

Cite as 1 WTD 213 (1986)

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

In the Matter of the Petitions for) D E T E R M I N A T I O
N
Correction of Assessments of)
) No. 86-263
)
 . . .) Registration No. . . .
) Tax Assessment No. . . .
 .)
)
 and)
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 . . .) Registration No. . . .
) Tax Assessment No. . . .
 .)
) Tax Assessment No. . . .

[1] **RULE 135, RCW 82.04.100, 82.04.330:** BUSINESS AND
OCCUPATION TAX -- AGRICULTURAL EXEMPTION -- SHELLFISH
EXTRACTING.

The raising and harvesting of shellfish is not an
agricultural activity for excise tax purposes and is
not exempt from business and occupation tax.

[2] **RULE 243, LITTER TAX:** SALES OF SHELLFISH.

Even though shellfish may be biodegradable, their
sales lead to litter tax liability because they are
food for human consumption. Food for human
consumption is a category specifically named by the
legislature as being subject to the litter tax.

[3] **RULE 111, BUSINESS AND OCCUPATION TAX:** CONDUIT FOR
PAYROLL -- NO PROFIT. Taxpayer failed to substantiate
its argument that it was merely a conduit for the payroll
of a related company. There was a written agreement by
which the taxpayer agreed to perform services for the
other company. The fact that no profit was made does not

mean that business was not engaged in for business and occupation tax purposes.

[4] **FISH TAX:** OWNER OF FISH LIABLE -- EXTRACTOR FOR HIRE NOT LIABLE. Under chapter 82.27 RCW the liability for tax lies with the owner of the fish or shellfish and not with an extractor for hire.

These 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.

TAXPAYERS REPRESENTED BY:

. . .
 . . .
 . . .
 . . .

DATE OF HEARING: November 13, 1985

NATURE OF ACTION:

The taxpayers petition for correction of assessments which were issued as a result of audits conducted by the Department.

FACTS AND ISSUES:

Gregory I. Potegal, Administrative Law Judge -- [A] is a partnership which, among other things, owns tidelands upon which it grows clams and oysters. [A] was audited for the period from January 1, 1981 through December 31, 1984. The audit found that Wholesaling business and occupation tax and litter tax had not been paid. Tax Assessment No. . . . was issued to reflect the deficiency. The assessment is unpaid. . . . contends that it is engaged in an agricultural activity and not taxable for that reason. Furthermore, litter tax should not be applicable to it because shellfish have no wrappings and the shells are biodegradable.

[B] is a corporation whose principals are the same as those of [A]. It was audited for the same period as [A] and found to be liable for Extracting for Hire business and occupation tax. Tax Assessment No. . . . was issued for this liability. The auditor believed that [B] received income for cultivating and harvesting shellfish owned by [A]. [B] contends that it is not subject to business and occupation tax because it is engaged in agriculture. [B] also asserts that its only

function was to handle the payroll for [A]. Any money received was used to pay the salaries of [A] employees.

[B] underwent a separate audit for fish tax (chapter 82.27 RCW) purposes covering the same period of time. Additional fish tax was found to be due. Tax Assessment No. . . . was issued accordingly. The taxpayer believes that the value attributed to the shellfish by the auditor was too high. In addition, the taxpayer claims that the party who purchased most of its shellfish agreed to, and did, pay the fish tax.

DISCUSSION:

[A]

[1] The raising of shellfish is not an agricultural activity within the meaning of this state's excise tax laws.

During the audit period RCW 82.04.330 exempted from business and occupation tax:

. . . any person in respect to the business of growing or producing for sale upon his own lands or upon land in which he has a present right of possession, any agricultural or horticultural produce or crop, including the raising for sale of any animal, bird, or insect, . . . or in respect to the sale of such products at wholesale by such grower, producer, or raiser thereof. . . .

The raising for sale of shellfish is not "the raising for sale of any animal, bird, or insect." Under some definitions a shellfish is an animal. But for a number of reasons a shellfish is not an animal for excise tax purposes.

First, the use of the words "bird" and "insect" indicates that "animal" does not have the broad meaning of all organisms within the animal kingdom. Otherwise, the use of "bird" and "insect" would be superfluous. Statutes must be construed, whenever possible, so as to render no part thereof superfluous. Catholic Archbishop v. Johnston, 89 Wn.2d 505 (1978). It is more likely that "animal" has this meaning expressed in the American Heritage Dictionary, "An animal organism other than a human being, esp. a mammal." Because birds and insects are mentioned, we believe that "animal" here refers to a mammal.

Second, RCW 82.04.220 and 82.04.230 impose the business and occupation tax on extractors. During the audit period RCW 82.04.100 defined extractor as:

. . . every person who . . . takes, cultivates, or raises fish, shellfish, or other sea or inland water foods or products.

The legislature explicitly defined shellfish growers as extractors. That made shellfish growers subject to business and occupation tax. Any statutory interpretation which renders an unreasonable and illogical consequence should be avoided. Puyallup v. Pacific Northwest Bell, 98 Wn.2d 443, 656 P.2d 1023 (1982). It would be unreasonable and illogical to conclude that shellfish growers are exempt from tax because they are raising animals when there is specific language subjecting shellfish growers to business and occupation tax.

