

BEFORE THE BOARD OF TAX APPEALS  
STATE OF WASHINGTON

WEST COAST BLUE MUSSEL	)	
CO., INC.,	)	
	)	
Appellant,	)	Docket No. 89-18
	)	
v.	)	Re: Excise Tax Appeal
	)	
STATE OF WASHINGTON	)	FINAL DECISION
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

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This matter came before the Board of Tax Appeals (Board) for a formal hearing on June 18, 1990, to review a Determination of the Department of Revenue finding excise tax liability for Appellant. Kenneth C. Pickard, President and Attorney, appeared for Appellant, West Coast Blue Mussel Co., Inc. (Appellant). John M. Gray, Assistant Attorney General, appeared for Respondent, Department of Revenue (Department).

MOTION TO DISMISS

At the outset of the hearing, the Department moved to dismiss the appeal for lack of jurisdiction of this Board. The motion was based upon the ground that a Determination was issued, but taxes owing were subsequently cancelled by the Department for the reporting period from January 1, 1984, through June 30, 1986. The Board denied the motion.

The cancellation of taxes, penalties, and interest did not remove the Department's express Determination that Appellant was bound by the ruling under the disclosed facts. The Determination was not withdrawn. The Department claimed tax liability commencing June 30, 1986. The Determination entered on June 23, 1989, fixed a legal relation between the parties, and was a "determination" subject to appeal under RCW 82.03.130(1).

Having heard the evidence, having examined the exhibits, and having considered the arguments of the parties, the Board makes these

FINDINGS OF FACT

1. Appellant is engaged in the cultivation and selling of mussels. The operation is conducted in Island County, Washington.
2. The Department is the agency charged by statute to administer the excise taxes for the state.

3. The Department examined the business records of Appellant for the period from January 1, 1984, through June 30, 1986. As a result of this audit, the Department issued a tax assessment on December 8, 1986, asserting fish tax liability in the amount of \$1,976 and interest due in the amount of \$126 for a total sum \$2,102. The assessment was appealed to the Interpretation and Appeals Division of the Department.

Because the mussels were aquaculturally grown by Appellant and not purchased by Appellant, the auditor used a figure of 70 percent of Appellant's selling price as representing the "value" -- that is, the measure of the tax -- of the harvested mussels before processing, but after the mussels were landed.

4. On March 17, 1987, the Department's Audit Section adjusted the fish tax assessment which, in effect, cancelled the fish tax liability. The Department made the adjustment "because the Department of Revenue feels that West Coast Blue Mussel Co., Inc. [Appellant] was erroneously informed that it was not subject to the fish excise tax." The auditor further instructed Appellant in writing:

The taxpayer should note, however, that as of June 30, 1986, it is liable for the fish excise tax on the value of the landed mussels. The Department of Revenue has deemed the taxable value of the mussels to be the sales value of the mussels less any costs incurred for the cleaning and processing of mussels after they have been landed on the dock.

5. Although no tax was due for the reporting period appealed, Appellant's tax liability, the rate of tax, and the measure of tax were nonetheless affirmed by the Department on June 23, 1989. The Determination was appealed to this Board.

6. Appellant began mussel growing in 1976. It maintains a series of floating rafts on twenty acres of leased water located about three miles from shore in Penn Cove. Each raft has a protective netting under water to ward off predators.

The cycle of mussel growing begins in the spring. Seed lines (coiled polypropylene ropes) are suspended near the surface of the water beneath the rafts among lines with mature mussels. The mature mussels spawn. Microscopic larvae of mussels, most of which come from the cultured mussels, attach themselves to the seed lines. Thereafter, the ropes are uncoiled and allowed to hang to their 25-foot length. The larvae grow to a point at which the mussels become heavy on the lines. In the fall or early winter, the mass of mussels must be "thinned". The mussels are removed from the seed lines and put on culture lines in the growing area. After the thinning process, the mussels are allowed to mature over a period of about nine or ten months. When the mussels have matured, they are removed

from the lines hanging from the raft and put on a floating barge where they are separated, cleaned, sorted, bagged, and hung back in the water, waiting to be delivered.

The entire process is under the physical control of Appellant. No mussel larvae are purchased for the operation.

7. On one occasion, some of the uncleaned mussels were sold from the barge to another mussel farmer for \$.30 per pound. The sale was occasioned by exigencies caused from a sinking raft. The circumstances of the sale indicate that the sale was made under duress.

Some cleaned mussels are sold to mussel farmers at \$.95 per pound. The unsold cleaned mussels are put in 30 pound bags which are suspended in the water. At the end of the day, the cleaned mussels are taken by boat to a dock and placed in a refrigerated truck. The next morning, the mussels are taken by truck to regular customers, or sold to wholesalers and retailers for \$1.25 per pound (1987) (\$1.15 per pound in 500 pound quantities in 1989), or sold to restaurants for \$1.50 per pound (1987) (\$1.40 per pound in 1989). The price includes the cost for delivery. When the mussels are sold to Canadian customers, the price has been \$.95 per pound which includes delivery cost to Seattle where the Canadian trucks pick up the mussels. In 1989, 33 percent of the cost went to production, 39 percent of the cost went to harvesting, and 28 percent of the cost went to marketing, distributing, and administration.

8. Biologically, a shellfish is any marine animal in a shell. Scientifically, there is no such thing as "food fish". Blue mussels and oysters are similar down to the ordinal level. Both are bivalves. They differ taxonomically. The difference between blue mussels and oysters is also visible. The terms "blue mussel" and "oyster" are not used interchangeably.

9. Under RCW 75.08.011(12) "food fish" is defined: "`Food fish' means those species of the classes Osteichthyes, Agnatha, and Chondrichthyes that shall not be fished for except as authorized by rule of the director. The term `food fish' includes all stages of development and the bodily parts of food fish species."

