Cite as Det. No. 99-006, 19 WTD 533 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	D E T E R M I N A T I O N
	)	No. 99-006
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .

[1] RCW 82.27.010 & RCW 82.27.020: FISH TAX -- GEODUCKS -- LANDING OF -- LIABILITY OF HARVESTER. A harvester of geoducks is the first person in possession after the taxable event and the party liable for the fish tax when that person harvests and retains ownership of the geoducks after landing.

[2] RCW 82.27.020: FISH TAX -- MEASURE OF -- GEODUCKS. The measure of the fish tax on geoducks is their value at the point of landing. That value may be calculated by adding the costs incurred up to the point of landing. The value may also be determined by starting with the wholesale price of the geoducks and *subtracting* costs incurred after landing.

[3] RCW 82.27.020: FISH TAX – MEASURE OF – GEODUCKS – COSTS OF BOAT. Where the landing point for geoducks is on shore, the cost of operating a boat to retrieve the geoducks and get them to shore is a proper component of the value of the geoducks for purposes of calculating the fish tax.

[4] RCW 82.27.020 & RCW 82.32A.020: FISH TAX -- ESTOPPEL -- PRIOR AUDIT – TAXPAYER RIGHTS & RESPONSIBILITIES. A taxpayer has the right to rely on official, written communications from the Department regarding its tax-reporting responsibilities. Where it does so rely to its financial detriment, resulting tax deficiency assessments may be waived. In order for waiver to be granted, however, the instructions must be incorrect, and a taxpayer's reliance upon them must be reasonable.

[5] RCW 82.27.020: FISH TAX -- MEASURE OF -- GEODUCKS -- DIGGING/DIVING COSTS. The cost of digging/diving is incurred prior to the

> landing of geoducks, so is to be included as a component of the value by which the fish tax is measured.

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:

Protest of fish tax on geoducks.

FACTS:

Dressel, A.L.J. -- . . . (taxpayer) harvests and sells geoducks and sea cucumbers. Its books and records were examined by the Department of Revenue (Department) for the period October 1, 1991 through June 30, 1995. As a result a tax assessment, identified by the above-captioned numbers, was issued for $. . . . The taxpayer appeals.

Principally, this case is about the taxpayer's geoduck clam operation. Geoducks are harvested in a unique manner. Unlike conventional clams, geoduck clams are found under the surface of the water. The geoduck fishery in Washington, unlike other fisheries, is controlled by the Department of Natural Resources (DNR). DNR has determined where geoducks are located on public lands. It has divided these areas up into tracts. It puts the right to harvest geoducks from these tracts up for bid. Those who bid the highest, and are otherwise qualified, obtain that right. In addition to the bid price, they have to pay so much per pound to DNR upon taking the geoducks from the salt water. Once a harvester makes a successful bid, (s)he enters into a written contract with DNR. Under terms of the agreement, the harvester has, sometimes, up to a year to harvest the geoducks in a certain tract. After that time expires, the tract is put up for bids once again.

Divers are used to harvest the geoducks. They are deployed from small boats. The divers are heavily weighted and breathe through air hoses which run from the boats. Divers walk along the sea bottom looking for geoducks in the sand. When they see one, they use a special, pressurized metal probe to blow the sand away from the geoduck. Then they simply pick it up and put it in a net that they carry. The net is connected to the boat by a rope. When the net is full, it is pulled to the boat, emptied, and then re-deployed.

DNR employees are present in the area to weigh the catch out on the water. The geoducks are taken by the taxpayer's boats to shore. From there most go to the taxpayer's facility, where they are packaged and shipped. Most of the geoducks are sold live to foreign buyers.

The taxpayer reports that the divers are independent contractors. Some of the boats are owned by those independent contractors, but others are owned by the taxpayer. A few of the people aboard the boats are taxpayer employees.

In the tax audit at issue, the Audit Division (Audit) of the Department assessed the tax on enhanced food fish (fish tax), measured by the wholesale price for which the taxpayer sold geoducks, less 12-20 percent for packaging and shipping.

