

Cite as Det. No. 05-0200, 25 WTD 12 (2006)

BEFORE THE APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petitions For Correction of Assessment of	)	<u>D E T E R M I N A T I O N</u>
	)	
	)	No. 05-0020 <sup>1</sup>
	)	
...	)	Registration Nos. ... and
	)	...
	)	Document No. ...
	)	Docket No. ...
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...	)	Registration No. ...
	)	Document No. ...
	)	Docket No. ...

- [1] RULE 193: INTERSTATE LEASES -- NEXUS. Washington has jurisdiction to tax an out-of-state lessor's receipts from the lease of tangible personal property used in this state where the lease or the parties to the lease contemplate that the lessor's property will be principally stored and substantially used in Washington by a Washington consumer.
- [2] RULE 203, RULE 178; RCW 82.04.030, RCW 82.12: USE TAX -- CORPORATE DISREGARD – ALTER EGO DOCTRINE – USE TAX. Where a corporate shell with no function beyond holding title to assets that are for the exclusive personal convenience and benefit of its only shareholders, has operated as the mere alter ego of the shareholders, and regarding it as separate from its shareholders would aid in the consummation of a wrong on the State, the Department may look beyond the legal fiction of distinct corporate existence and disregard the corporate entity.

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.

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<sup>1</sup> The reconsideration determination, Det. 05-0020R, is published at 25 WTD 25 (2006).

## NATURE OF ACTION

A [State A] corporation, whose sole assets are a . . . motor home and a utility trailer that its sole shareholders, Washington residents, lease from it and use in Washington, protests the assessment of deferred retail sales or use tax on those assets, contending Washington cannot assess taxes against the corporation because it is a nonresident and did not bring the motor home or trailer into Washington. The corporation's shareholders, who are husband and wife, protest use tax assessed against them on the motor home and trailer, to the extent the assessment exceeds the tax due on the portion of their rental payments associated with the miles they have used the vehicles inside Washington. The taxpayers also protest related penalties and interest. We find the corporation is merely the alter ego of its shareholders, and conclude that equity requires we disregard the corporate entity and the lease arrangement, and sustain the assessment against the shareholders on the full value of the motor home and trailer. We further hold that even if we did not disregard the corporate entity, Washington would have authority to tax the corporation, and the use tax liability of the shareholders could not be prorated.<sup>2</sup>

## ISSUES

- [1] Assuming the corporation is not disregarded, does the State of Washington have jurisdiction to assess excise taxes against Corporation on the activity of leasing the motor home and trailer to the shareholders?
- [2] Assuming the corporation is not disregarded, can the use tax assessment against the shareholders be prorated based on some measure of the extent of use in Washington versus use outside Washington?
- [3] Assuming the corporation is not disregarded, what is the measure of the shareholders' use tax liability?
- [4] Can and should the Department treat the corporation as the alter ego of the shareholders and disregard the lease between it and the shareholders?
- [5] If the Department disregards the corporation, what is the measure of the shareholders' use tax liability?

## FINDINGS OF FACT

Prusia, A.L.J. – [Taxpayers] are husband and wife. They reside in . . . Washington, and own and operate several [businesses] in the area.

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<sup>2</sup> Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

[In] January . . . 1999, . . . , an attorney in [State A Location], formed, under [State A] law, . . . [Corporation] to acquire personal property. [Corporation's] articles of incorporation were filed with the [State A] Secretary of State [in] January . . . 1999. The Articles of Incorporation stated attorney[']s . . . address as [State A Location].

[In] January . . . 1999, [State C Motor Home Dealer], sold a . . . motor home . . . to [Corporation]. A retail installment contract and security agreement was signed on that date. The signature of the buyer was as follows: “[Corporation], [Husband] President,” and “[Corporation], [Wife] Sec-Treas.” The purchase price was stated as \$. . . The seller did not charge sales tax. The contract stated that \$. . . was paid down, and the balance of \$. . . was financed over a fifteen-year period, with installments of \$. . . due monthly beginning [in] February . . . 1999.

Financing of the sale was arranged by [financial organization] and financing provided by [credit organization]. The Department obtained loan records from [financial organization] which show the [Husband and Wife] applied for credit on or before January . . . 1999. A printout of notes the Department obtained from [financial organization] includes the following note: “. . . TT MRS AND SHE WILL FAX SCH C- ALSO THEY WANT UNIT IN A SHELL CORP AND IT WILL NOT BE USED FOR BUS.” While arranging financing, [in] January . . . 1999, the [Husband and Wife] obtained an insurance policy on the motor home.

