

BEFORE THE INTERPRETATION AND APPEALS DIVISION  
DEPARTMENT OF REVENUE  
STATE OF WASHINGTON

In the Matter of the Petition                    ) D E T E R M I N A T I O N  
For       Correction                   of       Assessment                   and       )  
Refund of    )                   No. 89-268  
  )  
  )       Registration No.       . . . .  
  )       . . . /Audit No.       . . . .  
  )

[1] FISH TAX: RCW 82.27.030 (2) -- EXEMPTION -- FOOD FISH -- AQUACULTURALLY GROWN -- SHELLFISH. There is an exemption from the fish tax in RCW 82.27.030 (2) for the growing of food fish only, not shellfish, which are raised from eggs or fry and which are under the physical control of the grower until sold or harvested. Where taxpayer aquaculturally grows mussels, the exemption does not apply because the term "food fish" does not include shellfish.

[2] FISH TAX: RCW 82.27.020 (4) (c) and (d) -- RATE OF TAX -- SHELLFISH EXCEPT OYSTERS -- AQUACULTURALLY GROWN. The legislature by statute sets the rate of tax. The Department of Revenue as an administrative agency cannot exercise legislative authority to apply a tax rate not provided by statute. The statutes specify that "shellfish, except oysters" have a tax rate of two percent, and oysters have a tax rate of seven one-hundredths of one percent (.0007). The fact that taxpayer's mussels are aquaculturally grown and oysters may also be aquaculturally grown does not permit the Department to apply the tax rate for oysters to shellfish/mussels.

[3] FISH TAX: RCW 82.27.020 (3) -- MEASURE OF FISH TAX -- PRICE PAID -- VALUE AT POINT OF LANDING -- SELLING PRICE -- BUY/SELL TRANSACTION -- COST OF GROWING MUSSELS -- DELIVERY COST. Prior to July 28, 1985,

the measure of the fish tax was the price paid by the first person in possession of food fish or shellfish. From July 28, 1985 onward, the measure of the fish tax is the value of the enhanced food fish, which includes shellfish, at the point of landing. Where taxpayer aquaculturally grows mussels, the measure of tax is its selling price less delivery costs. The delivery costs are deductible where they occur after landing of the shellfish. The statute's terms of "price paid" and "value" by a commercial possessor contemplate a "selling price" resulting from a buy/sell transaction as the basis for the measure of the tax. The cost of growing shellfish is not the basis for the measure of the tax.

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.

TAXPAYER REPRESENTED BY: . . .  
. . .

DATE OF HEARING: July 23, 1987

NATURE OF ACTION:

Petition protesting the assessment of the Enhanced Food Fish Excise Tax (fish tax) on the basis that the taxpayer claims there is a statutory exemption for its aquacultural method of growing mussels or that the legislature intended such exemption to apply to its method. If taxable, the taxpayer protests the rate of tax applied and the measure of the tax.

FACTS AND ISSUES:

Krebs, A.L.J. -- [The taxpayer] is engaged in the cultivation and wholesale selling of blue mussels.

The Department of Revenue (Department) examined the business records of the taxpayer for the period from January 1, 1983 through June 30, 1986. As a result of this audit, the Department issued the above captioned tax assessment on December 8, 1986 asserting fish tax liability in the amount of \$ . . . and interest due in the amount of \$ . . . for a total sum \$ . . . which has been paid in full. The taxpayer seeks a refund of this payment.

The taxpayer seeks also a refund of fish taxes paid with its quarterly tax returns filed for periods subsequent to June 30, 1986.

The time period for the refunds sought, January 1, 1983 and thereafter, are governed by Chapter 82.27 titled "Tax on Food Fish and Shellfish" effective July 1, 1980 through July 27, 1985, and Chapter 82.27 titled "Tax on Enhanced Food Fish" effective July 28, 1985 to the present time. When referring to the former, we will use the term "prior fish tax statute". When referring to the latter, we will use the term "current fish tax statute".

#### AQUACULTURAL EXEMPTION.

The taxpayer contends that it was the legislature's intent to exempt fish which are grown by the aquacultural method from the fish tax. The taxpayer points to the current exemption statute, RCW 82.27.030 (2) -- in the prior statute, it is RCW 82.27.030 (3) -- as granting such exemption where it states:

The tax imposed by RCW 82.27.030 shall not apply to:  
...(2) the growing, processing, or dealing with food fish which are raised from eggs or fry and which are under the physical control of the grower at all times until being sold or harvested; ...