In objecting to such taxation, the taxpayer makes numerous arguments. First of all, it maintains that the fish tax should not apply at all because the taxpayer is, in effect, the fisherman, as opposed to the fish buyer, and the tax was not intended for fishermen. Secondly, if the tax is applicable, it should be measured only by the fees paid DNR for the harvesting rights. The taxpayer reasons that this is akin to a conventional fish buyer purchasing fish from a fisherman, in which case the fish tax would be measured, simply, by the price paid to the fisherman. Thirdly, the taxpayer contends that the Department is estopped from imposing tax for the audit period greater than one measured by the DNR fees plus the cost of the divers. This position is based on advice given the taxpayer in an earlier audit, issued in 1992. Fourthly, regardless of what else is included in the measure of the fish tax, the costs of digging the geoduck clams should be excluded, based on an opinion issued by the Board of Tax Appeals (BTA).

ISSUES:

1. Is a harvester of geoducks not the party liable for the fish tax because he is, effectively, a fisherman, as opposed to a fish buyer?

2. If a geoduck harvester is liable for the fish tax, is the measure of the tax limited to the price paid DNR for harvesting rights?

3. Is the Department estopped from asserting additional fish tax, based on advice given by its Audit Division in a 1992 audit?

4. Should the cost of digging geoducks be included in the measure of fish tax?

DISCUSSION:

The statute that imposes the fish tax is RCW 82.27.020, which reads, in part:

> (1) In addition to all other taxes, licenses, or fees 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. Processing and handling of enhanced food fish by a person who is not the owner is not a taxable event to the processor or handler.
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> . . .

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

(Italics ours.) "'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 82.27.010. In *Det. No. 87-304*, 4 WTD 113, 120 (1987), we held that "[t]he measure of the tax obviously means the measure at the time of the taxable event which by statute is 'first possession by an owner after the food fish or shellfish have been landed.'" In construing a slight change in the language of RCW 82.27.020, effective July 28, 1985, we concluded, again, that the fish tax is to be imposed "on the first possessor after landing who is most often the fish buyer, not the fish catcher." *Det. No. 87-147*, 3 WTD 111, 118 (1987).[1]

[1] In the instant case, however, the fish "catcher" had possession of the geoducks both before, during, and after landing. The taxpayer, through its employees and independent contractors, was the "catcher" of the shellfish. Landing, incidentally, did not take place until the geoducks were transported to dry land. The boat on which they were loaded after being harvested by the divers was not a tender boat. Therefore, landing did not take place until the geoducks were brought ashore. *See* RCW 82.27.010. Inasmuch, then, as the taxpayer had the first possession after landing, its possession constitutes the taxable event and renders the taxpayer liable for the fish tax. *See* RCW 82.27.020(1). If the "catcher" or harvester of the fish retains possession of them after landing, then it is the party liable for the fish tax.[2] This situation is distinguishable from more "conventional" fishing, such as salmon fishing, in that in the latter activity the fisherman sells the fish prior to or simultaneous with landing.

As to the first issue, the party liable for fish tax, the taxpayer's petition is denied.

[2] Next, we determine the *measure* of the tax. The taxpayer says that if it is liable at all for the tax, the basis for it should be only the fees it pays DNR.[3] "The measure of the tax is the value of the enhanced food fish at the point of landing." RCW 82.27.020(3). To ascertain the value at the point of landing, absent a sale at the point of landing, one must add the costs of getting the geoducks to shore, which, as we said earlier, is the point of landing. Those costs, then, consist of

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[1] The first person in possession was also found to be the party liable for the fish tax in We*st Coast Blue Mussel Co. v. Dept. of Revenue*, BTA Docket No. 89-18, 9 WTD 300-5 (1990). In this case the same person both cultivated and landed mussels.

[2] We recognize that fishermen frequently bring fish to a dock and sell them to buyers there. We have deemed the buyer liable for fish tax in that instance. By this decision, we do not intend that result to be changed. This case is to be applied to those instances in which the fisherman retains ownership past the dock.