Corporation held an organizational meeting at Attorney[']s office in [State A Location] [in] January . . . 1999, by telephone. According to the organizational meeting minutes, the first order of business was to elect the [Husband and Wife] as directors, to constitute the entire board of directors. The minutes further state that [the Husband] was elected president, and [the Wife] Treasurer Secretary. The minutes further state that the [Husband and Wife] transferred their title and interest in [the] motor home . . . to Corporation in return for 500 shares each in the corporation.

On the same date as Corporation's organizational meeting in [State A], January . . . 1999, “[the Husband], Pres.” signed an affidavit of acceptance of delivery of the above-described motor home, in [State C]. On the same date, Corporation provided [financial organization] with a Corporate Resolution to Obtain Credit in the amount of \$. . . , signed by the [Husband and Wife] as President and Secretary. On the same date, the [Husband and Wife], as individuals, signed a general continuing guaranty of extension of financial accommodations by [financial organization] to Corporation.

In February 1999, Attorney . . . , as agent for Corporation, applied for a [State A] certificate of title for the motor home. The application stated Corporation's address as [State A Location], which was then the office address of [the] attorney . . . . [State A] issued a certificate of title to Corporation. Subsequent [State A] registrations show the motor home registered to Corporation at a subsequent office address of [the] attorney . . . .

On May 28, 1999, an [State B] manufacturer sold a . . . utility trailer to Corporation. The Manufacturer's Certificate of Origin stated that the buyer's address was [State A Location]. On

June 29, 1999, Attorney . . . , as agent for the purchaser, applied for a [State A] certificate of title for the trailer. [State A] issued a certificate of title to Corporation. Subsequent [State A] registrations show the trailer registered to Corporation at [State A Location], which is an office address of attorney . . . .

Corporation has held annual corporate meetings, by conference call, since it was formed. Corporation provided the Department with copies of the 2003 and 2004 annual meetings, as examples. The wording of the two sets of minutes is identical, except for the dates and the signatures of the officers.

There is no evidence that Corporation has maintained its own financial records, has maintained a separate checking account, or has filed federal income tax returns.

Corporation's annual minutes for 2003 and 2004 recite that Corporation and the [Husband and Wife] entered into rental arrangements for use of the motor home and trailer "in 1999." Those minutes recite the arrangement as follows:

[T]he arrangement provided that all costs associated with the custody and operation of the coach and trailer be paid by the tenant and that the tenant pay rent based upon road mileage with minimum rents by the Shareholders as tenants equal to the payments due by the Corporation on the acquisition debt of the coach and trailer, payable directly to the lender.

There is no written rental agreement between Corporation and the [Husband and Wife]. At hearing, [Husband] stated that the [Husband and Wife] have rented the motor home and trailer from Corporation continuously since 1999, for their business and personal use. He stated the rental arrangement between Corporation and the [Husband and Wife] is that the [Husband and Wife] will pay all costs associated with storing, licensing, insuring, fueling, and maintaining the vehicles, and additionally will pay the greater of a) \$2.50 per mile for the first 20,000 miles the motor home is used annually, plus \$5.00 per mile for additional annual miles, or b) the monthly installments due the financing company. The [Husband and Wife] have paid all costs associated with custody and operation, and have paid the monthly installments to the financing company. They have never driven the vehicle enough in any year to owe Corporation more than the amount of the monthly installments. [The Husband] is listed as the insured on the automobile insurance policy for the motor home and trailer, and Corporation is listed on the policy as an additional loss payee.

Corporation has engaged in no business activity other than renting the motor home and trailer to the [Husband and Wife]. The [Husband and Wife] have been the sole operators of the motor home and trailer.

The [Husband and Wife] state they used the motor home and trailer entirely outside Washington during 1999, and never brought either vehicle into the state.

[In] May . . ., 2000, [the Husband] rented a storage unit in . . . Washington, from [Storage Facility]. The [Husband and Wife] state they brought the motor home and trailer into Washington in June 2000, and stored the vehicles at the [Storage] facility.

