Cite as Det. No. 01-186R, 21 WTD 308 (2002)

BEFORE THE 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. 01-186R
. . .	)	
	)	Registration No. . . .
	)	. . .
	)	Docket No. . . .

[1] RULE 178; RCW 82.04.040: USE TAX – REPOSSESSION – SATISFACTION OF DEBT. In contrast to a secured creditor that repossesses motor vehicles, the voluntary transfer of motor vehicles to an unsecured creditor in satisfaction of a debt constitutes a transfer of ownership for valuable consideration.

[2] RULE 178; RCW 82.12: USE TAX – PIERCING CORPORATE VEIL – NOMINEES OR "DBAS." A taxpayer that conducts business through other entities and expressly represents those entities as being his nominees or "dbas" is liable for tax on transactions engaged in by his nominees or "dbas."

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.

Mahan, A.L.J. – A Washington resident seeks reconsideration of a determination that sustained 21 different use tax assessments involving vehicles and equipment purchased or sold in Washington and contends that he acquired the vehicles and equipment through the repossession of collateral securing loans to the vehicle and equipment dealers.[1]

ISSUES:

1. Does the evidence support the imposition of use tax on vehicles either acquired in Washington or sold in Washington and licensed in Oregon by the taxpayer, or does the evidence show the vehicles were acquired through repossession of collateral that secured a loan to a Washington dealer?

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

2. Does the evidence support the imposition of use tax on equipment the taxpayer purchased and stored in Washington, or does the evidence show the equipment was acquired through repossession of collateral that secured a loan to an equipment dealer?

3. Does the evidence support treating an entity in which the taxpayer was the sole shareholder as a dba, nominee, or an alter ego of the taxpayer?

FACTS:

At all times relevant hereto the taxpayer was a resident of Washington. Following an investigation by the Washington State Patrol (WSP) and the Department of Revenue (Department), the Department issued 21 use tax assessments against the taxpayer on 12 motor vehicles (Invoice #s 1-9, 13, 16, 17, and 19), on a horse trailer (Invoice # 11), and on various backhoes, loaders, and other equipment (Invoice #s 10, 12, 14, 15, 18, 20, and 21)(. . .). The assessments involved the purchase or use in Washington of the vehicles and equipment over a three-year period. All of the assessments involved vehicles licensed in Oregon using either a . . ., Oregon post office box (with varying street addresses that may or may not exist) or a . . ., Oregon address (Invoice #s 3, 4, and 13). The sales of the trailer and the equipment were to the taxpayer or related companies using the same . . ., Oregon post office box. Although the taxpayer may have had business dealings in Oregon, at no time relevant hereto was the taxpayer a resident of Oregon.

A Washington used car dealer, . . . (hereinafter Dealer A), was a dealer in the chain of title on nine of the vehicles. The taxpayer either received title directly from Dealer A or the vehicles were first sold to members of a family located in Montana, who were friends of the taxpayer. The Montana residents later transferred the vehicle titles to the taxpayer (Invoice #s 4, 5, and 7). The taxpayer then licensed the vehicles in his name in Oregon. Three of the vehicles subject to use tax assessments were purchased directly by the taxpayer from other dealers in Washington and licensed in Oregon (Invoice #s 13, 16, and 19).

Eventually, the taxpayer traded in five vehicles (Invoice #s 4, 5, 7, 9, and 16) licensed in Oregon, including the vehicles from the Montana residents. The trade-ins were made to Washington dealerships and the new vehicles were licensed in Washington. On some trades, more than one used vehicle was traded for a vehicle of greater value. Because the trade-in values ended up being the same as the values on the vehicles being purchased, no sales tax was paid on the purchase of these new vehicles being licensed in Washington. Three vehicles were sold in Washington for cash (Invoice #s 1, 2, and 6). One vehicle was used to trade for equipment (Invoice # 17). Three vehicles and the horse trailer continued to be used or owned by the taxpayer (Invoice #s 3, 11, 13, and 19).

. . . (hereinafter a Washington Equipment Dealer) was the seller of all of the equipment subject to the assessments. The purchaser on some of the contracts was identified as ". . . [hereinafter entity A] dba [taxpayer]" with the same . . ., Oregon post office box as the purchaser's address or to " . . . [hereinafter entity B] dba . . . [hereinafter entity C]" at the same address. Some of the

equipment purchased by entity A, dba the taxpayer was used as trade-ins on some of the purchases by entity B, dba entity C. All of the equipment was delivered to the taxpayer's Washington residence and the equipment was stored at this address. Equipment given in exchange was picked up from the taxpayer's Washington residence.