[3] Until its first audit, the taxpayer was paying fish tax based on its diving costs. Following that audit, for part of the period in question, it reported the tax based on the diving costs plus the payments to DNR. It now takes the position, though, that if it owes fish tax at all, its measure should be only the payments made to DNR.

fees paid to DNR, including any "bonus" fees; the fees paid the divers; and the cost of operating the boats, including the movement of them from land to the geoduck beds and back to land again.[4]

Audit, however, has measured the fish tax by working from the other end. It has taken the price for which the taxpayer eventually sold the geoducks and subtracted costs of packaging and shipping to arrive at the value at the point of landing. Such a policy was condoned by the Board of Tax Appeals in *Olympia Oyster Co. v. Dept. of Revenue*, BTA Docket No. 89-12 (1989).[5] In the cited case the Department took the wholesale price of aquaculturally-grown clams and subtracted the "processing" costs of weighing, packaging, and shipping. The Department determined, and the BTA affirmed, those costs to be 20 cents a pound. The BTA, thus, approved the Department's method of backing out to the landing value from the wholesale price, but it also said one ought to get the same value by *adding* the costs up to the point of landing. In the instant case we assume Audit backed out to the landing value because the taxpayer did not have an adequate accounting of costs incurred up to the point of landing that would be required to use the other method. We assume this because correspondence from Audit to the taxpayer states that Audit would use the other alternative if the taxpayer provided the figures. Indeed, the burden is placed upon taxpayers to maintain records and documents sufficient to establish their tax liability. In the absence of same, taxpayers may not successfully complain about an ensuing tax assessment. RCW 82.32.070.

The taxpayer objects to Audit's calculation of the fish tax measure, in part, because it believes harvesting of geoducks and harvesting of clams and oysters, as discussed in *Olympia Oyster Co. v. Dept. of Revenue, supra*, are not financially comparable. The latter types of shellfish, according to the taxpayer, are not purchased from anybody. Most are produced by private growers from private lands. With clams and oysters there is, generally, no sale from a fisherperson to a fish buyer, which is the scenario in a "conventional" fisheries transaction, such as when salmon are purchased by fish buyers from independent fisherpersons. In the latter case, the measure of the fish tax is the price paid, assuming it is close to market value, by the fish buyer to the fisherperson. Indeed, the former version of RCW 82.27.020(3) set the measure of the fish tax at that price,[6] whereas the current version states that the measure should be the *value* at the point of landing. Ideally, either method should yield the same result. It is likely that the word "value" was substituted for "price" to cover clams and oysters which are frequently landed without a sale. In any event, the taxpayer argues that because it pays a certain price for geoducks, the harvest of these shellfish, vis-à-vis their financial aspect, is more akin to the harvest of salmon than it is to that of its "fellow" shellfish, "conventional" clams and oysters.

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[4] We reach this conclusion by, simply, noting the activities involved in harvesting geoducks, as described by the Audit Division and the taxpayer. It is logical that costs incurred in producing the product sold by the taxpayer are part of its value.

[5] This case is not published in Washington Tax Decisions.

[6] *Olympia Oyster Co. v. Dept. of Revenue*, BTA Docket No. 89-12 (1991), Conclusion of Law No. 8.

[3] Audit has included in its calculation of taxable value some indirect costs, including customs, moorage, accounting, advertising, rent, etc. It has factored in these costs as well as direct costs and then pro-rated them according to which were incurred up to the point of landing to determine the taxable value of the geoducks. We agree with the taxpayer that it shouldn't be this complicated. We also agree that the preferable method for setting value in the case of geoducks is to use the price paid. That price, certainly, includes all payments to DNR for the right to harvest the geoducks. It also includes, contrary to the taxpayer's contention, payments to the divers for collecting the geoducks. The geoducks aren't landed until they are brought to shore, as stated above. Obviously, they aren't landed until they are collected either, which is the function the divers perform. The fee paid the divers then, quite logically, is a component of the value of the geoducks at the point of landing.

The taxpayer argues further that even if the divers fee is determined to be part of the taxable value, that should be the end of it. Any further additions to the value, such as the indirect costs referenced above, are inappropriate. Such additions are not made to increase the taxable value of salmon, for instance, so it is unfair to make them here.