The [Husband and Wife] state the general whereabouts of the motor home and trailer, from June 2000 through 2003, as follows:

- 2000 Stored in . . ., Washington, with short trips between [Washington] and [other states].
- 2001 In [State D] until April 8, then on a trip to the east as far as [State C]. First in Washington on September 13. Trips between [Washington] and points in [other states] during September and October. Stored in [Washington] between October 13 and December 27, then to [State D].
- 2002 Stored in Washington from May through August, except for a 5-day trip to [State A]. Otherwise outside the state . . . . .
- 2003 In . . . [Washington], mostly in storage, from April 23 until sometime in August, otherwise outside Washington.

The motor home's only use in Washington was traveling to and from storage at the end and beginning of the [Husband and Wife's] . . .-business and personal trips outside the state. When in [Washington], it is stored at a storage facility except just before and just after trips out of state, when it parked at the [Husband and Wife's] residence. When it is outside Washington, it is temporarily stored much of the time at various locations.

The [Husband and Wife] have paid, from their personal and . . .-business funds, all expenses for operating, storing, maintaining, licensing, and insuring the motor home and trailer. The [Husband and Wife] have provided the Department with repair invoices verifying repairs outside Washington, which show dates of repairs and mileage on the motor home. They state those and other maintenance records they could produce show the miles they have actually driven the motor home annually in and outside Washington. They state those records show the mileage as follows:

<b>Year</b>	<b>Washington</b>	<b>Non-Washington</b>	<b>Total</b>	<b>Washington %</b>
1999	0	16,895	16,895	0
2000	1,060	10,632	11,692	9.07
2001	300	11,943	12,243	2.45%
2002	780	13,181	13,961	5.59%
2003	100	4,079	4,179	2.39%
<b>Totals</b>	2,240	56,730	58,970	3.80%

During a 2002 audit of the [Husband and Wife's] . . . business, the Department became aware of, and inquired about, the motor home. At that time, [Husband] told the Audit Division that the motor home was purchased out of state and stored in [State A]. On February 6, 2003, the

Department's Compliance Division was contacted by an officer of the Washington State Patrol, who reported he had observed the motor coach parked near the [Husband and Wife's] residence in . . . , Washington, during Christmas week 2002, and that a utility trailer with [State A] plate . . . had been attached to the motor coach. The WSP officer additionally reported that the motor coach had the initials ". . ." painted in large letters on the back.

Following additional investigation by the Compliance Division, [in] November . . . 2003, the Compliance Division issued separate use tax/deferred sales tax assessments against Corporation and the [Husband and Wife], on both the motor home and the trailer. The measure of the use tax was the value of the vehicles, stated as \$. . . and \$. . . respectively. The total tax assessed in each assessment was \$. . . . Interest of \$. . . and penalties of \$. . . also were assessed.<sup>3</sup>

Prior to the assessments, neither the [Husband and Wife] nor Corporation reported or paid any retail sales tax or use tax to Washington on the motor home or trailer. The assessments remain unpaid.

The taxpayers appeal both assessments against them. Corporation requests cancellation of the assessment against it, in its entirety. The [Husband and Wife] request that the assessment against them be adjusted to limit their use tax liability to the portion of their rental payments associated with the miles they actually drove the motor home in Washington.

### ANALYSIS

Washington imposes a use tax for the privilege of using within this state as a consumer, any article of tangible personal property purchased at retail, unless the use is exempt by law. RCW 82.12.020. The use tax does not apply if the sale to the present user or the present user's donor or bailor has already been subjected to Washington retail sales tax. *Ibid.* The two methods of taxation complement each other, providing a uniform tax upon the sale or use of all tangible personal property, irrespective of where it may have been purchased or how acquired. WAC 458-20-178 (Rule 178).

This appeal involves identical, alternative use tax assessments against two taxpayers, a [State A] corporation and its Washington owners, on the same use of tangible personal property.

The position of the Department's Compliance Division with respect to the liability of the [Husband and Wife] and Corporation may be summarized as follows. Corporation is a sham. It is merely the alter ego of the [Husband and Wife], and can be disregarded. *See* Det. No. 00-036, 19 WTD 723 (2000), and cases cited in that decision. The [Husband and Wife] are Washington residents. They purchased the motor home and trailer, and subsequently used both in Washington. They owe use tax on both, because they did not pay retail sales tax on their purchases. RCW 82.12.020; Rule 178. The [Husband and Wife] owe use tax on the full selling price of the motor home and trailer. RCW 82.12.010, .020. Alternatively, if Corporation is not

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<sup>3</sup> See footnote 2.

