

BEFORE THE BOARD OF TAX APPEALS.
STATE OF WASHINGTON.

CRESTING WAVE SEAFOODS, INC.,

Appellant,

Docket No. 32086

v.

Re: Excise Tax Appeal

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

FINAL DECISION

Respondent.

This matter came before the Board of Tax Appeals (Board) for informal hearing on June 4, 1987. The appellant, Cresting Wave Seafoods, Inc. (taxpayer), was represented by John L. Lofquist, President; and Yoshio Oono, Vice President. The respondent, Department of Revenue (Department), was represented by Abraham J. Krebs, Administrative Law Judge.

The Board, having heard testimony in support of the appellant's appeal and of the respondent's answer and having heard and considered the arguments made on behalf of both parties, now makes its decision as follows:

ISSUES.

There are two issues before this Board in this appeal..

1. Did the Department inform the taxpayer of their fish tax liability in a proper and timely manner?

2. Is the taxpayer liable for the fish tax for the salmon roe purchased by the taxpayer from Alaskan suppliers?

FACTUAL MATTERS.

1. The excise tax liability protested by the taxpayer is the Tax on Enhanced Food Fish (formerly: Tax on Food Fish and Shellfish), Chapter 82.27 RCW, in effect from July 1, 1980.

2. The fish tax was assessed upon the value of salmon roe purchased by the taxpayer from Alaskan vendors. This salmon roe was shipped to the taxpayer in Washington from Alaska.

3. The taxpayer ordered the salmon roe from various Alaskan suppliers by phone from Seattle. The Alaskan supplier then shipped the salmon roe to the taxpayer by air freight. The purchase price was not determined until physical inspection of the roe was made by the taxpayer or the taxpayer's Washington buyer upon arrival in Seattle.

4. The salmon roe is a very delicate commodity and its value is highly dependent on its quality. All shipments from Alaska to the taxpayer have had value. After physical inspection, the taxpayer negotiated a price with the Alaskan supplier by phone. All business transactions between the Alaskan supplier and the taxpayer were made verbally.

5. The Department audited the business records of the taxpayer for the period of January 1, 1981 through June 30, 1984. Pursuant to this audit, the Department issued a tax assessment on May 30, 1986 asserting fish tax liability in the amount of \$8,761 and \$2,999 for interest due for a total sum of \$11,760. The taxpayer has paid in full the sum of \$12,335.83 which includes extension interest.

6. The taxpayer claims that it is not liable for the fish tax because it was not the first owner, either inside or outside of Washington, to possess, either actually or constructively, the food fish after it had been landed in the state of Washington. The taxpayer contends that the Alaskan seller owned and possessed the salmon roe as the first owner within the state of Washington.

7. The taxpayer, through its attorney, submitted a Memorandum of Law on February 3, 1986, as well as evidence which included various exhibits and affidavits, to the Department regarding the potential fish tax liability. The Department concluded on March 17, 1986, that the taxpayer was liable for the fish tax and prepared an "Auditor's Detail of Differences and Instructions to Taxpayer." ¹ The Department did not forward this "detail of differences" to the taxpayer until October 1986 when their final determination was issued.

8. On May 30, 1986, the Department issued a Fish Tax Assessment notice to the taxpayer in the total amount of

1 The auditor's "detail of differences" is a written document that is provided to each taxpayer who had adjustments made as a result of an audit. The document explains why the adjustment to the taxpayer's account was made.

\$11,760 with supporting schedules detailing the Department's computations. The notice stated in pertinent part:

Total Due and Hereby Assessed \$11,760.00

A penalty of 10% will be assessed if not paid on or before June 24, 1986. If there are questions regarding tax included in this assessment or computation thereof, contact:

Lee Springer
901 Dexter Horton Building
Seattle, WA 98104
Phone No. (206) 464-6452

9. The taxpayer consulted his attorney about this notice and was advised to not respond and to continue to await a response to the February 3, 1986 data submitted to the Department.

10. On October 10, 1986 the Department issued to the taxpayer Final Determination No. 86-268 with the "detail of differences" attached.

