Cite as Det. No. 92-133, 12 WTD 171 (1993).

BEFORE THE INTERPRETATION AND APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 92-133
. . .	)	Unregistered
. . .	)	Unregistered

[1] RCW 82.12.020 and RCW 82.12.0251: USE TAX -- NONRESIDENTS. The use tax applies to any use within the state of Washington. The use tax may not be apportioned. The exemption for nonresidents who use motor vehicles within the state is not available to persons who are residents of this state. Accord: Det. No. 90-298, 11 WTD 67 (1990).

[2] RCW 82.44.020 and RCW 46.16.028: MOTOR VEHICLE EXCISE TAX -- RESIDENCE. The motor vehicle excise tax applies to the use of motor vehicles by residents of this state when they license them in another state. A person is a resident of Washington when he or she is registered to vote and licensed to drive in this state. Accord: Det. No. 91-111, 11 WTD 169 (1991).

[3] MISCELLANEOUS: SUBSTANCE OVER FORM. The validity of trust is determined by considering the substance of the trust and not merely its form. Citing: Time Oil Co. v. State, 79 Wn. 2d 143 (1971); Fidelity Title Co. v. Dept. of Rev., 49 Wn. App. 662 (1987), pet. for rev. den. 110 Wn. 2d 1010 (1988).

[4] MISCELLANEOUS: SUBSTANCE OVER FORM -- REVOCABLE LIVING TRUSTS. Where Washington domiciliaries: create a revocable, amendable trust; act as the sole trustees; are the sole current beneficiaries for life; and the stated reasons for the trust are not convincing, the

substance of the transaction was absolute ownership of the trust assets by the domiciliaries. Therefore, use tax and motor vehicle excise taxes are due upon the temporary use of the "trust's" motor home in Washington.

[5] RCW 82.32.050: EVASION PENALTY. Where the taxpayers reasonably relied on the advice of the attorney who drafted the trust instrument that there would be no Washington taxes due on their use of trust property and where the Department's sole evidence of evasion is the fact that the taxpayers have previously paid an evasion penalty in circumstances different from those in the current case, the evasion penalty will not be sustained. Partial Accord: Det. No. 87-109, 2 WTD 463 (1987).

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

TAXPAYER REPRESENTED BY: . . .
. . .
. . .

DATE OF TELEPHONIC CONFERENCE: . . .

NATURE OF ACTION:

The taxpayers protest the assessment of use tax, motor vehicle excise tax, and evasion penalties thereon based on the use of a motor home titled to a revocable living trust and registered in the state of Oregon.

FACTS:

Coffman, A.L.J. -- . . . (Trust) was created on October 2, 1989 by . . . (taxpayers). The same day, the taxpayers executed a purchase order for a new motor home, which was titled to the trust. Delivery of the motor home was made approximately three weeks later. The motor home was licensed in the state of Oregon. The Department on February 6, 1991 issued notices of use tax and motor vehicle excise tax to the trust and taxpayers, jointly and severally. These notices included assessments of the 50% evasion penalty. The entire amount remains outstanding.

1. The Taxpayers.

The taxpayers testified that they retired in 1984. They have been Washington residents for eleven years. They are registered to vote in Washington and both have Washington driver's licenses.

They own their Washington home and two vehicles which are licensed here. Upon retirement, the taxpayers began investigating the problems of our mobile society, especially the potential problems of probate in multiple states for persons who are "dual residents." The taxpayer husband testified that he attended numerous seminars on estate planning. He testified that they had a net worth in excess of $1,000,000 and had determined that the best method to avoid probate was through the use of "living trusts." Further, he was concerned about estate taxes and was aware that estates in excess of $600,000 are subject to federal estate tax.[1] The taxpayers are in Washington five or six months a year and spend the rest of the time in Oregon, Arizona, and traveling.

2. The Trust.

The taxpayers stated that the trust was established for estate planning purposes. Initially, the only asset of the trust was the motor home. The taxpayers stated that they purchased two pieces of real property in Arizona and titled those properties in the name of the trust. One of the parcels was sold for the same price at which it was purchased. The taxpayers stated that the records of the trust are kept in Oregon at the address shown in the trust document, which is the office of the attorney who drafted the trust documents. Further, they stated that they review those records at least twice a year. The trust does not have any bank accounts and its only expenses are those of operating the motor home (and presumably taxes on the Arizona property). These expenses are paid by the taxpayers. The value of the trust assets was estimated to be in the neighborhood of $130,000. The trust has not filed any state or federal income tax returns, because it has had no income.