disregarded and is viewed as the owner of the motor home and trailer, Corporation is liable for use tax on both because “[t]he corporation had its only asset and reason for existence in Washington being used exclusively by Washington residents. The fact is the motor home is used in Washington and is stored in Washington under WAC 458-20-178 the motor home is taxable in Washington either as a corporate asset or a personal asset.”<sup>4</sup>

The position of Corporation may be summarized as follows. Corporation is a validly-existing [State A] corporation. There is no basis for disregarding Corporation’s existence. *See* Det. No. 00-036, *supra*, and cases cited therein. Corporation, not the [Husband and Wife], is the owner of the motor home and the trailer. Corporation entered into a rental arrangement with the [Husband and Wife] outside Washington, before the motor home and trailer were ever brought into Washington. The rental of tangible personal property is defined as a retail sale, and in Washington, a lessor is subject to tax on its gross rents as they fall due, and must collect retail sales tax on rental payments. RCW 82.04.050; WAC 458-20-211 (Rule 211). An out-of-state lessor may also be subject to tax on its gross proceeds from renting for use in Washington, and may be required to collect sales or use tax from a Washington lessee, but those obligations are subject to jurisdictional limits. WAC 458-20-193 (Rule 193); Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, and Due Process Clause of the United States Constitution, Amend. XIV. Corporation does not have sufficient contacts with Washington to be required to pay or collect and remit sales tax or use tax. Indeed, Corporation has no contacts with Washington. Corporation has been wrongly assessed.

The position of the [Husband and Wife] may be summarized as follows. The [Husband and Wife] adopt Corporation’s position. Corporation was wrongly assessed, and only the [Husband and Wife] are liable for use tax on use of the motor home and trailer. Use tax liability on rented property is limited to the amount of the rental payments. Rule 178(5). Moreover, the [Husband and Wife’s] liability is limited to the rents paid for use in this state, not rents paid for use generally. Washington has no authority to tax more than the [Husband and Wife’s] tenancy in Washington. *See* RCW 82.12.020, Rule 178, and WAC 358-20-194. Because the [Husband and Wife’s] rental amounts were computed as a function of mileage, their use in this state is the Washington percentage of total miles driven. Their use in Washington was only 4.6% of the aggregate use, and their payments for use in Washington were only 4.6% of their rental payments. Accordingly, the base against which use tax can be calculated is limited to 4.6% of the payments made by the [Husband and Wife] on Corporation’s financing of the motor home.

If the corporate entity is disregarded, an issue we address later, the Compliance Division’s analysis is correct, with respect to the [Husband and Wife’s] tax liability. We would have a situation of Washington residents who purchased a motor home and a trailer out of state, did not pay retail sales tax on the purchases, and subsequently used both the motor home and the trailer as consumers in Washington. The Washington consumer is liable for use tax in that situation. Rule 178(2). Use tax liability arose when the property was first put to use in this state, including storage in this state. RCW 82.12.010, 020(2); Rule 178(3). The [Husband and Wife] admit they

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<sup>4</sup> Quotation from letter of . . . , Tax Discovery Manager, to the law firm of . . . , dated November . . . 2003.

used both the motor home and trailer in Washington in June 2000. The measure of the use tax is the value of the articles at the time of first use in Washington. RCW 82.12.010(1), 020(4); Rule 178(13).

### Assuming Corporate Entity is Not Disregarded

Corporation's and the [Husband and Wife's] analyses assume Corporation is not disregarded. Even assuming, for purposes of argument, that the corporate entity cannot be disregarded, both of their analyses are flawed. Even if Corporation were not disregarded, and we accepted the existence of a lease to the [Husband and Wife], Washington would have jurisdiction to assess B&O tax and retail sales tax against Corporation, and the [Husband and Wife's] use tax liability would not be limited to rents corresponding to the miles driven in Washington.

