Cite as Det. No. 00-036, 19 WTD 723 (2000)

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. 00-036
. . .	)	MVET . . .

[1] RCW 82.44: MVET – LIABILITY FOR – TRANSFER OF MOTOR HOME BY WASINGTON RESIDENTS TO OREGON CORPORATION. Washington resident taxpayers were not properly assessed MVET as the registered owners of a motor home registered in Oregon for the period of time after they contributed it to an Oregon corporation, despite the fact that the taxpayers failed to promptly transfer title to the motor home to the corporation.

[2] RCW 82.44: MVET -- SHAM CORPORATION – PIERCING THE CORPORATE VEIL – DOCTRINE OF DISREGARD. If the form and substance of the corporate entity reveals the entity is a sham, the government may invoke the doctrine of disregard to serve the purpose of the tax statutes. Where Washington resident taxpayers formed an Oregon corporation, their choice of corporate form will be respected unless: 1) they intentionally used the corporation to violate or evade a duty and 2) disregard of the corporate entity is necessary to prevent unjustified loss to the injured party. The corporate form will not be disregarded where: 1) the taxpayers maintained separate bank accounts; 2) the corporation kept business records, by-laws, Articles of Incorporation, Statement of Actions and minutes of annual meetings; 3) the corporation filed Oregon state and federal tax returns; 4) the corporation generated revenue; 5) the taxpayers did not attempt to conceal or misrepresent the identity of the responsible ownership, management and financial interest owned by the Corporation; and 6) the corporation did not participate in the diversion of assets to the detriment of creditors. Where the taxpayers, who were corporate officers, used the motor home in Washington only for corporate business, the taxpayers were acting on behalf of the Corporation when they traveled into Washington using a corporate asset. In these circumstances, the taxpayers are not liable for MVET.

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.

NATURE OF ACTION:

Taxpayers protest the assessment of Motor Vehicle Excise Tax (MVET).[1]

FACTS:

S. Thomas, A.L.J. -- The Compliance Division (Compliance) of the Department of Revenue (Department) assessed motor vehicle excise tax (MVET) on a . . . motor home owned by an Oregon corporation[2] against Washington resident taxpayers, ... The taxpayers owned the motor home prior to contributing it to an Oregon corporation in exchange for stock.

The taxpayers purchased this motor home in September 1995, for $. . . and registered it in Oregon.[3] They brought the motor home into Washington, without paying Washington use tax or MVET. In January 1997, Compliance assessed use tax and MVET on the motor home.[4] The taxpayers appealed the 1997 assessments. In August 1998, the Department's Appeals Division affirmed the assessments, and granted the taxpayer's petition with respect to the evasion penalty. Det. No. 98-155R.

On September 17, 1998, Compliance assessed MVET on the motor home for the period January 1997 through August 1998, with the measure of tax based on the motor home's $. . . purchase price. Compliance named the taxpayers as the owners, contending the Corporation is a sham:

> That [taxpayers] registered the . . . motor home in their individual names to an Oregon address . . . through May 5, 1997; that they never resided at nor operated a business from the listed address; that [the Corporation] was not established until December 12, 1996 after the Department of Revenue and the Washington State Patrol made inquiries regarding the motor home; and that [the Corporation] is the "Alter Ego" of [taxpayers], established after-the-fact to avoid a tax obligation.

According to Compliance, the totality of the circumstances surrounding the creation of the Corporation supports the conclusion it does not have a separate existence, and the Corporation is the mere instrumentality of the shareholders (taxpayers), who used the corporate form to circumvent a statute and escape a known tax obligation. Compliance also asserts that during the first part of 1997, before the taxpayers transferred title to the Corporation, the taxpayers were the registered owners of the motor home.

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[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.
[2] The Oregon corporation is ". . ." referred to as the "Corporation" in this determination.
[3] The taxpayers' claim that before they transferred the motor home to the corporation it was owned by an Oregon partnership, ... The partnership never registered in Oregon nor did it buy or sell real estate in Oregon.
[4] The original assessments covered the period September 27, 1995 through December 31, 1996.