The taxpayer describes its method of growing, harvesting and selling its mussels as follows. The taxpayer maintains . . . rafts in . . . on the east side of . . . Island. From these rafts hang some . . . lines, . . . feet long, to which maturing mussels are attached. In late spring, the mussels spawn. At that time, the taxpayer hangs down from the rafts some . . . lines, . . . feet long, near the . . . foot long lines to catch the eggs. The spawn attach to the . . . foot lines and grow to a size that can be handled. They are then removed from the . . . foot lines and put on the . . . foot lines where they remain stationary until harvested about six to eight months later. This process goes on throughout the year but is diminished in the winter time. The spawn of a "wild" (not aquaculturally grown) mussel may occasionally attach to the lines. If there are . . . mussels on a line, maybe . . . would be from a "wild" mussel. By varying the . . . of the lines, the taxpayer controls the growth of the mussels so that harvesting of the mussels can be done on a year-round basis.

The harvesting of the mussels is done by pulling them off the lines. The mussels are transferred to the taxpayer's processing boat which is pulled up alongside the raft. Processing consists of cleaning and scrubbing the mussels. The mussels are then packaged in onion sacks on the boat and weighed. The boat goes to the . . . wharf where the sacks are unloaded and put on the taxpayer's truck for delivery to wholesalers and retailers in . . . . The truck transports usually about 700 pounds.

The taxpayer negotiates a selling price for the mussels with the buyer but it is usually the buyer's offering price which closes the deal because of competition of sellers. The taxpayer receives an average price of one dollar per pound.

On some occasions, the taxpayer buys mussels from other "small farmers" who are unable to sell to their customers. The taxpayer has more regular customers and a wider market. The taxpayer takes its boat to the rafts of the "small farmers" and buys the mussels at 30 cents per pound and resells them at about one dollar per pound.

#### RATE OF TAX.

The taxpayer asserts that if the aquaculturally grown mussels are not exempt from the fish tax under RCW 82.27.030 (2), then the rate of tax should be the same as for oysters, that is, seven one-hundredths of one percent (.0007) per RCW 82.27.020 (4) (d), because oysters are the only other shellfish grown by the aquaculture method. The taxpayer asserts that its mussels should not be taxed at the two percent rate as applied to other shellfish. The taxpayer reasons that when the fish tax law was revised, mussel farming and culturing methods were overlooked or improperly addressed; otherwise its tax rate would have either been the same as for oysters or else the mussels would have had a separate or lower tax rate.

#### MEASURE OF TAX.

With respect to the measure of tax, the current fish tax statute, RCW 82.27.020 (3), provides:

(3) The measure of the tax is the value of the enhanced food fish at the point of landing.

The prior fish tax statute, RCW 82.27.020 (3), provided:

(3) The measure of the tax is the price paid by the first person in possession of the food fish or shellfish. If the food fish or shellfish are acquired other than by purchase or are purchased under conditions where the purchase price does not represent the value of the food fish or shellfish ..., the measure of the tax shall be determined as nearly as possible according to the selling price of similar products of like quality and character under rules adopted by the department of revenue.

Because there were no comparable sales of harvested mussels before they were cleaned and processed, the auditor used in computing the measure of the tax an estimated figure of 70 percent of the selling price as representing the value of the mussels at the point of landing. The remaining 30 percent not included in the measure of tax represented production (cleaning and processing) and delivery costs. The auditor requested additional cost data from the taxpayer so as to refine the 70 percent estimate, but the taxpayer did not respond.

The taxpayer asserts that, if taxed at all or at whatever rate, the measure of the tax should be at the "landed value of 30 cents per pound" which is the price that the taxpayer has paid when purchasing landed mussels not processed nor delivered from other mussel farms nearby. If taxpayer's selling price less processing and delivery cost is used to arrive at the value of the landed mussels, the taxpayer asserts that the following costs of marketing and production should be the basis for arriving at the value of the landed mussels: staff salaries, telephone, office rent, promotional materials, packaging, travel, research and development, and maintenance of processing equipment and boat. The taxpayer maintains that most of its expense costs are in research and development and in "value-added activities", not in the actual growing and initial harvest of mussels. By its computations, the taxpayer arrived at 30 cents per pound as the value/cost of its mussels.