### -- Corporation's liability

[1] We first address Corporation's liability under the assumption that the corporate entity is not disregarded. The mere presence of leased property in Washington is not sufficient for tax liabilities to attach to the out-of-state lessor. Rule 193. However, Washington has jurisdiction to tax lease receipts under the B&O tax and deferred retail sales tax/use tax where the property is leased to a consumer for use in this state during any of the lease period, where the lease agreement or the parties to the lease contemplate such use in this state. Det. No. 87-171, 3 WTD 153 (1987); Det. No. 87-171A, 5 WTD 281 (1988); Det. No. 91-313, 12 WTD 29 (1993).<sup>5</sup> Det. No. 87-171A explains:

This is so, even though the lessee originally takes delivery of the leased property at a point outside this state. If there is no written lease agreement or the agreement is silent with respect to the lessee's place of use of the property, then the circumstances surrounding the lease transaction will be weighed to determine the place of use contemplated by the parties. If the lessee is a Washington located business, or billings go to a Washington location or lease payments are made from a Washington location, such circumstances among others, are supportive of this state's taxing jurisdiction. The nexus contact is clear. In such cases the lessor knows and agrees to have its lease property maintained in this state as income producing property. Neither the Commerce Clause nor the Due Process Clause requires more.

Corporation would not have a right to apportion the measure of the sales tax. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 194 (1995); *D.H. Holmes v. McNamara*, 486 U.S. 24, 31 (1988). It would, however, be entitled to a credit against any use tax or deferred sales tax obligation for sales or use tax paid to other states. RCW 82.12.035.

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<sup>5</sup> See also HELLERSTEIN, STATE TAXATION, ¶18.04, which discusses when a state has adequate nexus with tangible personal property to impose a use tax on rentals.



We now consider the measure of Corporation's use tax liability under this assumption. Generally, persons who rent or lease tangible personal property to consumers are required to collect from their lessees the retail sales tax measured by gross income from rentals as of the time the rental payments fall due. Rule 211(6).<sup>6</sup> An accounting rule, WAC 458-20-197 (Rule 197) provides that tax is properly due when the seller receives payment or value accrues to the seller. Under the facts stated by the taxpayers, Corporation became liable for use tax at the time of each of the [Husband and Wife's] monthly payments on Corporation's financing obligation, on the amount of those payments. As discussed below, the measure of the tax may be subject to adjustment. See Rule 211(7), which applies to both use tax and deferred retail sales tax.

-- [Husband and Wife's] liability

Continuing to assume the corporate entity is not disregarded, the [Husband and Wife's] liability would be a use tax liability for their use of the motor home and trailer in Washington. Rule 178. The measure of the use tax would be the full value of the articles used (discussed below). The [Husband and Wife] could not prorate their use tax based on the percentage of use in Washington. Washington law provides for proration of the use tax based on actual usage in Washington under extremely limited circumstances, e.g., when motor vehicles and other vehicles are used primarily by persons engaged in operating as a private or common carrier in interstate or foreign commerce, and in certain bailment situations. RCW 82.12.0254; WAC 458-20-175 (Rule 175); Rule 211(7). We find no authority for the [Husband and Wife's] contention that they could prorate their use tax obligation. The [Husband and Wife] would be allowed a credit for retail sales tax or use tax they actually paid with respect to the property to any other state. RCW 82.12.035. However, it is doubtful another state would assess them use tax, because as to other states they would be nonresidents temporarily using the motor home and trailer in the state. *See* RCW 82.12.0251.<sup>7</sup>

Continuing to assume Corporation is not disregarded, and a lease is recognized, we turn to the measure of the [Husband and Wife's] use tax obligation. Generally, the "value of the article used" is the consideration paid for the article. RCW 82.12.010. However, RCW 82.12.010(1)(a), which defines "value of the article used" for use tax purposes, states, in relevant part:

In case the article used is acquired by lease . . . or is sold under conditions wherein the purchase price does not represent the true value thereof, the value of the article used shall be determined as nearly as possible according to the retail selling price at place of use of similar products of like quality and character under such rules as the department of revenue may prescribe.

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<sup>6</sup> Whether rental payments represent a reasonable rental value for the articles is a subject of particular scrutiny when the transaction is between shareholders and their controlled corporation. *See, e.g., Livernois v. Commissioner*, 433 F.2d 879 (1970), and other cases cited in the discussion, below, of the measure of the [Husband and Wife's] use tax obligation. Lease terms which do not reflect economic reality or a corporate business purpose may provide a basis for disregarding a Corporation, or for determining a different measure for a lessee's use tax obligation.

<sup>7</sup> This assumes they were not residents of more than one state.

Rule 211(7) states, in relevant part:

Consumers who rent or lease tangible personal property from others and who have not paid the retail sales tax to their lessors are liable for the retail sales tax or use tax on the amount of the rental payments as of the time the payments fall due unless an exemption from the tax applies. However, if the rental payments do not represent a reasonable rental value for the article, the taxable value shall be determined according to the rental charges made by other sellers of similar articles of like quality and character. This can include using the rate of return as a percentage of the capitalized value that lessors of the particular type of property are generally using in rate setting.

