative intent was not totally concerned about administrative convenience or paralleling the Federal tax classification structure as one, it did not include the "Head of Household" filing status and secondly, one basic progressive rate as previously existed was at least as convenient to administer as the three established, regardless of whether it corresponded to the Federal or not.

Legislative action for purposes of administrative convenience is one thing, however, when it affects the individual taxpayer adversely and for no apparent reason, then it must be justified on a more substantial basis than mere "administrative convenience."

As the line of thinking of the Court will no doubt lead to an examination of the reasoning behind the existing Federal tax filing structure, the appellant has included a copy of a Federal Tax Court and Court of Appeals decision which focuses on the reasoning and supposed justification of the subject at issue. (See Appendices 1 and 2: Federal Tax Court, Vivien Kellems, Docket No. 427-70, 6-27-72, and same, U.S. Court of Appeals, 2nd Circuit, Docket No. 74-2122, 4-4-73).

Let it be understood that the appellant makes reference to the above Federal court decisions for purposes of illustration only and for the convenience of you, the Supreme Court. The appellant strongly objects to the Utah State Supreme Court finding reason to justify changes in the State tax law based on Federal statute. The issue at hand is State legislative action regardless of Federal precedence.

It is, however, important to briefly examine the supposed Congressional line of reasoning which created the current tax differential based on marital status and personal life style. You will note from this particular case that two "...rational basis for distinction" are given:

1. The geographic equalization of taxpayers as between community and non-community property states.
2. The recognition of the greater financial burdens of married persons.

Little comment need be made regarding point number one, as any conflict in tax administration between community and non-community property is totally irrelevant to the requirements of the Individual Income Tax of the State of Utah.

No doubt in 1948 when this became a problem, the Congressional action taken seemed reasonable to many. Thirty years later this is certainly not the case, and to use it as justification to perpetuate an unreasonable system of classification is for the most part a red herring response. To say that one inequity must continue because of the existence of another law which in itself is inequitable is begging the question. It is like saying you cannot go for a walk because you have a rock in your shoe and leaving it at that.

The second point having to do with "the greater financial burden of married persons" is the only serious justification for the classification that the appellant is aware of, although at times some verbalize that single people deserve to be penalized for not being married.

If there is, or ever was, any validity to the present classification system, it comes down to one issue which is the second point mentioned. In 1948 it may have appeared that this was a reasonable extension of the "ability to pay" theory, but today that is for the most part a myth.

The appellant submits his own situation as an example: In 1970 the appellant was employed in the State of Michigan at an annual salary of \$13,500 with his wife earning approximately \$1,000 from part time work. As a result of a divorce, he returned to Salt Lake City to be closer to where his former wife and son were residing. He began employment at an annual salary of \$10,000. His former wife had obtained employment at approximately \$5,000 per year. In 1973 the appellant purchased a one-bedroom condominium for \$17,000 with a monthly payment and service fee of \$170. His former wife was renting a duplex at \$150 per month. An approximate breakdown of their monthly income and living expenses in 1973 compared to when married in 1970 is as follows:

(see next page)

<u>Monthly Income/ Expenses</u>	<u>Appellant</u>	<u>Former Wife</u>	<u>When Married</u>
Gross Income	\$ 1,066	\$ 570	\$ 1,208
Taxes and Ded.	266	67	292
Take-home pay	800	503	916
House payment/rent	170	150	145
Food	60	100	125
Clothing	10	15	30
Insurance	35	10	30
Utilities	30	45	60
Contributions	30	40	65
Recreation	40	20	30
Installment Payments	150	15	110
Transportation	50	40	80
Child Support	120		
Miscellaneous	100	75	140
Savings	5	-7	101
TOTALS	\$ 800	\$ 510	\$ 916

This above itemization of income and expenses is sufficiently accurate to substantiate the fact (and the appellant and his former wife would testify to such) that neither of them had an increased "ability to pay" income taxes at a higher rate as a result of their change in marital status. In fact, the situation was more to the contrary. They were both suddenly faced with the necessity of maintaining two separate households with no expenses being reduced that at the same time were not balanced off by increases in others and substantial decreases in individual income. At least in their case

(when married) they did have more funds available for savings and non-necessities than in either category of "single" or "head of household," and their situation does not appear to be that much different than many others in similar circumstances.