If the taxpayer paid the divers to get the geoducks to the point of landing, the shore, we would agree. However, some of the boats, used during the audit period to collect the shellfish and get it to shore, were the property of the taxpayer. In addition, some of the people working on the boats were taxpayer employees. The taxpayer directly bore the cost of its boats used to collect the catch and transport it to the point of landing. Thus, that cost is properly a component of the landing value, upon which the fish tax is based, of the geoducks.[7]

If the taxpayer had figures by which its boat costs could have been accurately established, those costs could have been added to the dive costs plus the DNR payments to arrive at taxable value in a "forward" fashion. In the absence of such figures, though, Audit determined taxable value another way, by *backing* out post-landing costs from the wholesale price of the geoducks. As stated earlier, Audit offered to use the "forward" method of simply adding up the costs to the point of landing. The taxpayer, however, has not come forth with reliable figures for the transportation costs, so Audit calculated the measure of tax the other way. As the Board of Tax Appeals said in *Olympia Oyster Co., supra*, either method "properly applied, would arrive at the same value result". A taxpayer that fails to keep books and records sufficient to establish its tax liability may not successfully object to a resulting assessment by Department of Revenue. RCW 82.32.070.

On the second issue, the measure of tax, the taxpayer's petition is denied.

[4] The third issue is estoppel. The taxpayer claims that because of directions given it by the Department, the Department should be estopped from including anything more than the DNR

[7] In those instances where the divers' boats were used, the divers' fee included a charge for the use of its boats.

fees and the divers' costs in the measure of fish tax. An inconsistent statement is alleged to have come from a 1992 audit of this taxpayer. We have retrieved that audit file. The possibly inconsistent instructions read:

> The shellfish tax reported on geoduck harvest activities is understated because payments to the Department of Natural Resources and Fareast Seafoods were excluded from the measure of the tax. Our current position concerning the measure of tax is that all harvest costs and payments to the Department of Natural Resources must be included in the landed value.[8]

The taxpayer interpreted this to mean that it was to report its tax based on the tract payments made to DNR, plus the dive costs. While the quoted instructions do not, specifically, say that, the actual adjustment, made by the auditor on an audit schedule, added only tract and dive costs to arrive at the taxable value. The taxpayer calculated its tax, based on this tax measure, for a portion of the audit period at issue.

Taxpayer Rights and Responsibilities are codified in chapter 82.32A RCW[9], which reads, in part:

> **RCW 82.32A.020 Rights.** The taxpayers of the state of Washington have:
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> . . .
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> (2) The right to rely on specific, official written advice and written tax reporting instructions from the department of revenue to that taxpayer, and to have interest, penalties, and in some instances, tax deficiency assessments waived where the taxpayer has so relied to their proven detriment;

Although the taxpayer interpreted the above-quoted Audit instructions to mean that it was to measure its fish tax by adding only DNR payments and dive costs, again, that is not exactly what the instructions said. They said the tax measure should be *harvest* costs, plus the payments to DNR. They also stated that the "measure of the tax is the value of the product at the point of landing". Taken together, those two instructions, reasonably, are interpreted to mean harvest costs include those necessary to get the shellfish to the landing point. The boats were necessary to get the geoducks to the landing point. Therefore, the cost of operating the boats ought to be included as a harvest cost. The fact that the auditor didn't include the boats in his calculations for the earlier audit period is likely explained by the fact that the taxpayer was not using its own boats then to transport the geoducks or that he was simply not aware that the taxpayer was using its own boats. The fact that the Department may have overlooked tax in a previous audit is not

[8] Auditor's Detail of Differences and Instructions to Taxpayer, January 31, 1992 Department of Revenue audit.

[9] Formerly, in those cases where the Department gave taxpayers incorrect, written information upon which they relied to their detriment, we judged whether resulting taxes could be canceled in terms of principles of common law estoppel. With the enactment in 1991 of Chapter 82.32A, the *Taxpayer Rights and Responsibilities* law, we are now judging cases in which the incorrect advice was relied upon after the effective date of that law by the provisions of that law, which are more specific than common law estoppel.

grounds for estoppel in a subsequent audit. *Kitsap-Mason Diarymen's Association v. Washington State Tax Commission*, 77 Wn.2d 812, 467 P.2d 312 (1970). As a matter of prudence, the taxpayer should have inquired of the Department about the effect of using its own boats and/or employees in the retrieval and transportation to shore of the geoducks.