The taxpayers were unable to participate in the teleconference held December 15, 1999; their attorney supplemented the materials with several additional documents, including copies of the taxpayers' depositions.[5]

On December 12, 1996, the taxpayers' attorney filed Articles of Incorporation with the Oregon Secretary of State for . . . (Corporation).[6] On the date the Corporation was created, the taxpayers contributed the motor home in exchange for stock in a §351 tax free exchange under the Internal Revenue Code (IRC).[7] At that time, the taxpayers were in Mexico, and did not transfer the motor home's title to the Corporation until May 1997, after they returned to the states. In May 1997, the Corporation registered the motor home in Oregon.

The corporate bylaws designate the motor home as the Corporation's principal office, with its Oregon business address being that of its registered agent.[8] The taxpayers are the corporate directors and officers; . . . is the President, . . . is the Secretary/Treasurer. For 1997, the Corporation filed an Oregon S Corporation Tax Return, and a federal S Corporation income tax return.

On December 12, 1997, the President (. . .) called a special meeting in order to conduct new business. This meeting and the subsequent annual meetings were held at . . . Trailer Park, . . ., Mexico. At this meeting, the corporate officers voted to remove the Corporation's registered agent and corporate attorney, and appoint a new registered agent. The minutes note negotiations had begun for the purchase of a golf course development in . . ., Oregon.

The first annual meeting was held on March 18, 1998. The minutes indicate the corporation was considering the sale of property owned in . . ., California. The minutes note the negotiations for the . . . [Oregon] golf course development had ceased. The second annual meeting was held March 17, 1999. An architect was selected for the [Mexico] property. The minutes note the

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[5] The documents submitted by the attorney were:

1. Copy of . . .'s Deposition;
2. Copy of . . .'s Deposition;
3. Copy of Stipulation and Agreed Order in Board of Tax Appeals Docket No. . . .;
4. Letter of . . . to Administrative Law Judge Pree of June 9, 1998 including Declaration of . . .;
5. Documents regarding . . ., a corporation controlled by the taxpayers which now holds title to the motor home;
6. Florida purchase and registration documents, including copies of two checks, one for $. . . and one for $. . . .

[6] An election was made to treat [Corporation] as a Subchapter "S corporation" for federal tax purposes. A resolution was adopted which determined the corporation would be run as a Small Business Corporation, thus qualifying the stock as §1244 IRC stock, which allows the stockholders to take an ordinary loss upon the sale or exchange of stock.

[7] The assets contributed were:

1. . . . Motor Home (motor home in this appeal), Purchase price $. . .;
2. . . . Motor Home, Purchase price $. . .;
3. . . . Motor Home, Tax basis $. . .;
4. . . . Real Estate – Lot 25 on . . . Golf Course, Purchase Price $. . . .

[8] Its registered agent is listed as: . . . located at . . ., Oregon.

property will probably be a good investment. So far, the Corporation has bought and sold land in California and Mexico.[9]

The taxpayers say prior to forming the Corporation, they operated a partnership, . . . located in Oregon. The partnership filed 1995 and 1996 federal and Oregon state tax returns in September 1997. According to the taxpayers, the partnership owned the motor home before they contributed it to the Corporation.

During the winter months the motor home is stored in California. The taxpayers claim the use of the motor home in Washington is restricted to travel to and from their Washington residence. Once in Washington, the motor home is parked at the taxpayers' residence for several months. It remains there until they leave for their yearly southbound excursion. Then, the motor home is used for a couple weeks each year to travel the highways of Oregon searching for recreational land for investment purposes.

The taxpayers protest the assessment asserting: (1) Compliance erred when it issued the assessment against the taxpayers as individuals when an Oregon corporation owns the motor home, and (2) the $. . . purchase price value assigned to the motor home is incorrect.