#### DISCUSSION:

The pertinent provisions of the "prior fish tax statutes," in effect from July 1, 1980 through July 27, 1985, and relevant to the taxpayer's appeal, are as follows (emphasis supplied):

RCW 82.27.020 (1) In addition to all other taxes...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....

RCW 82.27.020 (3) The measure of the tax is the price paid by the first person in possession of the food fish or shellfish. If the food fish or shellfish are acquired other than by purchase..., the measure of the tax shall be determined as nearly as possible according to the selling price of similar products of like quality and character under rules adopted by the department of revenue.

RCW 82.27.020 (4) The tax shall be equal to the measure of the tax multiplied by the rates for food fish and shellfish as follows:

(c) Other food fish and shellfish, except oysters: Two percent.

(d) Oysters: Seven one-hundredths of one percent.

RCW 82.27.030 Exemptions. The tax imposed by RCW 82.27.020 shall not apply to: (1) Food fish or shellfish previously landed outside the state...and (3) the growing, processing or dealing with food fish which are raised for eggs or fry and which are under the physical control of the grower at all times until being sold or harvested.

RCW 82.27.050 ...The meaning attributed to words and phrases in chapter 82.04 RCW, insofar as applicable, shall have full force and effect with respect to taxes imposed under this chapter.

The pertinent provisions of the "current fish tax statutes," in effect from July 28, 1985 to the present time, and relevant to the taxpayer's appeal, are as follows (emphasis supplied):

RCW 82.27.010 Definitions. As used in this chapter, the following terms have the meanings indicated unless the context clearly requires otherwise.

(1) "Enhanced food fish" includes all species of food fish, shellfish, and anadromous game fish...

(5) "Landed" means the act of physically placing enhanced food fish (a) on a tender in the territorial waters of Washington; or (b) on any land within or without the state of Washington including wharves, piers, or any such extensions therefrom.

RCW 82.27.020 (1) In addition to all other taxes ... provided by law there is established an excise tax on the commercial possession of enhanced food fish as provided in this chapter. The tax is levied upon and shall be collected from the owner of the enhanced food fish whose possession constitutes the taxable event. The taxable event is the first possession in Washington by an owner.

RCW 82.27.020 (3) The measure of the tax is the value of the enhanced food fish at the point of landing.

RCW 82.27.020 (4) The tax shall be equal to the measure of the tax multiplied by the rates for enhanced food fish as follows:

(c) Other food fish and shellfish, except oysters: Two percent.

(d) Oysters: Seven one-hundredths of one percent.

[1] RCW 82.27.030 Exemptions. The tax imposed by RCW 82.27.020 shall not apply to: (1) Enhanced food fish originating outside the state...(2) the growing, processing, or dealing with food fish which are raised from eggs or fry and which are under the physical control of the grower at all times until being sold or harvested; and (3) food fish, shellfish, and anadromous game fish,...shipped from outside the state...

We now turn to the issues raised by the taxpayer.

AQUACULTURAL EXEMPTION.

Exemptions to a tax law must be narrowly construed. Yakima Fruit Growers Ass'n v. Henneford, 187 Wash. 252 (1936). Taxation is the rule and exemption is the exception. Fibreboard Paper Prods. Corp. v. State, 66 Wn.2d 87 (1965). Where a statute specifically designates the things upon which it operates, there is an inference that the legislature intended all omissions. Wash. Natural Gas v. P.U.D. 77 Wn.2d 94 (1969), Queets Band of Indians v. State, 102 Wn.2d 1 (1984). Anyone claiming a benefit or deduction from a taxable category has the burden of showing that he qualifies for it. Group Health Coop. of Puget Sound, Inc. v. State Tax Comm'n, 72 Wn.2d 422 (1967). Exemptions thus do no more than carve out a narrow niche where the tax law does not reach. Budget Rent-A-Car v. Dep't of Rev., 81 Wn.2d 171 (1972).