The taxpayer challenges all of the use tax assessments. With respect to the transactions with Dealer A and the Washington Equipment Dealer, the taxpayer contends they involved "off balance sheet" flooring arrangements, and "the possession of the vehicles and/or equipment in Washington, Oregon, or elsewhere resulted from the pledge thereof to him and/or from his acceptance thereof in lieu of foreclosure of the flooring loans."[2] The evidence regarding the alleged flooring arrangement differs as between Dealer A (promissory notes) and the Washington Equipment Dealer (guarantee). As to the vehicles, the taxpayer further argues that the "vehicles licensed in Oregon were either used in Oregon or held for sale in Oregon. . . [the Department] has cited no evidence that these vehicles returned to Washington except in connection with their resale to dealers." At the hearing, consistent with observations by the WSP, the taxpayer admitted that certain vehicles were used in Washington by himself of family members, but states the vehicles were used with a dealer's plate issued to Dealer A. As to the equipment, the taxpayer further argues that the Department improperly assessed use tax against the taxpayer on equipment purchases involving entity B.

In considering these issues, we note the taxpayer was not entitled to a nonresident exemption from use tax. *See* WAC 458-20-178. The taxpayer was not a licensed vehicle dealer in Washington. *See* RCW 46.70. The taxpayer was not an employee of a vehicle dealer and the use of one or more of the vehicles would not have been exempt from use tax under WAC 458-20-132. The taxpayer was not entitled to any exempt use with a dealer's plate, based on the manner in which the vehicles were used. *See* RCW 46.70.090. The taxpayer did not perfect any security interest in the vehicles in accordance with RCW 46.12.095. The taxpayer did not provide a resale certificate for any purchase. The taxpayer, entity A, entity B, and entity C were not registered with the Department to do business in Washington and reported no income with respect to any of the transactions at issue. No purported security interest was perfected under the provisions of the Uniform Commercial Code. *See* RCW 62A.9-302.

In support of its claim that the taxpayer made flooring loans to Dealer A, the taxpayer provided copies of some promissory notes in which Dealer A was the payor. Some of the notes are clearly copies of previous notes. In response the taxpayer states that the notes were "rolled over" and he made copies so the notes could be associated with the different purchases. On some of these copies the taxpayer has written a VIN number and the number of the assessment in associating the note with a particular later purchase. The promissory notes issued with respect to loans to Dealer A variously listed the payee as the taxpayer, taxpayer/entity B, or entity B. The vehicle

[2] The taxpayer provides no basis for challenging the assessments regarding vehicles purchased from other dealers in Washington and licensed in Oregon (Invoice #s 13, 16, and 19). The assessments for these invoices are sustained without further comment.

purchases that the taxpayer associated with these loans were titled in the taxpayer's name, dba entity A, and licensed in Oregon.
On reconsideration, the taxpayer provided a copy of a deposition of one of the principals in Dealer A in a lawsuit between entity B and the Washington Equipment Dealer. The deponent testified that the taxpayer "operated" through Entity B, the taxpayer had a "debtor/creditor" relationship with Dealer A, payments were made to entity B on profits from sale of some vehicles associated with the loans, and that when the debtor/creditor relationship came to an end "there were two or three vehicles" that were transferred to the taxpayer.

However, no loan agreement, flooring agreement, security agreement, agreement in lieu of foreclosure, or similar documentation was provided with respect to the invoices at issue. The deponent testified that title to a vehicle can be placed in an individual's name for "title purposes only" so the individual can "have security on the vehicle." No evidence was presented of any such security arrangement for either the taxpayer or entity B with respect to the invoices at issue.

With respect to the lending or flooring arrangements with the Washington Equipment Dealer, no promissory note, loan agreement, flooring agreement, agreement in lieu of foreclosure, or security agreement was produced to show the equipment was collateral that secured a loan from the taxpayer to the Washington Equipment Dealer. In a September 6, 2000 summary of statements made by the Washington Equipment Dealer to the Department, the transactions were described as sales that were "final and [the taxpayer] never loaned [the Washington Equipment Dealer] any money."