ISSUES:

1. Whether Washington resident taxpayers were properly assessed MVET as the registered owners of a motor home registered in Oregon for the period of time after they contributed it to an Oregon corporation but before they transferred the title to the Corporation that subsequently registered the motor home in Oregon?

. . .

3. Whether the Corporation was a sham created so the taxpayers could escape a known tax liability?

DISCUSSION:

[1] Compliance asserts the taxpayers are personally liable for the MVET on the motor home before and after title to the vehicle transferred to the Corporation. Compliance advances two theories, of personal liability each covering a different time period. The first time period spans from January 1, 1997 until May 5, 1997, the period before the Certificate of Title was transferred to the Corporation. The second period covers May 1997 through October 1998. When Compliance assessed MVET, the Corporation was the title owner of the vehicle.

The taxpayers stipulate they are Washington residents.[10] A resident of Washington is required to register a vehicle to be operated on the highways of the state. See Chapters 46.12 and 46.16 RCW; RCW 46.16.028(3); WAC 308-99-025. However, the taxpayers assert the nonresident exception applies because the motor home belongs to an Oregon corporation. There is no

[9] . . . Dep. at page 9.

[10] . . . Dep. at page 15; . . . Dep. at page 16.

question regarding the residency of the Corporation. It is an Oregon corporation, created in Oregon, and is registered with the Oregon Secretary of State.

For the first period, Compliance asserts the taxpayers owned the motor home. We disagree. Contributing the motor home to the Corporation when it was created effectively transferred ownership to the Corporation at that time. They did not transfer title until May 1997, after they returned to the states. Such failure to transfer the title certificate immediately upon the transfer of ownership, did not render the transfer incomplete. Rather, we found the only relevant consequence of not timely filing the certificate of title in Oregon results in a traffic infraction. ORS 803.105; see also, ORS 803.092; ORS 803.094. The Oregon motor vehicle statutes do not require the transferee to take possession of the certificate of title in order to acquire legal title. Thorn v. Adams, 123 Ore. App. 257, 261-62, 865 P.2d 417, 419 (1993).

. . .

The taxpayers presented conflicting testimony regarding whether the motor home was used for a business purpose in Washington. Mr. [Taxpayer] stated he uses the motor home to get to his Washington residence and exit the state.[11] However, he also admits to having "a lot of businesses in Washington." [12] When asked if he might use the motor home for a Washington business purpose he replied "Just to get us to our place of residence." That line of questioning closed with the deposer stating "So you do [use it for business purposes in Washington]. Okay".[13]

Later, Mr. [Taxpayer] explained to his attorney that he did not pay MVET because the motor home is "not a vehicle that's licensed in Washington nor used for personal use in Washington. . . . . It's a corporate entity. I don't – in a sense, I don't own it directly, the corporation does."[14] Mr. [Taxpayer] stated that they did however telephone people regarding investment property from their Washington residence.[15]

Mrs. [Taxpayer] said they always carried their cell phone and computer with them in their previous motor home that was used as an office.[16] She too, reiterated that they use the motor home only to get home in Washington and denied any business usage in Washington.[17] Although when questioned about why it was parked in a Washington State park in September 1996, she replied "That was to look at property. We were going to look at property." [18]
WAC 458-20-178(7)(g), the Department's administrative rule implementing the use tax, explains the exemption for a nonresident business applies only to vehicles which are most frequently

[11] . . . Dep. at page 35.
[12] . . . Dep. at page 35.
[13] . . . Dep. at page 35.
[14] . . . Dep. at page 61.
[15] . . . Dep. at page 42.
[16] . . . Dep. at page 25; see also . . . Dep. at page 52.
[17] . . . Dep. at page 25; see also . . . Dep. at page 52.
[18] . . . Dep. at page 25; see also . . . Dep. at page 52.

"dispatched, garaged, serviced, maintained, and operated from the user's place of business in another state." Because the statutes involve the same subject matter, the use tax definition of "resident" may be applied to issues regarding residency and MVET. Beach v. Bd. of Adjustments, 73 Wn.2d 343, 438 P.2d 617 (1968); Det. No. 96-049, 16 WTD 177 (1996).

