Cite as Det. No. 01-002R, 22 WTD 65 (2003)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

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| In the Matter of the Petition for Correction of Assessment of | ) | F I N A L D E T E R M I N A T I O N |
| | ) | No. 01-002R |
| . . . | ) | Registration No. . . . |
| | ) | FY . . . |
| | ) | Use Tax Assessment |
| | ) | Docket No. . . . |

[1] RULE 179: USE TAX – MOTOR HOME – RESIDENCY. Washington residents who leave this state to travel in a motor home remain Washington residents when they fail to establish a home elsewhere outside this state.

[2] RULE 179: USE TAX – MOTOR HOME – RESIDENCY – OREGON LICENSE. To lawfully register a vehicle in Oregon under the laws of that state, persons must actually be "domiciled" there, i.e., they must make their home there.

[3] RULE 179: USE TAX – FAMILY TRUST – LIABILITY OF GRANTORS. When property is transferred into a standard revocable living trust (i.e., "family trust"), and the grantors act as the sole trustees and are the sole current beneficiaries of the trust, the substance of the transaction is that absolute ownership of the trust assets remains in the settlers who established the trust and who, as its beneficiaries, retain actual use of its assets. Such a trust will not shelter its grantors from Washington's excise taxes.

[4] RULE 179: USE TAX – FAMILY TRUST – LIABILITY OF TRUSTEE. Under trust law, a trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent that he would be liable if he held the property free of trust.

[5] RULE 179: USE TAX – FAMILY TRUST – VOID AS TO CREDITORS. All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the

> same, shall be void as against the existing or subsequent creditors of such person. RCW 19.36.020

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:

Petition concerning Washington use tax on a motor home owned by a "family trust" of a marital community who left the state of Washington to travel.[1]

FACTS:

Bauer, A.L.J. -- The facts of this case, as initially understood, are set forth in Determination No. 01-002 and are incorporated by reference herein. In their Petition for Reconsideration, Taxpayers allege Det. No. 01-002 contained the following "numerous factual errors":

Oregon residency. Taxpayers allege they did not "stay with their nephew while in Albany, Oregon," but resided there in their motor home on property that was owned by their nephew and his wife. Taxpayers paid all of the utility costs associated with that real property, rather than a fixed amount for rent, in exchange for being able to stay on that property. Taxpayers allege that the reason they did this was to establish residency in the State of Oregon. Taxpayers always maintained that . . . , Oregon was their official residence, where they say they still have items stored. Taxpayers filled out the 2000 census information based on their residency in Oregon. Because of the amount of time Taxpayers spend traveling, they use a private mail service located at . . . , TX. This private mailbox service, for a fee, forwards their mail to them while they are traveling. Virtually all their mail is received at this address except for two magazines that are too expensive to have forwarded to that address. Because Taxpayers spend one or two months each summer at their Washington lake cabin, they pick up those two magazines then.

Washington Business Address. Taxpayers object to the Department's use of the former business address in Washington, contending this company is not active because it has not transacted any business since 1992. Taxpayers complain that it is the Department – not the Taxpayers -- that maintains this business account in a non-reporting status and changed its address to the lake cabin in 1997.

Voter's Registration/Driver's Licenses/Oregon Income Tax. Taxpayers allege the ALJ made factual errors as to Mrs. [Taxpayer] voter's and driver's registration and Oregon tax payment history. They again explain that Mr. [Taxpayer] obtained an Oregon driver's license and registered to vote in Oregon. He alleges he has voted in every Oregon election since 1995. Mrs. [Taxpayer] has not voted in any state for "a number of years" (presumably since 1996, as Det. 01-002 points out). The only reason she renewed her Washington driver's license was to avoid

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

having it expire and thus be required to take a driving test to obtain another one. "She hardly ever drives anyway." The only reason Taxpayers don't pay any Oregon income taxes is because they don't make enough income to do so.

Sale of Washington triplex. Taxpayers argue the ALJ erred by assuming Taxpayers never left the state to establish residency until they sold their triplex. Taxpayers again explain that, although they did not live there for several years, they did not start to market it until 1995, and even then the marketing was accomplished through a real estate agent. Therefore, they did not return to Washington to either "sell" or "clear out" the triplex," but to "retrieve items that were stored there."

Trip Permit. Taxpayers allege they did not go to the Department and get a trip permit for the motor home, but that the dealer supplied it. Although they could have taken delivery in Oregon, they elected not to since they were already at the dealership. Taxpayers also allege they did not look at motor homes at an Oregon dealership in 1996, but at an Oregon factory in 1995.

Taxpayers further allege that Det. No. 01-002 contained two major errors of law:

Residency. Taxpayers are no longer residents of Washington. They have complied with Oregon's residency requirements and have therefore established residency in that state.

Liability for Tax. Taxpayers do not own the motor home in question, and they should not have been assessed. Taxpayers' Family Trust owns the motor home in question. Therefore, if any use tax is due, the trust should have been assessed, not Taxpayers

ISSUES:

1. Even assuming the truth of Taxpayers' allegations of the factual errors listed above, did Det. No. 01-002 erroneously find Taxpayers to be residents of Washington?
2. Should the use tax have been assessed against the Family Trust instead of against Taxpayers personally?

DISCUSSION:

Residency. Det. No. 01-002 found Taxpayers to be residents of Washington because they had not established a permanent residence outside Washington. We find that, even if Taxpayers' amended factual allegations (listed above) are accepted as truth, Taxpayers would still be properly considered to have been Washington residents.