On reconsideration, the taxpayer provided a copy of a November 12, 2001 letter allegedly from the owner of the Washington Equipment Dealer to entity B and the taxpayer for the stated purpose of "clarifying the tax consequences of the various transactions." This letter states that the taxpayer, operating under entity B's name, entered into various off-balance sheet arrangements. This included entity B allegedly acting as a borrower with a financing company for the purchase of equipment (with the taxpayer as guarantor), with the purchased equipment treated as "off-book" inventory stored on the taxpayer's property. As such, the taxpayer states this letter supports its contention it was acting as a lender to the Washington Equipment Dealer.[3]

In further support of its contention that the purchases from the Washington Equipment Dealer involved collateral on loans, the taxpayer provided a copy of an undated, handwritten note from entity B/taxpayer to the company that the taxpayer used to finance the purchase of the equipment. The note states that entity B "is securing the loan for [Washington Equipment Dealer] . . . please review agreement (see att)."[4] The taxpayer also provided copies of subsequent sale agreements for some of the equipment by the Washington Equipment Dealer to third-parties, at prices higher than paid by the taxpayer. At the hearing, the taxpayer stated that

[3] The Washington Equipment Dealer has made conflicting statements, which bear on his credibility. For example, in a September 6, 2000 summary of statements he made to the Department, the sales were stated to be to the "[taxpayer] with delivery usually made to his residence in [Washington]."
[4] The lender was neither aware of nor consented to any purported use of the loan proceeds for purposes other than for the purchase of equipment, according to an investigation by the Department's Revenue Officer.

the prices on his purchase invoices were at or near dealer costs. Specifically, the documents show that the equipment subject to invoice # 18, item 5, was resold to the taxpayer's Montana friends, with the balance being split between the taxpayer (not entity B) and the Washington Equipment dealer, after pay off of the amount due to the taxpayer's lender, who was a secured creditor.

With respect to the various entities used by the taxpayer, no corporate records, tax records, or other documents were produced to indicate the entities were being operated as distinct entities. During all time relevant hereto, none of these entities was registered with the Department (registered only with the Washington Secretary of State or Department of Licensing, except for entity A, which was unregistered) and were treated by the taxpayer as being inactive. The taxpayer is the sole shareholder in the various entities. In a September 5, 2000 summary of statements made by one of the taxpayer's representatives to the Department, the corporate entities were stated to be "other names for [the taxpayer]." This is supported by the taxpayer's own records, showing the various entities as nominees or dbas of the taxpayer. Because of such representations and other support for the proposition that the entities were not distinct corporate entities, but were other business names for the taxpayer (discussed further, *infra*), the Department did not further investigate these entities or assess tax against these entities.

ANALYSIS:

[1] Washington imposes both a retail sales tax and a use tax. Retail sales tax is an excise tax imposed on each retail sale in this state. RCW 82.08.020. RCW 82.04.050 defines a "sale at retail" as:

> (1) "Sale at retail" or "retail sale" means every sale of tangible personal property . . . to all persons irrespective of the nature of their business . . . other than a sale to a person who presents a resale certificate under RCW 82.04.470 and who:
>
> (a) Purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person; ' ' '

The use tax supplements the retail sales tax, and where the user has already paid retail sales tax no use tax is due. RCW 82.12.0252. It is imposed "for the privilege of using within this state as a consumer . . . [a]ny article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment. . . ." RCW 82.12.020. RCW 82.12.010(2) broadly defines "use":

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state . . . .

RCW 82.04.190 defines "consumer" to mean:

> Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property irrespective of the nature of the person's business . . . other than for the purpose (a) of resale as tangible personal property in the regular course of business . . . .

See also WAC 458-20-178.

In the present case, without considering any use observed by the WSP, the taxpayer used the vehicles purchased from Washington dealers both when they were driven from Washington to Oregon and when they were driven into Washington from Oregon for sale or trade to Washington dealers. The vehicles purchased from the Montana friends were similarly used when the taxpayer brought the vehicles into Washington from Oregon. Further, the equipment was used in Washington when the taxpayer asserted dominion and control through the storage of the equipment at its residence, whether for investment purposes, in preparation for eventual rental of the equipment, or for other uses in Washington.

The taxpayer argues that the vehicles and equipment were exempt from sales or use tax because he did not purchase the vehicles and equipment, rather he acquired them in lieu of foreclosure citing *Palmer v. Department of Rev.*, 82 Wn. App. 367, 917 P.2d 1120 (1996). In *Palmer*, the Court of Appeals discussed the terms "sell" and "convey" for purposes of determining whether Palmer was liable as a successor in interest.

The taxpayer's reliance on *Palmer* is misplaced. In *Palmer*, a boat dealer secured financing from a lender, which perfected its security interest by filing a Uniform Commercial Code statement with the Department of Licensing. In an agreement, Palmer guaranteed the lender's debt and Palmer had the right to be subrogated to the secured creditor's position. The boat dealer became in arrears and Palmer paid the debt and became subrogated to the lender's rights as a secured creditor. Palmer then repossessed four boats and trailers as a secured party, under the provisions of RCW 62A.9-503.