The trust was established by the taxpayers, who are also the sole trustees and sole current beneficiaries. The taxpayers have the right to revoke or amend the trust at any time. Revocation and amendment do not require concurrence of both taxpayers. That is, either may, by acting on his or her own, amend the terms or revoke the trust. The taxpayers have the right to use any real property owned by the trust without paying rent. Further, they have the right to "possession and full management of" any personal property owned by the trust. The taxpayers have the right to demand distribution of any trust income or principal. At the death of either taxpayer, the remaining taxpayer will continue to have all the rights and benefits of the trust. Upon the death of the last taxpayer, the trust is to be dissolved and

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[1]We note that the use of a living trust does not per se assist the taxpayer in reducing or eliminating federal estate taxes.

the assets distributed to the taxpayers' children. The trust instrument also contains the following provisions:

> The laws of the State of Oregon will govern with respect to the validity and interpretation of this agreement and with respect to all questions relating to the management, administration and investments of the trust estate.
>
> . . .
>
> This trust shall be located in and have its main office in the State of Oregon at . . . and shall be governed by the laws of the State of Oregon.

3. The Motor Home.

The purchase price of the motor home was $. . . . The taxpayers traded in their then-current motor home,[2] which reduced the purchase price to $. . . . This amount was financed for the period of one month. The taxpayers made the one payment from personal resources. The taxpayers testified that the motor home was in the state of Washington on only one occasion for five days. The taxpayers further testified that the motor home is placed in out-of-state storage when they are in Washington.

ISSUES:

1. Is the creation by its grantors/beneficiaries/trustees of a revocable "living trust" purporting to be located in the state of Oregon sufficient to preclude the Department from assessing use tax and MVET against the taxpayers and the trust when: the taxpayers are domiciled in Washington; the motor home is titled to the trust; and the motor home is in the state of Washington for only five days?

2. Assuming that use tax and MVET is due, is the use of the trust to hold title to the motor home evasion of the those taxes?

DISCUSSION:

RCW 82.12.020 imposes use tax on the privilege of using within this state as a consumer any article of tangible personal property purchased at retail. WAC 458-20-178(3) states, in part:

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[2]The taxpayers had originally registered the trade-in in Oregon as well as a previous motor home. They were assessed use tax and MVET as well as the 50% evasion penalty on these vehicles. The taxpayers paid the assessments, including the penalty, and two months later purchased the subject vehicle.

> Tax liability imposed under the use tax arises at the time the property purchased, received as a gift, acquired by bailment, or extracted or produced or manufactured by the person using the same is first put to use in this state. The terms "use," "used," "using," or "put to use" include any act by which a person takes or assumes dominion or control over the article and shall include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within the state.

(Emphasis supplied).

[1] The use tax applies to any use within this state and is not contingent upon the duration of such use. The taxpayers argue that: "If the tangible personal property is not purchased by a resident of the state, and also brought into the state for use, the state is powerless to impose either a [sic] excise or use tax." (Footnote omitted; brackets supplied.) The taxpayers erroneously assume that the use tax may only be imposed on residents and only on purchased property. The statute and rule do not refer to residents as being liable for the tax; rather, they refer to "persons". Further, the tax applies to the use of property acquired by gift or bailment. The taxpayers admit that the motor home was under their dominion and control in Washington for at least five days.

There is an exemption for nonresidents. RCW 82.12.0251 provides:

> in respect to the use by a nonresident of Washington of a motor vehicle or trailer which is registered or licensed under the laws of the state of his or her residence, and which is not required to be registered or licensed under the laws of Washington, including motor vehicles or trailers exempt pursuant to a declaration issued by the department of licensing under RCW 46.85.060; . . .

(Emphasis supplied.)

The taxpayers are clearly residents of the state of Washington. Therefore, RCW 82.12.0251 does not apply to them. Further, any vehicles which are owned by them that are used in the state of Washington are subject to the use tax on the full value. If the taxpayers use vehicles in Washington which are loaned to them or bailed to them, they are subject to the use tax on the fair rental value of the vehicle. WAC 458-20-178(13).

[2] The MVET is imposed on the privilege of using in this state any motor vehicle except those operated under reciprocal agreements (and other nonapplicable exemptions). See RCW 82.44.020(1). The reciprocal agreements referred to in the statute pertain to the registration requirements for vehicles operated on the highways of Washington. See WAC 308-99-025. The following excerpt from RCW 82.44.020 makes it clear that the duty to pay MVET follows the duty to license one's vehicle in this state which follows a determination of whether or not the vehicle owner is a resident of Washington:

> (4) Washington residents, as defined in RCW 46.16.028, who license motor vehicles in another state or foreign country and avoid Washington motor vehicle excise taxes are liable for such unpaid excise taxes. The department of revenue may assess and collect the unpaid excise taxes under chapter 82.32 RCW, including the penalties and interest provided therein.

(Emphasis supplied.)
A resident of Washington shall register (under chapters 46.12 and 46.16 RCW) a vehicle to be operated on the highways of the state. RCW 46.16.028(3). The definition of "resident" for licensing purposes only is provided by statutory law. RCW 46.16.028(1) states:

> For the purposes of vehicle registration, a resident is a person who manifests an intent to live or be located in this state on more than a temporary or transient basis. Evidence of residency includes but is not limited to:
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> (a) Becoming a registered voter in Washington;
> (b) Receiving benefits under one of Washington's public assistance programs; or
> (c) Declaring that he or she is a resident for the purpose of obtaining a state license or tuition at resident rates.