This should not be surprising. Whether married, single or head of household, the basic and essential expenses are for the most part fixed. The only really significant variable is the number of children, which (if not fairly treated) is at least acknowledged in the provision for "exemptions."

For a moment let us assume that in all married households only one person were employed and at the same time had several children. That would at least cause one to reflect on the desirability of manipulating the tax structure for the purpose of accomplishing or supporting what were considered to be socially desirable goals.

Many years ago this may have been the case. However, now the situation has changed dramatically. Now in at least half the married households both parties are employed outside the home and at the same time average family size has decreased substantially. The end result largely negating whatever validity there may have been to any lessening of ability to pay income taxes in comparison to single or head of household status.

Leaving aside for the moment the appellants own personal circumstances and bias, lets look for a moment at the situation of others who are less fortunate than himself in regard to the issue under discussion.

The status of two particular groups of people deserves special note:

1. First of all there are thousands of adult single people in the State who for whatever reason(s) are not married--which very often is not a matter of choice, but because of circumstances largely beyond their control. Their desires are the same as a married person; one of the most important of which is that of getting out of an apartment and owning their own home. The majority of these individuals are women who are in lower paying unskilled jobs. It goes without saying that such an individual with one income would at least have as equal a difficulty in being able to obtain financing and making the payments on a purchased dwelling as a married couple with two incomes. The appellant would assume there would be no disagreement as to their equal right to become a homeowner.
2. Secondly, there is the large number of single parent "head of households" (again mostly women) who are in a similar situation as the above and perhaps with even a greater need and desire to have their own home, yet must do so on one income.

What is the essential difference (that justifies a different tax rate) between the status of a single parent with two children with an income of \$10,000 per year, and a married couple with one child making \$10,000 annually?

Treating people in such a manner is not only unreasonable and arbitrary, it is cruel--especially when most of them accept their status in life and the benevolence of their government with resignation.

The appellant admits he is not able to "prove" the foregoing assumptions or conclusions, but at the same time maintains that with the combination of what is really common knowledge and the use of common sense, the weight of evidence would lean in the direction of his position.

Regarding the issue of the "head of household" status: The present neglect of due consideration will probably be acknowledged through a recommendation of the Governor's present Tax Revision Committee to provide for such in the same manner as does the Federal

classification which operates on the rather thoughtless assumption that a head of household family has a greater ability to pay taxes than a married couple, but less than a single individual. This recommendation will not be surprising as it appeared to be some of the unfinished business of past tax revision committees.

It is interesting to review the minutes of the Tax Revision Committee (on file in the State Capital Archives). The Committee was empowered by the 1967 Legislature to study Utah's taxes with the "view of effecting a more equitable distribution of the tax burden and to prepare bills provided" and specifically to "study the adjustability or feasibility of coordinating the Utah Income Tax Act" with the Federal law. (Utah Code Annotated, Section 20 (2-3) (Supp. 1971).

The first Federally based tax bill submitted to the Legislature in 1969 contained only one tax rate schedule (S. 21, 38th Legislature, 1969). It appeared that as the Committee and the Legislature got more involved in trying to parallel the Federal structure they felt that they had to give up either the one rate structure or continue with what they thought was an administrative burden which was married persons having to file separate returns. What finally won out was a variable rate structure which would encourage married filing joint returns.

In the process, it appears that what this action might do to the existing equitability of the system was disregarded and thus a new inequity was created nearly on the basis of accommodating the inflexible sacred cow of the joint return as if it were an unquestionable "given."

Although not directly at issue in this case, it is worth noting that an equally nonsensical situation exists under the Federal system in regard to the so-called "marriage penalty" where a couple filing jointly may claim only a \$3,200 standard deduction, whereas each partner before marriage (or if living together as unmarried) can claim a \$2,200 standard deduction. So in this case it isn't just the unmarried who are the victims of unreasonable tax policy discrimination.

What are we left with then that is still at issue. It has been established that, (at least in regard to the "head of household" category) ... "there is no fair reason for the law that would not require equally its extension to those it leaves untouched." (Article 1, Section 24, Utah State Constitution).