Here, the [Husband and Wife] agreed to an annual rent, based on the annual miles driven or the amount of Corporation's obligation on its financing, whichever was greater. In fact, the [Husband and Wife] never paid Corporation more than the amount of Corporation's obligation on its financing of the motor home. Corporation received nothing above its cost for the motor home, and nothing whatsoever for the trailer. The terms of the lease did not reflect economic reality, or a corporate business purpose, but instead benefited only the shareholders as individuals. We find the value agreed upon between Corporation and the [Husband and Wife] was not a reasonable rental value. In accordance with Rule 211(7), the Department is required to determine the taxable value according to the rental charges made by other sellers of similar articles of like quality and character.

Thus, even if we do not disregard the corporate entity, Corporation is liable for uncollected retail sales tax on the payments the [Husband and Wife] made on Corporation's financing obligation, and the [Husband and Wife] are liable for use tax on the full annual reasonable rental value of the motor home and trailer.

#### Should the Corporate Entity be Disregarded?

The Compliance Division, in assessing use tax personally against the [Husband and Wife], ignored the corporate form they created, asserting that the corporation was a sham, with no economic substance, and was created to avoid paying Washington's retail sales and use taxes.

A corporation is a separate entity or "person," under the law, from the persons or entities which comprise its membership. RCW 84.04.030; WAC 458-20-203 (Rule 203). Washington courts and the Department generally will respect taxpayers' use of the corporate form. There are, however, circumstances in which the courts and the Department will not recognize a corporation as separate from its shareholders, and will employ the doctrine of disregard.

In order to apply the doctrine of disregard, two elements must be met. *Rogerson Hiller Corp., v. Port of Port Angeles*, 96 Wash. App. 918, 924, 982 P.2d 131 (1999). First, there must be an abuse of the corporate form to violate or evade a duty. Such abuse typically involves "fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit

and creditor's detriment." *Truckweld Equip. Co. v. Olson*, 26 Wash. App. 638, 645, 618 P.2d 1017 (1980). Second, disregard of the corporate entity must be "necessary and required to prevent unjustified loss to the injured party." *Rogerson*, 96 Wash. App. at 924. Washington courts have applied the doctrine on a case by case basis with each case being decided upon its own peculiar facts. Harris, *Washington's Doctrine of Disregard*, 56 Wash. L. Rev. 253 (1981).

One situation in which it is proper to disregard a corporate entity is when the corporation is used merely as an instrumentality of the entities that own it in the conduct of their own business, generally referred to as the alter ego situation, and a third party suffers injury thereby. *Grayson v. Nordic Construction Co., Inc.*, 92 Wn.2d 548, 553, 599 P.2d 1271 (1979); *Garvin v. Matthews*, 193 Wash. 152, 74 P.2d 990 (1938); *Platt v. Bradner Co.*, 131 Wash. 573, 230 P. 633 (1924).<sup>8</sup> In *Platt*, 131 Wash. at 539, the court explained the doctrine of alter ego, as follows:

It is also well-settled law that, while in general, a corporation is a separate legal entity, nevertheless when one corporation so dominates and controls another as to make that other a simple instrumentality or adjunct to it, the courts will look beyond the legal fiction of distinct corporate existence, as the interests of justice require; and where stock ownership is resorted to not for the purpose of participating in the affairs of the corporation in the customary and usual manner, but for the purpose of controlling the subsidiary company so that it may be used as a mere agency or instrumentality of the owning company, the court will not permit itself to be blinded by mere corporate form, but will, in a proper case, disregard corporate entity, and treat the two corporations as one.

[2] In the present case, we find Corporation has been the mere alter ego of the [Husband and Wife]. From the outset, the lack of a clear distinction between the personal financial accounts, debts, and assets of the [Husband and Wife] and those of Corporation belie the [Husband and Wife's] claim they intended to form a legitimate, separate business entity. At no time from its inception has Corporation had a separate financial existence apart from the [Husband and Wife]. It is the [Husband and Wife's] personal credit and funds that have kept Corporation solvent. The [Husband and Wife] co-signed the motor home loan personally guaranteeing repayment. The [Husband and Wife] paid for the trailer. The [Husband and Wife] have provided the money for maintenance, storage, and operation of the motor home as well as paying for the mortgage debt. Corporation has not had its own operating capital. There is no evidence Corporation has maintained its own financial records, its own bank account, or has filed federal tax returns. In addition, the evidence shows the [Husband and Wife] never regarded Corporation as an independent business. [The Wife] herself described Corporation as a "shell" in applying for credit to purchase the motor home. Corporation acquired no assets beyond those the [Husband and Wife] have used for their personal convenience and benefit. Corporation did not maintain an arms-length relationship with the [Husband and Wife]. It entered into a lease arrangement with