This is the definition of domicile with specific criteria. Thus, the determination of liability for MVET is based on the taxpayers' intent. In this case, it is beyond question that the taxpayers are domiciliaries of the state of Washington. Therefore, if the trust is not valid as against the state of Washington, then both the use tax and MVET are due and owing.

[3] It is clear that the determination of whether the state of Washington will treat the trust as valid is a question of substance and form. Further, it is clear that the determination of whether a trust is valid is not solely based on the dictates

of the grantors in the trust terms. See The Law of Trusts, Scott, 4th Ed., §598. The form of the transaction is such that the Trust does exist in the state of Oregon. The trust records, if any, are located in Oregon and the motor home is sometimes stored in Oregon. The Trust terms state that the trust will be construed under Oregon law. The term "person" for Washington excise tax purposes is defined to include a trust. RCW 82.04.030. However, we have ruled and so have the courts that the substance of a transaction must be considered and not just the form. See: Time Oil Co. v. State, 79 Wn. 2d 143 (1971); Fidelity Title Co. v. Dept. of Rev., 49 Wn. App. 662 (1987), pet. for rev. den. 110 Wn. 2d 1010 (1988); and Det. No. 89-331, 8 WTD 53 (1989) where we said:

> The availability of the "substance over form" analysis is generally limited to use by the Department when it believes that transactions may be sham and lack economic reality.

Further, we said in Det. No. 90-397, 10 WTD 341 (1990):

> In essence, the taxpayer asks the Department to evaluate these transactions based strictly on its form without examining the substance of the matter. This, we must decline to do. The U.S. Supreme Court, in Higgins v. Smith, 308 U.S. 473 (1940) when faced with a similar problem stated:
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> > . . . A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.
> >
> > On the other hand, the government may not be required to acquiesce in the taxpayer's election of that form of doing business which is most advantageous to him. The government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serve's the purpose of the tax statutes. To hold otherwise would permit the schemes of taxpayers to supersede the legislation in the determination of the time and manner of taxation.

* * *

> We also note that Higgins v. Smith, supra involved piercing the corporate veil to determine the true ownership of certain property. In the taxpayer's case, there is no corporate shield, but merely the tenuous distinction between using property for consumption as a sublessee [beneficiary] instead of as an owner. Under such circumstances we believe that the substance of the transactions should be even more determinative of the outcome of the case.

[4] In this case, the substance of the trust was that the taxpayers in fact owned the motor home. They treated it as their personal property. They paid the maintenance and insurance expenses relating to the trust property. The trust was created by them, for their benefit, they were the trustees, and they retained the power to revoke or amend it any time. Under the trust instrument, the trust property retained its character as community property while held by the trust. There were and are no controls on their use of "trust property." There are no adverse interests in the trust property.

Further, by analogy, the Internal Revenue Code treats the trust as a grantor trust under I.R.C. §§ 673 through 677. Thus, the trust is not a taxable entity for federal income tax purposes; rather, any income or gain from the sale of assets held by the trust will be taxed to the taxpayers. The grantor trust rules were adopted to prevent taxpayers from assigning income to persons who are subject to a lower tax rate. Likewise, the Department must look to the substance of the transactions to determine if they have any economic reality.

We see no purpose for the trust except to shelter the motor home from Washington's use tax and MVET. The use of the trust as means to avoid probate is not convincing. If that were the reason, additional assets would have been contributed. The taxpayers' own testimony was that they had a net worth of over $1,000,000 and only ten to fifteen percent were "owned" by the trust. The taxpayers' testimony that estate taxes were a concern is equally unconvincing, because, under federal estate taxation law, the value of the property held by the trust would be included in the estate for tax purposes. I.R.C. §§ 2033, 2036, 2037, 2038, and others.

Therefore, we find that the taxpayers are subject to use tax and the assessed MVET[3].

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[3]MVET may not be apportioned based on the length of time in the state.

[5] The fifty percent evasion penalty has been assessed on the taxpayer's use of the motor home. We have held on several occasions that the Department must prove each element of evasion by clear, cogent, and convincing evidence. Det. No. 90-314, 10 WTD 111 (1990). Further, unsuccessful attempts to limit one's tax obligations or avoid them altogether do not amount to evasion. Evasion requires that the taxpayers: (1) Know they have a tax obligation; and (2) intentionally do something which is false or fraudulent to evade that obligation. The only evidence of the taxpayers' intent submitted by the Department is the fact that the taxpayers paid the evasion penalty on previously owned motor homes. While this may have been evidence of the taxpayers' knowledge of the taxes, the facts thereunder were different. Further, that evidence alone does not prove evasion. In this case the taxpayers sought the advice of an Oregon attorney who advised them that the use of the trust would insulate them from the Washington taxes. Additionally, it is not totally clear the taxpayers knew that the use of the motor home in Washington for the one limited excursion would cause the tax to be imposed. Therefore, we find that the evasion penalty must be cancelled.

DECISION AND DISPOSITION:

The taxpayers' petition is granted as to the evasion penalty and denied as to the use tax and motor vehicle excise tax.

DATED this 27th day of May 1992.