We now have the most difficult task which is trying to convince many who believe (yet would never admit it) that the single status can be equated with sin and the single parent as tainted or at least irresponsible, which somehow leaves them with a greater ability to pay taxes not only because they have more money but because they are part of an undesirable social cost and therefore merit such.

Someone once said "When you go through the grocery line, they don't ask you your marital status and ring you up on another cash register." What more can one say? Expenses of people, no matter what their marital status and life style are much more similar than dissimilar. In general, any savings of expenses on the part of the unmarried is compensated for by a married couple's ability to pool resources, and likewise the lack of having the expense of children on the part of singles

is compensated (at least as much as should reasonably be expected) with the exemption provision and the fact that singles pay (through property and other taxes) a substantial portion towards the expense of educating other peoples' children.

Therefore as a result of being unreasonably and arbitrarily classified the appellant and his former wife were required to pay additional amounts of 1973 State income tax over 1972 of \$84.00 and approximately \$18.00 respectively on the same dollar income. This increase is mostly attributable to the "single and head of household tax penalty" and not the increase in tax rates from 1972 to 1973.

The position of the appellant is therefore that the only sensible, reasonable and fair way of taxing people is based on the ability to pay on income and any other extension of the "ability to pay" has no validity when making classifications for taxing purposes based on marital status and personal life style. Any such consideration, to be equitable, must be provided for through individual exemptions and itemized deductions.

The appellant would take issue with one statement in Article 1, Section 24 of the State Constitution which states..."In fixing the limits of the class, the legislative body has a wide discretion; and the Supreme Court may not concern itself with the wisdom or policy of the law." Let it only be said that if there were ever any truth to such a statement, that time has long past. Almost by definition (now days) that is precisely what courts of appeal and supreme courts do do--is concern themselves with the wisdom and policy of law and its effects, call it by what name you may.

POINT II: That portion of the present Utah State Income Tax which bases tax rates on marital status and personal life style is a "special law" which is prohibited by the Constitution.

Article VI, Section 26 of the Utah State Constitution states that "the Legislature is prohibited from enacting any private or special laws" in certain enumerated cases, one of which is "assessing and collecting taxes."

Although what is termed as "special laws" is not defined, a General law is defined as: "Laws which apply to and operate uniformly upon all members of any class of persons, places, or things, requiring legislation peculiar to themselves in the matters covered by the laws in question, are general and not special."

The question here then is do the legislatively created classifications regarding marital status and personal life style for taxing purposes really require legislation peculiar to themselves? Present law by definition gives "special" consideration to those living within the legal framework of marriage. Are the circumstances of persons in that category so special that they be allowed to pay less taxes than their single or head of household counterparts with the same taxable income and comparable expenses? The appellant maintains that under an impartial judgement the answer must be no.

POINT III: That portion of the present Utah State Income Tax which bases tax rates on marital status and personal life style denies one equal protection and benefit of the law.

Article I, Section 2 of the Constitution of Utah states that: "All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit,

and they have the right to alter or reform their government as the public welfare may require."

The appellant maintains that having variable tax rates based on marital status and personal life style in effect results in having two or more laws which apply to groups of people arbitrarily created by the Legislature which when analyzed it will be found as reiterated before "...that there is no fair reason for the law that would not require equally its extension to those which it leaves untouched (Article I, Section 24).

It is therefore a contradiction in terms to claim equal protection and benefit of the law when the existing law is in fact a multiplicity of laws which are administered in a discriminatory manner, and based on assumptions that are irrelevant to the requirements of the objective in the first place which is to tax income and not people.

The other side of the coin of "due process" is "equal protection." The appellant, in having the Supreme Court review this appeal, has received due process. He is now requesting equal protection for himself and thousands of other residents of the State under one tax rate, as it is impossible to have such under two or more laws that apply to the same thing, and that same thing is equal amount of taxable income.

POINT IV: That portion of the present Utah State Income Tax which bases tax rates on marital status and personal life style is a usurpation of "Fundamental Rights" which are deemed essential under the Constitution.