[1] Taxpayers, as Washington residents who left the state, were held to still be residents of Washington when they purchased their motor home because they had, at that time, failed to establish a home elsewhere outside this state. It is clear, even from their amended version of the facts, that they remained in Oregon only long enough to park their motor home on their nephew's land in [Oregon] for the minimum period they understood was necessary to obtain a valid Oregon driver's license and voter's registration for Mr. [Taxpayer]. Leaving Oregon, they

then began their travels. They claim they have always considered their address in . . . , Oregon (owned by . . . , who lived in . . . , Ohio) as their "official" Oregon residence.

[2] We again reiterate Oregon's legal requirement that those who register their vehicles in that state must be "domiciled" there; i.e., they must make their "home" there. Merely paying the utility costs for staying on a relative's property for a prescribed length of time did not make Taxpayers permanent residents of Oregon any more than paying a motel for that period would have. The storage of items in [Oregon City] did not make them residents of that city; nor did the use of the private mail service at the RV park in . . . , Texas, make them residents of that city. None of these actions objectively evidence an intent to make one's home in Oregon.

Taxpayers, even under their amended version of the facts, simply had not established a permanent residence outside the state of Washington when they purchased their motor home. Thus, they had not by such an action, manifested an intent to no longer live or be located in Washington on more than a temporary or transient basis. Therefore, we hold that Det. No. 01-002 did not err in holding Taxpayers to be Washington residents subject to use tax.

Liability for Tax. Taxpayers allege that use tax on the motor home was erroneously assessed against them, and should have been assessed against their Family Trust. Taxpayers assert:

> The [Taxpayer] Family Trust owns the motor home in question. Mr. and Mrs. [Taxpayer] do not own it individually. Therefore, as a separate legal entity, the use tax, if any were actually due, would be the responsibility of the trust, not Mr. and Mrs. [Taxpayer]. To simply ignore the trust is an obvious error of law.

Although we have not been supplied with copy of the trust documents in question, we will assume that the Family Trust is a standard revocable living trust – an amendable trust agreement used by many for the stated purpose of "avoiding probate" -- wherein Taxpayers, as trustors, also act as the sole trustees and are the sole current beneficiaries of the trust for life. We base this on Taxpayers' statement concerning the lake house (which had also been transferred into the trust): that "they retained control of the property as the trust's trustees." If the trust documents are different from these assumptions, the taxpayer could have provided them but chose not to do so.

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: See The Law of Trusts, Scott, 4th Ed., §598; Time Oil Co. v. State, 79 Wn. 2d 143, 483 P.2d 628 (1971); Fidelity Title Co. v. Dept. of Rev., 49 Wn. App. 662, 745 P.2d 530 (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.
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> > 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 serves 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.
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> . . .
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> 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.

Further, by analogy, the Internal Revenue Code treats such a trust as a grantor trust under I.R.C. §§ 673 through 677. Thus, the trust is not a separate taxable entity for federal income tax purposes, and any income or gain from the sale of assets held by the trust will be taxed to the taxpayers who formed it. The grantor trust rules were adopted to prevent taxpayers from assigning income to other "persons" – i.e., trusts -- which would be 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.

[3] When property is transferred into a standard revocable living trust (commonly known as a "family trust" intended for use in avoiding probate), and the grantors (settlors) act as the sole trustees and are the sole current beneficiaries of the trust, the substance of the transaction is that absolute ownership of the trust assets remains in the settlors who established the trust and who, as its beneficiaries, retain actual use of its assets. Such a trust will not shelter its settlors from Washington's excise taxes. See Det. No. 92-133, 12 WTD 171 (1993).

[4] Furthermore, it is a basic premise of trust law that the trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent that he would be liable if he held the property free of trust. See, Restatement of the Law, Second, Trusts, § 261 (1959).

[5] Additionally, RCW 19.36.020 provides:

> That all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.

In this case, Taxpayers, who were not only its settlors, but also the trustees and beneficiaries of their Family Trust, treated the motor home as if it were their own personal property. The substance of Taxpayers' Family Trust, for use tax purposes, was that Taxpayers in fact did own the motor home. They paid its maintenance and insurance expenses. The trust was created by them, they were the trustees, and presumably retained the power to revoke or amend the trust document at any time prior to their deaths. Under such a trust instrument, the trust property retained its character as community property while held by the trust. We have been advised of no adverse interests in, or controls on, Taxpayers' use of the "trust property."

Even without such a holding Taxpayers would be liable for use tax. Because Taxpayers serve as the trustees of their Family Trust, they are personally liable to third persons on obligations incurred by them in the administration of the trust. Because Taxpayers, as trustees, caused the motor home to be purchased in the State of Washington without payment of retail sales tax, and subsequently used in this state, Taxpayers are personally liable for the use tax. Restatement of the Law, Second, Trusts, supra.

Finally, RCW 19.36.020 serves as a bar from sheltering Taxpayers from their failure to pay retail sales tax on the purchase of the motor home. The State of Washington, a valid creditor as to the retail sales taxes that were not timely paid at purchase, has a right to proceed against Taxpayers as if the trust were void.

In this case, Taxpayers, as a marital community, are properly considered to be the true purchasers and users of the motor home. We hold that use tax was properly assessed against them and not the trust.

DECISION AND DISPOSITION:

Taxpayers' petition for reconsideration of Det. No. 01-002 is denied.

Dated this 30th day of November, 2001