The exemption from fish tax in RCW 82.27.030, both prior and current statutes, is available to "food fish" only when raised by the aquacultural method described in the statute. The word "shellfish" does not appear in the section of the statute granting an exemption to food fish raised by an aquacultural method. The word "shellfish" does appear conjunctively with "food fish" in other sections of the same statute as qualifying for exemption, i.e., "(3) food fish, shellfish, anadromous game fish...shipped from outside the state". It is obvious then that the legislature intentionally omitted "shellfish" from the aquacultural exemption. Clearly the legislature has carved out a "narrow niche" to exempt only the aquaculturally grown food fish, not shellfish.

An administrative agency (such as the Department of Revenue) cannot alter or amend a statute by interpretation, even with legislative acquiescence, and the court must give effect to the plain meaning of the language used. Burlington Northern v. Johnson, 89 Wn.2d 321 (1977). An administrative agency may not interpret the statutes it implements in a manner which has the effect of amending them. In re Meyers, 105 Wn.2d 257 (1986). Where a statute designates a list of things whereupon the statute operates, the inference arises that the Legislature intended to omit other things not listed; "specific inclusions exclude implication". In re Eaton, 110 Wn.2d 892 (1988). The court cannot read into a statute that which it may believe the Legislature has omitted, be it intentional or inadvertent omission. Jepson v. Dept. of Labor & Industries, 89 Wn.2d 394 (1977). Accordingly, the Department has no power or authority to extend the fish tax exemption to aquaculturally grown shellfish. We conclude that the exemption for aquaculturally grown food fish is not available for the taxpayer's aquaculturally grown shellfish.



RATE OF TAX.

[2] For the same rules of statutory construction and the same limitations upon the Department as an administrative agency to exercise legislative authority as set forth above, we must abstain from applying a tax rate not provided for in the statutes. RCW 82.27.020 (4) (c) specifies that "other food fish and shellfish, except oysters" have a fish tax rate of two percent. Clearly the legislature has spoken that all shellfish except oysters are subject to the two percent fish tax rate. Accordingly, the Department has no power or authority to change the tax rate applied to shellfish. We conclude that the taxpayer's mussels as shellfish are properly subject to the two percent tax rate.

The taxpayer has pointed out that oysters are the only other aquaculturally grown shellfish. Why the legislature specified a lower .0007 fish tax rate on oysters, whether "wild" or aquaculturally grown, can only be answered by speculation. It is noted that there are other fish tax rates of five percent for chinook, coho and chums salmon; and three percent for pink and sockeye salmon. Interestingly, the predecessor of the fish tax was the levying prior to July 1, 1980 of a privilege fee upon wholesale and retail dealers of food fish and shellfish where the tax rates as applied to "primary market value" were similarly five percent on chinook, coho and chum salmon; three percent on pink and sockeye salmon; and two percent on all other food fish and shellfish, except oysters; and there was no privilege fee assessed with respect to oysters. RCW 75.32.030 (administered by the Department of Fisheries). Given that oysters were exempt altogether from the privilege fee prior to July 1, 1980, it may be that the legislature thereafter indulged the oyster industry with the low tax rate of .0007.

MEASURE OF TAX.

The taxable event is the "first possession by an owner after the food fish or shellfish have been landed" per prior fish tax statute RCW 82.27.020 (1), and in the current fish tax statute, RCW 82.27.020 (1), the taxable event occurs at the time of "the first possession in Washington by an owner".

[3] Per prior fish tax statute, RCW 82.27.020 (3), "the measure of the tax is the price paid by the first person in possession of the...shellfish". Per current fish tax statute, RCW 82.27.020 (3), "the measure of the tax is the value of the

enhanced food fish at the point of landing". In this case, the taxpayer is the first person in possession with respect to its aquaculturally grown shellfish but has not paid a price pursuant to a purchase of the shellfish. The prior fish tax statute further declares that where the "shellfish are acquired other than by purchase...the measure of the tax shall be determined as nearly as possible according to the selling price of similar products of like quality and character". The current fish tax statute speaks of "value", but because the tax is levied on commercial possession per RCW 82.27.020 (1), it contemplates the selling of the enhanced food fish. In the commercial sense, value is what the possessor can get for it or what the buyer can get it for, that is, the price of a buy/sell transaction; not what it cost the possessor to produce.