Article I, Section 27 of the Utah State Constitution states that "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

The appellant acknowledges the necessity of legislative and legal (court cases) precedence for the effective and equitable administration

of government, however, he also sees that such precedence is a mixed blessing and at times a curse. An honest and enlightened appraisal of such would confirm this to be the case. The legislative and legal approach of today is too often an excess of justifying current action by the past without sufficient regard to letting (whatever is being considered) be judged on its own merits rather than questionable past precedence.

An appropriate example (excepting it is on the Federal level) is the reversing of the long held acceptability of the "separate but equal" interpretation in Plessy v Ferguson (1896). At that time the Court said that a law which recognizes a difference in color "has no tendency to destroy the legal equality of the two races." Also adding that the Fourteenth Amendment was not intended to enforce "social, as distinguished from political equality." If the enforced segregation "stamps the colored race with the badge of inferiority, it is solely because the race chooses to put that construction upon it."

Unfortunately it took the Court nearly 60 years to realize there was something very fundamentally wrong with previous lines of reasoning and logic. In Brown v Board of Education (1954), the Court stated that separate facilities (in education) were "inherently unequal" and that continuance by the states would breach the equal protection clause of the Fourteenth Amendment.

The Utah State Supreme Court is well aware of the ramifications of this decision in all phases of civil rights since 1954. The issue of taxation based on marital status and life style is no less of a civil rights issue. Similar assumptions of the "separate but equal" mentality pervade today's justification of existing tax policy. One might rephrase

the statement from Plessy v Ferguson by saying that "a law which recognize:

a difference in (marital status or life style) has a tendency to destroy the legalequality of the (groups being taxed.)" At least the Court can be assured that the frustration, anger, and resultant disrespect for unfair (if not oppressive) taxation on the part of many is not just because they "choose to put that construction upon it," it is because it is "inherently unequal."

As to the precedence that has developed now for 30 years, it is due time for those who are in control and sit in judgement to begin asking why are we doing things the way we are and upon what justification, and have our actions been arbitrary or unreasonable?

For the security of individual rights, this issue demands the "recurrence to fundamental principles" and this is what the appellant is requesting the Utah State Supreme Court to do. Please, for the moment, discard the traditional mode of legal justification which uses the past as a standard for the future.

The Constitution deems it as essential that you at times focus on fundamental principles and this cannot be done fairly by using precedence as a crutch or a substitute for original thinking.

POINT V: That portion of the present Utah State Income Tax which bases tax rates on marital status and personal life style is a denial of religious freedom and rights of conscience.

Article 1, Section 4 to the Constitution states that "The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The Court may think it rather naive on the part of the appellant to appeal to the "rights of conscience" in defending his position. If so, you are probably right if such stops at mere belief without action. History has shown that an appeal to a natural or higher law has always gotten its adherents into trouble, but this will no doubt always be the case.

The appellant's point is quite direct and simple. He, as a matter of conscience (religion) believes (and without qualification) in paying his share of taxes to support the public "good." However, as a correlary, he also believes with the same conviction that being forced to pay more than his share is theft on the part of the government and an evil which is in precisely the same category as tax evasion.

As faith without works is dead, likewise is belief without action. This is why the appellant has no choice but to refuse to voluntarily pay the unjust tax under discussion.

The making of an "ability to pay" determination beyond that based on equivalent taxable income amounts, is a moral judgement, which (however desirable) is one that courts and particularly legislative bodies are ill-suited to do.

It makes just as much sense to tax a person based on their sex, religion, or where they live as to do so through classification by marital status and life style. In fact it would make more sense to do so based on sex as males traditionally have higher incomes than females, and that isn't mere speculation or wishful thinking.

If the Utah State Legislature, either individually or collectively had the wisdom of Solomon, the appellant would defer to its judgement. But as that hardly seems likely in his lifetime he cannot as a matter of conscience do so, as anything less would be a betrayal of his own integrity and a compromise of "the free exercise" of his religious convictions.