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<sup>8</sup> Other jurisdictions have applied the alter ego doctrine in circumstances that are similar to those before us. See, e.g., *Coppa v. Tax Division Director*, 8 N.J. Tax 236 (1986); *Lewis Trucking Corp. v. Commonwealth of Virginia*, 147 S.E. 2d 747 (1966).

the [Husband and Wife] that was unwritten, and did not require a minimum rental that would include a profit component. Corporation has repeatedly renewed that exclusive lease arrangement despite receiving no profit on the lease for any year. The [Husband and Wife] have paid Corporation nothing beyond what they would have paid had they purchased the motor home and trailer in their own names. The unity of ownership and interest, and lack of an arms-length relationship, militates against supporting the corporate fiction of Corporation.

The taxpayers argue that the factors the Department listed in Det. No. 00-036, *supra*, as factors that are considered in deciding whether the corporate form should be disregarded, do not support disregard of the corporate entity in this case. The listed factors listed in that determination are: 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. The taxpayers argue that Corporation engaged in an economic activity, the acquiring and leasing of personal property. They argue that the [Husband and Wife] followed all legal formalities in setting up and operating Corporation. The [Husband and Wife] did not use any corporate assets without paying for them. The [Husband and Wife] had a lease agreement with Corporation and fully performed it. The [Husband and Wife's] commitment to pay all expenses and make the mortgage payments provided Corporation with sufficient equity to meet its obligations. They argue "commingling" arises when there is uncompensated use of assets by one of the parties by the other or when there is unaccounted use of the bank accounts of one party by the other, and such was not the case here. They argue that no fraud was perpetuated upon the only third party who dealt with the corporation, the lender.

As we stated above, Washington courts have applied the corporate disregard doctrine on a case by case basis, with each case being decided upon its own peculiar facts. Many of the factors listed in Det. No. 00-036 relate to abuse and disregard of a corporate entity that has assets and a substantial business function. Those factors will not be applicable in a case like the present one, where the corporate entity is a mere shell with no function beyond holding title to assets that are for the exclusive personal convenience and benefit of its shareholders. To the extent the listed factors apply in this case, they support disregarding the corporate entity.

The [Husband and Wife's] use of Corporation as their alter ego avoided their duty, as Washington residents, to pay use tax on their use of vehicles in Washington, and has injured the State of Washington. Had the [Husband and Wife] held the motor home and trailer in their own names, there would have been no question that they had a duty to report and pay use tax on the full value of the motor home at the moment they first used the motor home and trailer in

Washington. Using Corporation as their instrumentality for holding title to the vehicles allowed the [Husband and Wife], until discovered by the State Patrol at the end of 2002, to not register or license the motor home and trailer in Washington, and thereby avoid having to address potential use tax liability. Recognizing the corporate entity and the lease would allow the [Husband and Wife] to pay use tax only on a reasonable annual rental value, rather than the full value of the motor home and trailer. If the Department does not disregard Corporation, the State of Washington might eventually collect use tax from the [Husband and Wife] on their lease payments equal to or greater than the tax it would have collected in 2000 had they paid tax on the full purchase price at the time of first use, but whether it would be able to do so is speculative and dependent on the [Husband and Wife's] future actions.

Under the circumstances presented, it is permissible and necessary to disregard the corporate alter ego of the [Husband and Wife], and disregard the lease arrangement between the [Husband and Wife] and Corporation, and impose the use tax on the [Husband and Wife] personally on the full value of the motor home and trailer. Det. No. 90-397, 10 WTD 341 (1990) . . . .

Since Corporation and the [Husband and Wife] are alter egos, we consider the assessment against Corporation to merely duplicate the assessment against the [Husband and Wife]. We sustain both assessments. Payment of either will constitute payment of the other.

#### DECISION AND DISPOSITION

Taxpayers' petitions are denied.

Dated this 31<sup>st</sup> day of January 2005.