[A]'s petition will be denied with respect to exemption on the basis of the agricultural exemption.

After the audit period the legislature amended both the agricultural exemption and the definition of extractor. These amendments excluded from the definition of extractor and added to those entitled to the agricultural exemption, "persons cultivating or raising fish entirely within confined rearing areas on the person's own land or on land in which the person has a present right of possession." RCW 82.04.100. Persons otherwise taking fish and all persons taking, cultivating, or raising shellfish remain subject to business and occupation tax.

[2] We must also deny [A]'s petition with respect to the litter tax assessment. RCW 70.93.130 mandates the application of the litter tax to sales of thirteen categories of products. The first category named by the legislature is "Food for human or pet consumption." The Attorney General's office has advised that the Department of Revenue cannot exclude from the litter tax a category of product which is specifically named in the law as a product to be subjected to the tax. Since shellfish are clearly food for human consumption the Department has no authority to exclude their sale from tax.

[B]

[B] is not entitled to the agricultural exemption from business and occupation tax. Even if [A] had been found to be engaging in an exempt agricultural activity, that exemption

would not have carried over to [B]'s activities. This is because the agricultural exemption only applies to persons performing activities on their own land or on land in which they have a present right of possession. RCW 82.04.330. [B] neither owned the land upon which the shellfish were grown nor did it have the right to possess it.

The preponderance of evidence before the Department supports the conclusion that [B] was performing extracting for hire for [A]. It was more than a mere conduit for [A]'s payroll.

There was a written management agreement between [A] and [B]. Under the agreement [B] agreed to manage [A]'s tidelands and growing stock of clams and oysters. It also agreed to handle the harvest and sale of all the shellfish. [B] would be responsible for paying all labor costs and taxes. [B] was to receive all the income from the sale of shellfish and to pay over to [A] that income less labor and other costs.

[B] did testify that the agreement was not completely followed, that [B] was used because it was already registered with the Department of Revenue and had payroll identification numbers, and that it was only used for payroll purposes. These arguments were made for the first time at the conference on November 13, 1985. Prior to that, [B] had implicitly acknowledged that it was engaged in business activity by claiming that it was an agricultural business and therefore exempt.

In support of its contention that it was only used for payroll purposes, [B] submitted copies of its federal income tax returns. These returns reveal that substantially all of its income was paid out as compensation for officers and salaries. While the returns show that [B] made little or no profit they do not show that [B] was merely passing through the payroll for someone else's employees. In fact they reflect that [B] received income with which it paid its own officers and employees. This is consistent with the written agreement under which [B] was responsible for labor costs.

[3] It may well be that the [B] corporate structure was intended to be used mostly as a matter of convenience. However, the election to use the corporate form also meant that [B] was engaging in business within the broad meaning of the business and occupation tax statute. RCW 82.04.140 defines "business" as, "all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class." That the activities of [B] did not

produce a profit and were not intended to produce a profit does not mean that [B] is not a taxable business. Y.M.C.A. v. State, 62 Wn.2d 504, 383 P.2d 905 (1963).

The taxpayer's petition will be denied on this point.

[4] With respect to the fish tax assessment it should first be noted that [A], not [B], is the party liable for fish tax. [B] was audited and assessed because it had been regularly submitting fish tax returns. However, the fish tax is to be "levied upon and collected from the owner of the food fish or shellfish whose possession constitutes the taxable event." RCW 82.27.020. Because [A] was the owner of the shellfish whose possession constituted the taxable event it was liable for the tax and should have been reporting it.

The two substantive arguments against the amount of the fish tax assessment are factual in nature. First, the taxpayer believes that when the auditor computed the value of the shellfish he did not allow a sufficient amount for the costs of processing. At the time of the audit the taxpayer presented no evidence of the amount of those costs. Second, the taxpayer has asserted that one of its major customers, [C]'s , reported and paid a substantial portion of the tax which was assessed. The taxpayer substantiated this claim with a letter from [C]'s . The letter stated that by agreement of the parties [C]'s Inc. paid the fish tax on its purchases of shellfish from [A] at certain times during the audit period.

The fish tax assessment will be referred back to the audit staff for the following actions:

1. Verify that [C] paid tax on shellfish the possession of which was taxed in the audit. If appropriate, grant a credit for such tax.
2. Accept and consider any evidence as to the amount of cost which should have been allowed in determining the value of the shellfish.
3. Cancel the assessment, as adjusted, and reissue it against [A].

DECISION AND DISPOSITION:

The taxpayers' petitions are denied with respect to business and occupation tax and litter tax. The fish tax assessment is

referred back to the audit staff for the actions called for in the "DISCUSSION" section of this Determination.

Because the due dates of the assessments have been extended for the sole convenience of the Department, interest will be waived for the period from February 13, 1986 through the new due dates. Tax Assessment No. . . ., in the amount of \$. . ., plus unwaived interest of \$. . ., for a total of \$. . ., is due for payment by October 14, 1986. Tax Assessment No. . . . in the amount of \$. . ., plus unwaived interest of \$. . ., for a total of \$. . ., is due for payment by October 14, 1986.

DATED this 24th day of September 1986.