SUMMARY

In presenting his argument the appellant has tried to take what was a common sense approach to him. Not being a lawyer he hasn't been privy to the nuances of that profession which may have helped in his presentation. Nonetheless, the appellant believes he has sufficiently established the following so as to allow the Court to grant the relief sought:

That the provision(s) of the 1973 Individual Income Tax of the State of Utah which provide for basing tax rates on marital status and personal life style is unconstitutional or violates the intent of such because:

1. It is an unreasonable and arbitrary legislative classification.
2. It is a "special law."
3. It violates the concept of "equal protection and benefit of the law."
4. It is a usurpation of the "fundamental rights" of individuals.
5. It is an infringement of the right of conscience and free exercise of religion.

The appellant would appeal to the Court to reflect on the words of Oliver Wendell Holmes, Jr. who said, "The law is the witness and eternal deposit of our moral life. Its history is the history of the moral development of the race." Gentlemen, you are in a unique position to assist in that moral development which is so sorely needed. Please do so.

In conclusion, (and with all due respect to the Court), if it sees fit not to grant the relief sought on this appeal, the appellant can only say that he tried, and then echo the words of Charles Dickens who once said, "If that's the law, then the law is an ass."

CERTIFICATE

Ten copies of the foregoing appellant's Brief were delivered to the Supreme Court of the State of Utah in care of the clerk of the Supreme Court, State Capital Building, Salt Lake City, Utah; and two copies of the same were mailed to Bruce N. Hale, Attorney for Plaintiff and Respondent, 235 State Capital Building, Salt Lake City, Utah 84114, this 6th day of September, 1978.

Warren S. Wright, Pro Se
Appellant

Warren S. Wright

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Vivien Kellerns

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Cite as 58-53 P-H TC

hence, not deductible as a claim against the estate under section 2053(a)(2).

Finally, even if the record supported the conclusion that there was full and adequate consideration in money or money's worth for the agreement of May 28, 1947, we would conclude that petitioner has failed to establish the deductibility of the \$150,000. The stipulation with respect to the settlement dated May 12, 1966, recites as consideration for the \$150,000 settlement distribution the following:

* * * in full settlement of all claims and disputes relating to (1) the agreement between Mr. and Mrs. Lazar dated May 28, 1947 (ii) the agreement of trust of Lena G. Lazar dated February 14, 1963, (iii) the various wills of Lena G. Lazar and (iv) the estate of Lena G. Lazar. * * *

The stipulation does not apportion the \$150,000 settlement distribution to the four designated bases of the claims of Susan R. Simon, et al. Petitioner has presented no evidence upon which a reasonable apportionment of any part of the \$150,000 settlement distribution could be made to the rights of Susan R. Simon, et al., as third party claimants under the agreement dated May 28, 1947, as distinguished from their rights as beneficiaries of the testamentary estate under prior wills or otherwise. Therefore, petitioner would still have failed to establish the deductibility of the \$150,000 settlement distribution or any part thereof under section 2053. Raytheon Production Corporation, 1 T.C. 952 (1943), ac'd. 144 F.2d 100 [32 AFTR 1155] (C.A. 1, 1944).

Decision will be entered for respondent.

[58-56] 58 TC No. 56. VIVIEN KELLEMS. Docket No. 427-70. 6-27-72. Opinion by WITHEY, J. Year 1965. Decision for Commissioner.

TAX ON INDIVIDUALS—Rates of tax—constitutionality. Federal income tax laws as applied to single taxpayer are constitutional. Computation of taxpayer's tax through use of rates applicable to single persons rather than married persons didn't constitute unconstitutional classification. *Ref:* 1972 P-H Fed. ¶3427.

Official Tax Court Syllabus

[17] Petitioner, a single person, com-

LR.C. 1951, as applicable to the year 1965. Held: The application of single return rates, without the income-splitting benefit of sec. 2(a), to petitioner's taxable income was not a violation of petitioner's constitutional rights under the fifth, ninth, fourteenth, and sixteenth amendments or article 1, section 2, clause 3, and article 1, section 9, clause 4 of the United States Constitution.

David R. Sheiton, for the petitioner.

David M. Reizes and Barry D. Gordon, for the respondent.

WITHEY, Judge: Respondent determined a deficiency in Federal income tax for petitioner for the year ended December 31, 1965, in the amount of \$813.30. Respondent has also denied petitioner's claim for refund of taxes for the same year in the amount of \$2,939.12. The issues raised by way of the notice of deficiency having been conceded by petitioner at the time of trial, the remaining issue is the allowability of petitioner's claim for refund which is based upon the assertion that the computation of petitioner's tax through the use of rates applicable to single persons rather than married persons constituted an unconstitutional classification.