After the shellfish have been landed, there is a "price paid", a "purchase" and a "selling price" terminology in the prior fish tax statute. These terms clearly indicate that the measure of the tax is based upon a buy/sell transaction, not upon a cost of production/aquacultural growing. The term "price paid" is not defined in the Washington Revenue Act. The balance of that statute offers some insight into exactly what the legislature intended to tax where the statute speaks of "selling price". The definitions contained in Retail Sales Tax Chapter 82.08 RCW are not expressly incorporated in Chapter 82.27 RCW, but the term "selling price" nevertheless appears in RCW 82.27.020 (3). This is a term charged with such meaning under the Washington Revenue Act that we must presume that the legislature intended something by its use. We believe that the intent was to relate the fish tax concept of "price paid" to the retail sales tax concept of "selling price".

RCW 82.08.010 defines "selling price" (for retail sales tax purposes) as:

The consideration, whether money, credits, rights, or other property, expressed in terms of money paid or delivered by a buyer to a seller, all without any deduction on account of the cost of the tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued...  
(Emphasis supplied.)

Consequently, we find that the costs incurred by the taxpayer for research and development, growing, marketing, producing, and selling the mussels are no more deductible from the "price

paid" for fish tax purposes than such costs would be deductible for retail sales tax purposes. Nor do such costs indicate "commercial" value where there is a selling price from a buy/sell transaction to serve as the basis for the measure of the tax.

Because the prior fish tax statute, RCW 82.27.020 (1), speaks of the taxable event as occurring "after the food fish or shellfish have been landed"; and the current fish tax statute, RCW 82.27.020 (3) speaks of the measure of the tax as being ascertained at "the point of landing," the Department in administering the fish tax statutes has deducted the delivery costs, incurred after the fish have been landed, from the price paid. In this case, the auditor deducted 30 percent of the selling price in computing the measure of the tax for delivery costs and cleaning, although we would question whether the cleaning occurred after the shellfish had been "landed". RCW 82.27.010 (5). The auditor requested additional cost data so as to refine the 30 percent deducted relevant to the delivery costs and cleaning, but the taxpayer did not respond. The taxpayer did submit a cost analysis relevant to expenses incurred before the shellfish had been landed. However, as indicated earlier, such expenses are not deductible from the measure of the tax and they do not have weight in computing the "price paid" where we have the selling price from which only the delivery expenses need be deducted to arrive at the measure of the tax.

RCW 82.32.070 in pertinent part provides:

Every person liable for any fee or tax imposed by chapters 82.04 through 82.27 RCW shall keep and preserve...suitable records as may be necessary to determine the amount of any tax for which he may be liable...Any person who fails to comply with the requirements of this section shall be forever barred from questioning, in any court or proceeding the correctness of any assessment of taxes made by the department of revenue based upon any period for which such books, records, and invoices have not been so kept and preserved.

Accordingly, we must sustain the auditor's computation of the measure of the tax with respect to the use of an estimation of the deduction allowed for the delivery costs after landing of the shellfish. This holding does not preclude the taxpayer from presenting records or other evidence to show that its

delivery costs were greater than the 30 percent of the selling price so as to reduce the measure of the tax.

Because it occasionally buys mussels from "small farmers" at 30 cents per pound, the taxpayer has asserted that 30 cents per pound should be the basis for the measure of the tax, not the one dollar per pound which the taxpayer generally gets on its sale of the mussels. These "small farmers" have not been able to sell their mussels to their limited number of customers and their sales to the taxpayer can be characterized as being in the nature of distress sales. Furthermore, the taxpayer's cost analysis for its growing of mussels shows that they cost 29.9 cents per pound. The question arises as to whether the taxpayer values them at 30 cents per pound for commercial selling purposes and whether the taxpayer would sell its aquaculturally grown mussels for 30 cents as the "small farmers" have done. We think not. In any event, the taxpayer has made no sales at 30 cents per pound.

For the facts, reasons and applicable law stated, we conclude that the assessment was proper.

#### DECISION AND DISPOSITION:

The taxpayer's petition for refund is denied. However, the taxpayer may present records or other evidence to the auditor to establish that its delivery costs exceeded the amounts allowed by the auditor in reducing the measure of the tax and accordingly receive a partial refund.

DATED this 24th day of May 1989.