We find the motor home was used for business purposes in Washington. The taxpayers carried their mobile office cellular telephone and computer at all times. Telephone calls were made from their residence regarding investment property while the motor home, the principal corporate office, was parked in the driveway. The motor home was parked at the taxpayer's Washington residence for several months each summer; it is not garaged or stored in Oregon. The motor home is designated as the principal office of the corporation, and it is a vehicle used in Washington. The facts demonstrate the Corporation engaged in business while in Washington.

. . .

Compliance . . . did not assess the MVET against the Corporation, claiming it was a sham, created so that the taxpayers could use the vehicle in this state without paying MVET.

While a taxpayer may choose any form of business that taxpayer wishes to use, the government may not be required to acquiesce to the taxpayer's choice of business form. Higgins v. Smith, 308 U.S. 473 , 60 S. Ct. 355 (1940). If the form and substance of the corporate entity reveals the entity is a sham, the government may invoke the doctrine of disregard to serve the purpose of the tax statutes. Id. It may be necessary to disregard a corporate entity to prevent wrongdoing and schemes designed to supercede legislation. Id. In an appropriate situation, the corporation will be disregarded and the shareholders will be held personally liable for debts of the corporation. Morgan v. Burks, 93 Wash. 2d 580, 585, 611 P.2d 751 (1980); see generally 18A Am. Jur. 2d Corporations § 43 - 54 (1999). However, the mere fact that all the corporate stock is held by members of one family does not cause the corporation to loose its separate legal identity. Grayson v. Nordic Constr. Co., 92 Wash. 2d 548, 553; 599 P.2d 1271 (1979); Nursing Home Bldg. Corp. v. DeHart, 13 Wn. App. 489, 535 P.2d 137 (1975).

The taxpayers chose to do business as a corporation created under Oregon laws. In Oregon, a corporation is presumed to have the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.[19] ORS 60.074. But, escaping taxation is not a "business" activity. Nat'l Carbide Corp. v. Comm'r, 336 U.S. 422, 437 n.20; 69 S. Ct. 726, 734 n.20 (1949); see Nat'l Investors Corp. V. Hoes, 144 F.2d. 466 (2d Cir. 1944).

In order to apply the doctrine of disregard, Washington courts require two elements be met. Rogerson Hiller Corp., v. Port of Port Angeles, 96 Wash. App 918, 924, 982 P.2d 131 (1999). First, the shareholders must have intentionally used the corporation to violate or evade a duty. Id.

[19] Oregon law provides that a shareholder of a corporation is not personally liable for the acts or debts of the corporation merely by reason of being a shareholder. 60.151 ORS

Second, disregard of the corporate entity must be "necessary and required to prevent unjustified loss to the injured party." Id. at 924, 982 P.2d 131. The first element requires the court find the corporate form was abused. Id. The second element requires that the abuse caused harm to the party seeking relief necessitating application of the doctrine of disregard. Id.

Factors the Washington courts will consider when determining whether the corporate form was abused include: [20]

1. Commingling of funds and other assets.
2. Unauthorized diversion of corporate funds or assets to other than corporate uses.
3. Treatment by an individual of the assets of the corporation as his own.
4. Failure to obtain authority to issue or subscribe to stock.
5. Holding out by an individual that he is personally liable for corporate debts.
6. Failure to maintain minutes or adequate corporate records and the confusion of the records of separate entities.
7. Failure to adequately capitalize a corporation.
8. Absence of corporate assets and undercapitalization.
9. Concealment and misrepresentation of the identity of the responsible ownership, management and financial interest or concealment of personal business activities.
10. Disregard of legal formalities and the failure to maintain arm's length relationships among related entities.
11. Diversion of assets from a corporation by or to a stockholder or other person or entity to the detriment of creditors.