FINDINGS OF FACT

Petitioner, a single person from 1947 to the time of trial of this case, resided at East Haddam, Connecticut, at the time of filing the petition. Both petitioner's 1965 individual return and claim for refund were filed with the district director of internal revenue, Hartford, Connecticut.

The tax on petitioner's return, as filed, was computed by petitioner on the basis of the rates set forth in section 1(a)(2) of the Internal Revenue Code of 1954 as amended through 1965.

OPINION

Having conceded the only issue with regard to the notice of deficiency, petitioner claims entitlement to a refund of income tax paid for 1965. The basis for petitioner's claim is that the provisions of the Internal Revenue Code providing a rate of tax applicable to petitioner, who is a single person, higher than the rate applicable to joint returns of married persons are unconstitutional and in violation of the fifth, ninth, fourteenth, and sixteenth amendments and article 1, section 2, clause 3, and article 1, section 9, clause 4 of the United States Constitution.

7-7-72

Vivien Kellems

58-377

Cite as 58-56 P-H 377

1, section 9, clause 4 of the United States Constitution.¹

Petitioner's argument with respect to the ninth and sixteenth amendments and with respect to the first article of the Constitution is apparently that the amount of tax paid by her in excess of that which would be payable if joint return rates were applied to her income is not an income tax, and also is not a tax which is apportioned among the states. This argument, predicated on the assertion that the "excess" is a penalty for remaining single, and not an income tax, is without merit. No evidence has been submitted showing the intent of Congress was to regulate or restrict or penalize persons who are not married.

Although the fourteenth amendment is generally applicable to states rather than to the Federal government, the fourteenth amendment concept of equal protection has been held in certain non-tax situations to be applicable to the United States through the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969). Without specifically stating that equal protection was an essential part of the fourth amendment in cases involving persons within the Internal Revenue Code, the Supreme Court has set forth the standard for judicial review of classifications within the Internal Revenue Code in *United States v. Maryland Salt & Share Ins. Corp.*, 400 U.S. 4 [26 AFTR2d 70-5679] (1970), a case in which the equal protection argument was made by the tax-

payer. In that case the Court stated:

Normally, if legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969). *McGowan v. Maryland*, 366 U.S. 429, 436 (1961). *Standard Oil Co. v. City of Marysville*, 279 U.S. 582, 590-587 (1929). ***

Petitioner's central argument thus hinges on the issue of whether this Court "perceives" a rational basis for the distinction drawn between married and single persons for purposes of the applicable rates of taxation. We do perceive such a basis.

This distinction was drawn for the first time by section 301 of the Revenue Act of 1918, 42 Stat. 174, and has remained a part of the Code since then. Legislative history discloses congressional intent in the enactment of the provision to bring geographic equalization of tax to the point of comparison. This equalizing provision was meant to forestall a substantial and immediate threat by state governments, adopting community property laws. The anticipated community property laws were expected by Congress to produce several "leveling" movements in magnitude to the revenue loss caused by the enactment of the bill and at the same time cause serious disruption in state and Federal governments. Congress felt it could not directly attack the effect of community property laws in light of the decision of *Poe v. State*, 190,

¹ The relevant sections of the Internal Revenue Code, as amended through Public Law 88-272, February 29, 1964, were as follows:

Sec. 1(a)(2). . . . In the case of a taxable year beginning after December 31, 1964, there is hereby imposed on the taxable income of every individual (other than a head of a household to whom subsection (b) applies) a tax determined in accordance with the following table:

Over \$14,000 but not over \$16,000	\$3,550 plus 39% of excess over \$14,000
Over \$26,000 but not over \$32,000	\$9,030 plus 55% of excess over \$26,000

Sec. 2(a). Rate of Tax. In the case of a joint return of a husband and wife under section 6013, the tax imposed by section 1 shall be twice the tax which would be imposed if the taxable income were cut in half. . . .