The Court of Appeals reasoned that a party with a perfected security interest does not acquire the property by sale or conveyance because there is no valuable consideration. *Id.* at 373. Under RCW 82.04.040, a "sale" means a transfer "of the ownership, title to, or possession" of property for "valuable consideration." The court further held that there was no conveyance because there was no transfer of title: "As a creditor with a subrogated security interest in the collateral, he already held title . . . but did not have possession of his collateral." *Id.* at 374. The court concluded, at 374:

> Palmer's exercise of his rights as a secured creditor to possession of his collateral did not constitute either a sale or conveyance by definition. Because a sale or conveyance did not occur, Palmer was not a successor pursuant to RCW 82.04.180 and is not subject to the assessed tax liability.

Accordingly, the repossession of collateral by a party with a security interest is not a sale or conveyance.

The present case is dissimilar. As to the transactions with Dealer A, the taxpayer has not advanced any evidence or authority to the effect it had title in the vehicles prior to acquiring them or that he acquired them by way of repossession. At best, the mixed evidence with respect to the promissory notes indicates the taxpayer may have loaned funds to Dealer A, for which the taxpayer received vehicles in partial satisfaction of the debts. In other words, the vehicles were conveyed to the taxpayer in exchange for valuable consideration, the debts evidenced by the notes. Such evidence does not show the taxpayer had a security interest in the vehicles or that he acquired them by repossession. As such retail sales tax or use tax was due on the acquisition of the vehicles in Washington.

As to the equipment, the transaction documents between the dealer and the taxpayer all indicate that the transactions involved a purchase of the equipment from the dealer. In one set of transactions, the taxpayer also received a guarantee from the dealer that it would repurchase the equipment within one year. Again, this document involves the purchase and sale of equipment, not a security interest in the equipment. Other transactions did not have a similar guarantee. In contrast to *Palmer*, there was no financing statement showing the taxpayer to be a secured creditor in the equipment. To the contrary, the dealer and the financing company filed a financing statement as secured parties in Oregon, because an Oregon address was used in purchasing the equipment. The taxpayer was not identified as the secured party with respect to the equipment. The taxpayer has not advanced any evidence or authority to the effect it had a security interest in the equipment prior to acquiring it or that he acquired it by way of repossession. As such retail sales tax or use tax was due on the acquisition of the equipment in Washington. As such, the *Palmer* decision does not provide a basis for the taxpayer to avoid paying tax on the purchase transactions.

We also do not find the Washington Equipment Dealer's recent characterization of the transactions to be credible. The fact the taxpayer at all times had possession of the purchased equipment at his residence in Washington or, more recently, [outside Washington], is inconsistent with the characterization of the transaction as involving "off-balance sheet" lending for inventory purposes. Instead, such evidence is consistent with respect to the documents treating the transactions as a purchase and sale, with the taxpayer taking possession of the purchased equipment.[5]

Even if we were to accept the Washington Equipment Dealer's characterization, the result would be the same. The evidence overwhelmingly supports the Department's position that the transactions at issue were structured as purchase and sale transactions. The taxpayer's argument, in effect, asks us to disregard the form of the transactions and to look at the alleged substance of the transactions. We decline to do this.

[5] At best, the additional documentation provided by the taxpayer is consistent with the taxpayer having purchased the equipment for investment purposes, because of the favorable pricing, with the plan to resell it through the dealer. A purchase of goods for investment purposes is a purchase as a consumer, not as a secured party. *See, e.g.*, *Rhyne & Associate v. Department of Rev.*, BTA Docket No. 81-5 (1982); Det. No. 91-250, 12 WTD 19 (1993).

In general, the doctrine of substance over form is not generally available to a taxpayer to eliminate the tax consequences of the taxpayer's structured form of the transaction. *See, e.g.*, Det. No. 85-112A, 1 WTD 343 (1985), *citing Higgins v. Smith*, 308 U.S. 473 (1940); Det. No. 92-166, 12 WTD 211 (1993); *see also Chevron USA, Inc. v. Department of Rev.*, Docket No. 99-94 (Bd. Tax Appeals 1999), *citing Commissioner of Internal Rev. v. Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974) ("This Court has observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not."). Having organized the transactions for all appearances as purchase and sale transactions, the taxpayer must accept the tax consequences of having done so.