Implicit in RCW 82.32A.020(2) is that the Department has imparted, in writing, *incorrect* instructions on which a taxpayer has relied to its detriment. The same is true of common law estoppel.[10] We find, however, that the instructions of which complaint has been made were not incorrect. Therefore, even though the taxpayer may have relied on the instructions to its detriment, it did not do so *reasonably*. Waiver of tax in such an instance will not be granted.

As to the third issue, estoppel, the taxpayer's petition is denied.

[5] The last issue is digging costs. The taxpayer cites *Olympia Oyster Co. v. Dept. of Revenue*, *supra*, as authority for the proposition that, in addition to packing and shipping, the cost of digging the clams ought to be deducted from the wholesale price when backing down to the landing price as described above. We do not share that view. Digging is an operation that occurs prior to landing.[11] Again, we determined above that landing does not occur until the boat carrying the geoducks reaches a dock or the shore. Notwithstanding the taxpayer's argument that, under the DNR contract, title to the geoducks passes to the taxpayer at the moment the geoducks are pulled from the sand, the crucial element for excise tax purposes is when the landing takes place. Landing is the tax-triggering event described in chapter 82.27 RCW. We note, though, that even if we accepted the taxpayer's argument that the key point is when the clams are pulled from the sand, that act itself constitutes digging. Either way, if the taxpayer must dig the clams to obtain title to them, why should the cost of digging not be included in the value of the landed geoducks?

As for *Olympia Oyster Co. v. Dept. of Revenue, supra*, we do not construe it in the same manner as the taxpayer. The BTA, in that case, did enter a Conclusion of Law stating: "14. The cost of digging the clams does not represent the value of the clams at landing". We assume this is the basis for the taxpayer's attorney saying that digging costs should be allowed as a deduction. When one looks at how the BTA arrived at taxable value, however, it is apparent that digging costs *are* a part of that value. The BTA calculated that value by deducting weighing, packing, and shipping from the wholesale price. It did not deduct digging. We have no doubt that what it meant by the quoted sentence is that the cost of digging *alone* does not represent the value of the geoduck clams. We conclude that the costs of digging are to be included in the measure of tax, the value at the point of landing.

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[10] For the elements of common law estoppel, see *Harbor Air Service, Inc. v. Board of Tax Appeals*, 88 Wn.2d 359, 366-67, 560 P.2d 1145 (1977).

[11] In that digging is done by divers, we assume the taxpayer equates divers' costs to digging costs.

On the fourth issue, digging costs, the taxpayer's petition is denied.

At the beginning of this decision, we mentioned that the harvest of sea cucumbers was also at issue. Money-wise, according to the taxpayer's attorney, it is a relatively insignificant component of the tax assessment. Although at the hearing of this matter, the taxpayer pointed out some differences in the sea cucumber fishery, as opposed to the geoduck and other fisheries, we did not get enough details to reach any different conclusions than we have on geoducks. For that reason, what we have said in this determination about geoducks should be applied to sea cucumbers as well.

Finally, we acknowledge the opening line of the taxpayer's brief that "[a]pplying RCW 82.27 to the harvest of geoducks is a bit like trying to fit a square peg into a round hole". He emphasized the many differences between conventional fisheries, such as salmon, and the geoduck fishery. In addition to the unique harvest operation for geoducks, it is characterized by its division of public waters into tracts on which harvesters bid and by its control by DNR. Additionally, the taxpayer's attorney states that while the fish tax is dedicated to the improvement of the state's fisheries, generally, none of that tax benefits the geoduck industry. The tract payments to DNR are used for that purpose. To force the taxpayer to pay both is unfair, according to the taxpayer, and could not have been intended by the legislature. The taxpayer, quite logically, stated that because of DNR and its tract system, geoducks should be taxed like timber, with a tax assessed according to the stumpage value of the product.

It is our duty to enforce the Revenue rules and laws as they are written. While the legislature may not have had geoducks in mind when it enacted the fish tax, a geoduck clam is, clearly a shellfish, and shellfish are subject to the tax. RCW 82.27.010 and RCW 82.27.020. Further, there are no statutory exemptions for geoducks. While we sympathize with the taxpayer and the industry generally, we cannot change the law. That is up to the legislature.

DECISION AND DISPOSITION:

The taxpayer's petition is denied.

DATED this 25th day of January 1999.