Meisel v. M & M Modern Hydraulic Press Co., 97 Wash. 2d 403, 409, 645 P.2d 689 (1982) citing to Harris, Washington's Doctrine of Corporate Disregard, 56 Wash. L. Rev. 253, 260 n.38 (1981) citing Arnold v. Browne, 27 Cal. App. 3d 385, 386, 394-95, 103 Cal. Rptr. 775, 781-82 (1972); see also 18A Am. Jur. 2d Corporations, supra at § 52 (factors considered to determine whether corporation is a sham and the president is merely the alter ego of the corporation). However, even a corporation's failure to keep corporate records or follow formalities without an overt intention to abuse the corporate entity will not support a finding favoring disregarding the corporate entity. Grayson, 599 P.2d 1271.

The taxpayers maintained several bank accounts. Mr. [Taxpayer] kept records for their various business enterprises in the form of computer spreadsheets. Mr. [Taxpayer] recorded business expenses in his computer spreadsheet by noting for which business the monies were designated providing a means to separate personal expenditures from corporate expenses. The taxpayers are acting as corporate officers when they operate the motor home. The taxpayers adamantly deny any personal liability for the corporate debts, hence, this appeal.

The Corporation maintained corporate records and produced copies of the corporate by-laws, Articles of Incorporation, Statement of Actions and minutes of annual meetings along with Oregon state and federal tax returns; it did not disregard legal formalities.

[20] The list here provides only the factors relevant to this case that have been listed as to be considered when determining whether to disregard the corporate entity.

The taxpayers have not attempted to conceal or misrepresent the identity of the responsible ownership, management and financial interest. They provided corporate documents naming them as corporate officers and showing the assets owned by the Corporation. Nor has the corporation participated in the diversion of assets to the detriment of creditors.

In previous determinations, we applied a substance over form test to determine the validity of a legal entity. Using this test, we found a trust to be invalid in Det. No. 92-133, 12 WTD 171 (1993), and, in Det. No. 90-397, 10 WTD 341 (1990), we concluded a leaseback agreement in fact a sale. Such a test is consistent with the application of factors to the case at hand. Piercing a corporate veil is not to be taken lightly, and if the factors do not clearly reveal abuse of the corporate entity, we cannot apply the doctrine of disregard.

Recently, the Board of Tax Appeals (BTA) affirmed the Department's decision to disregard a corporate entity in a formal appeal, Jacobs v. Dep't of Revenue, Docket No. 97-8, when it concluded the corporation did not make a good faith effort to engage in the business. Also significant to the BTA was that the corporation's operating expenses were completely funded by loans from the taxpayer. In the immediate appeal, the Corporation generated revenue from selling assets.

The taxpayers are free to choose any form they please to conduct business, even when the business structure provides them tax advantages. They cannot however, attempt to escape a known tax liability through the use of a sham corporation. For the reasons discussed above, we cannot disregard this corporation as a sham entity.

A corporation has no personal existence and can only act through its officers and agents. Seattle Int'l Corp. v. Commerce and Indus. Ins. Co., 24 Wash. App. 108, 600 P.2d 612 (1979). An act of a corporate officer is an act of the corporation if it is on behalf of the corporation or for the corporation's benefit. Id. "A corporate officer is an agent for his corporate principal." C. B. William v. Queen Fisheries, Inc., 2 Wash. App. 691, 694; 469 P.2d 583 (1970).

The motor home was used for corporate business by the corporate officers in Washington. Thus, the taxpayers were acting in behalf of the Corporation when they traveled into Washington using a corporate asset. We find the taxpayers were incorrectly assessed MVET and dismiss this assessment. Because the taxpayers were incorrectly assessed, there is no need to reach a decision on the issue of valuation. "Human ingenuity, understandably enough, functions at its optimum whenever tax problems are concerned." Leslie Car Wash Corp. v. Dep't of Revenue, 69 Ill.2d 488, 372 N.E.2d 653, 655 (1978).

DECISION AND DISPOSITION:

The assessment is dismissed.

Dated this 29th day of February 2000.