After giving effect to the increase in petitioner's income reported in respondent's notice of deficiency, the Federal income tax applicable to petitioner's 1964 income under the provisions of section 1(a)(2) shown above is \$10,750.11. If the "income splitting" provision of section 2(a) shown above were applicable to the same income, the tax would be \$7,568.26; the difference between the two amounts of \$3,181.85, which is a 41.7 percent increase from \$7,568.26, or a 26.1 percent reduction from \$10,750.11, depending on the reader's perspective.

¹ H. Rept. No. 1274, 90th Cong., 2d Sess. (1968), 1968-1 C.B. 241, 269.

² *Ibid.* at 261.

³ *Ibid.* at 259.

376-53

Vivien Kellems

7-7-72

Cite as 58-56 P-H TC

282 U.S. 101 [9 AFTR 576] (1930).⁵ The effect of the 1913 Act was to provide equality of treatment to persons who were married whether or not living in a community property state.

Petitioner argues that issue is not taken with the wisdom of the enactment of the split-income device to frustrate the anticipated state community property laws, but rather issue is taken with the denial of the benefit of the split-income device to single persons. We perceive two justifications to what was done by Congress in this respect. First, it is reasonable for Congress to attempt to achieve geographic equality. The means chosen to meet that end was reasonable in spite of the unequal treatment of single people since there were no viable alternative methods available to Congress to leave *all* taxpayers equal. Inequality remained if the income-splitting device were extended to *all* individual returns of both married and single persons, since then married persons in community property states filing individual returns would still be better off than persons married or single outside of community property states; nor would equality be achieved if the income-splitting device were extended only to single persons and married persons filing joint returns, because then a single person would pay a much lower tax than the tax paid by a married person who filed a separate return. Furthermore a single person would also pay a tax lower than the effective tax on the same income of a married person whose spouse also had significant income (both of whose incomes were included on a joint return).

More importantly, however, Congress was within the bounds of its constitutional role since it is conceivable Congress believed that married persons generally have greater financial burdens than single persons.⁶ The recognition of such greater burdens is certainly consonant with taxation based on the ability to pay, which has long been an important objective of the income tax scheme. The degree of recognition given by Congress to the problem of greater financial burdens on the part of the married taxpayers (see footnote 1, *supra*) was also within the discretion of Congress since it does not appear arbitrary or unreasonable.

Furthermore, the fact that the income-splitting device grants the greatest amount of tax reduction to those earning high incomes simply reflects the graduated rate structure of the Internal Revenue Code. This factor in no way negates the idea that the provision was an acknowledgment of the greater financial burdens of married persons since in any given income category the married person filing jointly will pay less tax than a single person having the same income.⁷

Petitioner's faith in *Hooper v. Tax Commission*, 254 U.S. 206 [10 AFTR 468] (1931), and similar cases is misplaced. In *Hooper* the Court was dealing with a Wisconsin income tax statute which added a wife's earnings to her husband's taxable income. The Court stated at page 217, "It can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax." The distinction between *Hooper* and the present case is that in *Hooper* the state was attempting to tax to the husband earnings which were not his, whereas in this case Congress is applying a different rate of tax to earnings conceded to be petitioner's. It is fully within the power of Congress to enact provisions changing or modifying the effect of the graduated rates, subject to the restriction discussed above; that is, if the change in the rate structure is not equal as between classes of taxpayers, there must be a rational basis for the distinction. In this case the geographic equalization of taxpayers as between community and non-community states and the recognition of the greater financial burdens of married persons provide such rational basis.

Decision will be entered for the respondent.

[58-57] 58 TC No. 57. ALFONSO DIAZ and MARIA de JESUS DIAZ. Docket No. 714-71. 6-29-72. Opinion by TANNENWALD, J. Year 1966. Decision for Taxpayer.

INCOME — To whom taxable — amounts received by others—whether income to taxpayer. Taxpayer's income

⁵ *Ibid.* at 257.

⁶ It need not be demonstrated that Congress actually considered such a state of facts as long as the facts are perceptible to the Court. See *Maryland Savings-Share*, *supra*.

⁷ It is worth noting that as the married person's spouse has an increasing amount of separate income, the "tax reduction" due to "income splitting" diminishes, reaching zero when the two incomes are equal.