11. The legislature amended Chapter 82.27 RCW effective July 24, 1983. The language of the pertinent statutes, before and after amendment, is as follows:

Before amendment, RCW 82.27.020 in pertinent part provided:

(1) In addition to all other taxes, licenses, or fees provided by law there is established an excise tax on the possession of food fish and shellfish for commercial purposes as provided in this chapter. The tax is levied upon and shall be collected from the owner of the food fish or shellfish whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish or shellfish have been landed. Processing and handling of food fish and shellfish by a person who is not the owner is not a taxable event to the processor or handler.

. . .
(3) The measure of the tax is the price paid by the first person in possession of the food fish or shellfish .
. . .

(Underlining indicates that statutory definitions are provided below.)

Before amendment, RCW 82.27.010 in pertinent part provided the following definitions:

(2) "Commercial purposes" has the meaning ascribed to it by RCW 75.04.080. [Basically dealing in food fish . . . for profit, or by sale, barter, trade, or in commercial channels.]

(3) "Possession" means the control of food fish and shellfish by the owner and includes both actual and constructive possession. Constructive possession occurs when the person has legal ownership but not actual possession of the food fish or shellfish.

After amendment effective July 24, 1983, RCW 82.27.020 in pertinent part provides:

(1) In addition to all other taxes, licenses, or fees provided by law there is established an excise tax on the commercial possession of food fish . . . as provided in this chapter. The tax is levied upon and shall be collected from the owner of the food fish . . . whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish . . . have been landed. Processing and handling of food fish . . . by a person who is not the owner is not a taxable event to the processor or handler.

(Underlining indicates the new language provided by the 1983 amendment.)

After amendment effective July 24, 1983, RCW 82.27.010 in pertinent part provides the following definitions:

(2) "Commercial" means related to or connected with buying, selling, or bartering.

(3) "Possession" means the control of food fish

. . . by the owner and includes both actual and constructive possession. Constructive possession occurs when the person has legal ownership but not actual possession of the food fish . . . 2

12. On the issue of ownership, the Uniform Commercial Code (UCC) statute RCW 62A.2-401 provides:

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is

to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(Emphasis added.) UCC statute RCW 62A.2-401 also states:

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

(Emphasis added.)

13. Ownership is defined by Black's Law Dictionary, 997 (5th rev. ed. 1979), in pertinent part as follows:

The exclusive right of possession, enjoyment, and disposal; involving as an essential attribute the right to control, handle and dispose.

2 RCW 75.98.005 states, "In enacting this 1983 act, it is the intent of the legislature to revise and reorganize the fisheries code of this state to clarify and improve the administration of the state's fisheries laws. Unless the context clearly requires otherwise, the revisions made to the fisheries code by this act are not to be construed as substantive. [1983 1st ex.s. c 46 section 1]"

CONCLUSIONS.

The appellant and respondent each have had an opportunity to place their arguments before this Board for consideration.

The Board has considered all the testimony and documentary evidence submitted by both parties to support their position in this appeal. Based on the testimony and evidence presented, the Board concludes:

1. The Board has jurisdiction over the persons and subject matter of these proceedings.

2. The Board concludes that the 1983 amendments to RCW 82.27.010 were to clarify and improve the administration of the tax on enhanced food fish and were not substantive changes. Therefore, the Board will not distinguish between the amended or original language in their interpretation of this statute.

ISSUE I..

3. The Department issued the Fish Tax Assessment No. 111275 to the taxpayer on May 30, 1986 without attaching the "detail of differences" which is the Department's common practice. However, the Fish Tax Assessment received by the taxpayer clearly stated that if there were questions regarding the tax due in this assessment or computation thereof to contact a particular individual at a definite address and telephone. It also clearly stated that a 10 percent penalty would be assessed if the tax were not paid by June 24, 1986. In any event, the taxpayer has not shown that it was due more notice under the statute or rule. Therefore, the Board concludes that the taxpayer was given an opportunity to seek clarification and was properly and timely informed.

ISSUE II..

4. The fish tax is an excise tax established on the commercial possession of enhanced food fish. The tax is levied upon and shall be collected from the owner of the enhanced food fish whose possession constitutes the taxable event. RCW 82.27.020. The taxable event is the first possession in Washington by an owner.

5. The taxpayer, as the owner, had the first commercial possession of the salmon roe in Washington at the time in question. The taxpayer was the owner of the salmon roe when it landed in Washington and the taxpayer had the right to control, enjoy and dispose (sell), or reject the goods.

6. The fish tax was properly imposed in substantial compliance with the statute, and the Department's determination should be affirmed.