[2] The next issue is whether tax was properly imposed against the taxpayer on equipment nominally purchased by a company in which the taxpayer was the sole shareholder. The documentation shows that entity B and entity C were a nominee or dba of the taxpayer. For example, the guarantee relied on by the taxpayer refers to "[entity A]. dba [entity C] and [taxpayer]." The handwritten and undated letter by the taxpayer, purportedly supporting the contention that the transactions with the Washington Equipment dealer involved loans, states that the Washington equipment dealer was "being loaned money by [enity B]/[taxpayer]." Further, the promissory notes issued with respect to loans to Dealer A variously listed the payee as the taxpayer, taxpayer/entity B, or entity B. The vehicle purchases purportedly associated with these loans were then titled in the taxpayer's name, dba entity A. Several of the purchases from other Washington dealers referred to the purchaser as "[taxpayer] dba [entity C, (which was the dba of entity B)]." Title registration documents made similar representations. In a September 5, 2000 summary of statements made by one of the taxpayer's representatives to the Department, the corporate entities were stated to be "other names for [the taxpayer]." Accordingly, we find that the entities A, B, and C were nominees or dbas of the taxpayer, and tax was properly assessed against the taxpayer.

Because of the taxpayer's express representations and use of the corporate entities as his nominees or dbas, there is no need to pierce the corporate veil. Even if necessary, the evidence would support doing so.

When the shareholders of a corporation, who are also the corporation's officers and directors, conscientiously keep the affairs of the corporation separate from their personal affairs, and no fraud or manifest injustice is perpetrated upon third persons who deal with the corporation, the corporation's separate entity should be respected. *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn.2d 400, 562 P.2d 244 (1977). The evidence in this case with respect to disregarding the corporate form goes only to whether the corporation was simply an alter ego for the taxpayer. The alter ego theory of piercing a corporate veil has been described as follows:

> The alter ego theory, upon which the trial court pierced the corporate veil and imposed personal liability upon Bergstrom, is applied when

> the corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest that the separateness of the corporation has ceased to exist. *Kueckelhan v. Federal Old Line Ins. Co. (Mut.)*, 69 Wn.2d 392, 418 P.2d 443 (1966); *J.I. Case Credit Corp. v. Stark*, [64 Wn.2d 470, 392 P.2d 215 (1964)]; *W.G. Platts, Inc. v. Platts*, 49 Wn.2d 203, 298 P.2d 1107 (1956); *In re Estate of Trierweiler*, 5 Wn. App. 17, 486 P.2d 314 (1971).
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> *Burns v. Norwesco Marine, Inc.*, 13 Wn. App. 414, 418, 535 P.2d 860 (1975). It is clear from the record that Nordic was a closely held corporation. However, a corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person. *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 535 P.2d 137 (1975). *See State v. Northwest Magnesite Co., supra*.

Grayson v. Nordic Construction Co., Inc., 92 Wn.2d 548, 553, 599 P.2d 1271 (1979)

In the present case, the equipment purchaser on some of the contracts was identified as entity A, dba the taxpayer with the same . . . , Oregon post office box as the purchaser's address or to entity B dba entity C at the same address. Some of the equipment purchased by entity A dba the taxpayer was used as trade-ins on the purchases by entity B dba entity C. During all times relevant hereto, none of these corporate entities was registered to do business in Oregon. During all time relevant hereto, none of these entities was registered with the Department (registered only with the Washington Secretary of State) and were treated by the taxpayer as being inactive. Any proceeds of sale were paid directly to the taxpayer.

The taxpayer treated these entities as his alter egos. Although requested, no business records or other documents have been submitted to support a conclusion that the entities were active, or that they maintained separate identities from the taxpayer.

On reconsideration, the taxpayer asserts that a piercing of the corporate veil requires a showing of an avoidance of a duty, citing Det. No. 89-252, 7 WTD 325 (1989), or to prevent fraud, citing Det. No. 86-296, 2 WTD 19 (1986), with the critical factor being the avoidance of a duty. To the extent proof of an avoidance of a duty was required, there is ample evidence for us to find that the taxpayer used the entities with an Oregon address to avoid the duty of the taxpayer, a Washington resident, to pay retail sales tax on his purchase of the vehicles and equipment. The taxpayer has not submitted any credible evidence as to why an Oregon address was used by entities that had no business in Oregon, were not registered to do business in Oregon, and which never took possession in Oregon. The reasonable conclusion under the facts of this case is that the various entities were used as a means for the taxpayer to avoid his duty to pay tax in Washington. In this case the purported acts of the various corporate entities were the acts of the taxpayer.

DECISION AND DISPOSITION:

The taxpayer's petition for reconsideration is denied.

Dated this 29th day of April 2001