Appendix 2

80,746

U. S. Tax Cases
Kellems v. Com.

These principles apply with equal force here, where we are not confronted with any contention that Secor was denied due process in the enforcement proceeding or that he was barred from raising his Fifth Amendment claims on a question-by-question basis before the IRS. The later procedure might have represented at least an effort to furnish non-incriminatory information to the IRS and have permitted the court to rule on specific questions claimed to be incriminatory. But Secor simply refused on Fifth Amendment grounds to submit to any interrogation.

Since Secor is thus barred by *recalcitra* from raising again the issue of whether he properly invoked his privilege against self-incrimination, we need not consider on the merits his claim that enforcement of

the IRS summons would violate the Fifth Amendment.*

Although Secor does not raise the issue, we note that there was ample evidence in the record to support the district court's finding of contempt. His conduct in refusing to comply with the district court's February 10, 1972 enforcement order was not free of contumacy. Upon the entry of that order he faced the choice of complying or taking an appeal. Instead of following either course, he deliberately defied the order. Four months later, when the court entered its second enforcement order in the hope that Secor might comply, he adhered to his course of disobedience. The order holding him in contempt was fully justified and is affirmed.

[¶9343] Vivien Kellems, Appellant v. Commissioner of Internal Revenue, Appellee.
U. S. Court of Appeals, 2nd Circuit, Docket No. 72-2122, 4/4/73.

[Code Sec. 1]

Tax rates: Unmarried individuals: Discrepancies: Constitutionality.—Discrepancy in the tax rates between unmarried taxpayers and married taxpayers filing joint returns is constitutional. Back reference: ¶40115.

See U. S. District Court, Munsey Bldg., Washington, D. C., for appellant; Stephen M. Kellems, Jr., P. Crumpton, Assistant Attorney General, Meyer Rothhacks, Leonard & Kellems, P. A., Department of Justice, Washington, D. C. 20530, for appellee.

Before KAUFMAN, ANDERSON and OAKES, Circuit Judges.

PER CURIAM: The judgment is affirmed on the basis of the Tax Court's opinion below. We find *Mertz v. Commissioner*

[72-2 USTC ¶9759], 469 F. 2d 466 (10 Cir. 1972), cited to us by appellant, to be inapposite.

[¶9344] United States of America, Plaintiff v. Joseph Battaglia, et al., Defendants.
U. S. District Court, No. Dist. Ill., East Div., No. 70 C 2387, 7/11/72.

[Code Sec. 6013]

Joint returns: Liability for tax: Innocent wife exemption.—Motion for summary judgment, based on the innocent wife exemption to the joint liability requirement incident to the filing of joint returns, was denied. The court, sustaining the Commissioner's

*On this issue we do note that claims of self-incrimination in IRS civil investigatory proceedings have been approached differently by different courts. Compare *United States v. Roundtree* [69-2 USTC ¶9731], 439 F. 2d 875, 882 (5th Cir. 1970), with *United States v. White*, 304 F. Supp. 1129, 1131 (D. R. I. 1970). See also *United States v. Hatch* [73-1 USTC ¶9521], — F. Supp. —, 31 AFTR 2d 73-495 (D. C. Idaho, Civ. No. 472-16, June 28, 1972); *United States v. White* [73-1 USTC ¶9565], — F. Supp. —, Civ. No. 12-12, Civ. No. 18-314, Jan. 18, 1973); *United States v. Kordel*, 397 U. S. 1 (1970), relied on by Secor, did not rule upon the issue which he seeks to raise on this appeal. There the Supreme Court held that where a defendant did not invoke his

privilege against self-incrimination in a civil examination proceeding initiated by the government, testimony given in response to that proceeding could be used at a subsequent criminal prosecution. In the case at hand the Court ruled that the defendant must have invoked his privilege in the civil proceeding if he would not intend that his testimony be used in the criminal proceeding. The defendant's failure to do so was not a waiver of the privilege, but was a tactical concession to the IRS.

We of course did not rule upon this issue in the present case, but the government's failure to invoke the privilege in the civil proceeding was not a tactical concession to the IRS, and the IRS's failure to invoke the privilege in the criminal proceeding was not a tactical concession to the government.

¶9343

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