RCW 75.08.011(13) defines "shellfish" as ". . . those species of marine and freshwater invertebrates that shall not be taken except as authorized by rule of the director. The term `shellfish' includes all stages of development and the bodily parts of shellfish species."

10. Scientifically, the term "enhancing" includes assisting in any part of the life cycle. Appellant's operation assists in the life cycle of the blue mussel.

11. During the period in controversy, certain provisions of the fish tax statutes were revised. As applicable to this matter, the pertinent statutes under the previous and the

current versions of the statute result in the same conclusions. For clarity, we will reference the current version of the statute as applying to the entire period.

12. The pertinent provisions of the "current fish tax statutes", in effect from July 28, 1985, to the present time, and relevant to Appellant's appeal, are as follows:

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 . . . .

. . .  
(3) "Possession" means the control of enhanced 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 enhanced food 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.

(Emphasis added.) RCW 82.27.010.

(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. . . .

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

- (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.

(Emphasis added.) RCW 82.27.020.

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, anadromous game fish, . . . shipped from outside the state . . . .

(Emphasis added.) RCW 82.27.030.

#### CONTENTIONS

13. Appellant requests a determination that (1) it is exempt from the fish tax because it aquaculturally grows the mussels from larvae, or (2) if it is determined that it is subject to the fish tax, then it contends the rate of tax be the same rate of seven one-hundredths of one percent (0.0007) as applied to oyster farmers, and (3) the measure of the tax be based upon the value of the larvae when they attach themselves to the rope, or its sales of "rough" mussels from the deck of its raft, as indicating the value of the harvested mussels at the point of "landing". At the hearing, Appellant for the first time asserted a constitutional equal protection claim to invalidate the application of the tax.

14. Appellant contends that its product, cultured mussels, is not subject to the fish tax pursuant to Chapter 82.27 RCW. Appellant contends that the fish tax is intended to be a tax upon food fish and shellfish which are grown in nature, not those artificially cultured such as the mussels it raises. Appellant points to RCW 82.27.030 as exempting salmon aquaculture because salmon are raised from eggs or fry and notes that all of its mussels are similarly cultured from larvae through substantial labor, materials, and culturing expenses. Appellant also relies upon constitutional equal protection grounds to fit within the aquacultural exemption.

The Department contends that the aquacultural exemption of Chapter 82.27 RCW applies only to "food fish" and does not apply to "shellfish". It asserts that the legislature did not exclude the growing, processing, or dealing with "enhanced food fish", which would have included "shellfish" by definition. "Food fish" is a term referring to vertebrate marine life.

15. Appellant 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 (0.0007)

per RCW 82.27.020(4)(d), because oysters are grown by a similar method of aquaculture.

The Department contends that blue mussels are "shellfish" under RCW 75.08.011(13) and WAC 220-12-020. It contends that the rate of tax is two percent for shellfish, except oysters, under RCW 82.27.020(4)(c).

16. Appellant asserts that the value of shellfish at the point of "landing" is the value of the larvae at such time as they attach themselves to the collection ropes. If that is not the value at landing, Appellant asserts that the value should not be higher than its sales of "rough" mussels from the deck of its raft, as indicating the value of the harvested mussels at the point of "landing".

The Department contends that the value of the shellfish at the point of landing is the value after the mussels have been landed on the rafts. "Value" is the fair market value of the mussels rather than the price of the particular bargain which happened to be struck at any one time.

From these findings, the Board comes to these

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the persons and subject matter except as discussed below.

#### CONSTITUTIONAL ISSUE

2. While this Board has consistently since its origin ruled on the constitutionality of various interpretations of existing statutes by administrative agencies, we do not have jurisdiction to determine that a provision of a statute establishing an exemption or setting a tax rate is unconstitutional. E.g., Yakima Clean Air v. Glascam Builders, 85 Wn.2d 255, 257, 534 P.2d 33 (1975); Bare v. Gorton, 84 Wn.2d 380, 383, 526 P.2d 379 (1974); Ackerley Communications v. Seattle, 92 Wn.2d 905, 908-909, 602 P.2d 1177 (1979).

#### SHELLFISH EXEMPTION

3. 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.

4. The blue mussel is a "shellfish" under RCW 75.08.011(13). WAC 220-12-020 identifies species of shellfish. The blue mussel (mytilis edulis) is classified as a shellfish. The oyster is classified as a shellfish also. However, the blue mussel is not classified as an oyster.

5. The word "shellfish" does not appear in the section of the statute granting an exemption to food fish raised by an aqua-cultural method. In contrast, the word "shellfish" does appear in conjunction with "food fish" in other sections of RCW 82.27.030 as qualifying for exemption; i.e., "(3) food fish, shellfish, anadromous game fish, . . . shipped from outside the state". It is clear that the legislature intended to

exempt fish and shellfish shipped from outside the state. The legislature clearly omitted the term "shellfish" from the aquacultural exemption for fish raised in the state. By so doing, the legislature has provided an exemption only for aquaculturally grown food fish, not for aquaculturally grown shellfish.

#### RATE OF TAX

6. RCW 82.27.020(4)(c) provides that "other food fish and shellfish, except oysters" have a fish tax rate of two percent. Oysters are also taxed, but at a lower rate. Shellfish, including mussels, are expressly taxed at two percent.

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#### MEASURE OF TAX

7. Under the current fish tax statute, RCW 82.27.020(1), the taxable event is "the first possession in Washington" and the tax is on "the commercial possession of enhanced food fish". RCW 82.27.020(3) provides that the "measure of the tax is the value of the enhanced food fish at the point of landing."

8. The current fish tax statute, RCW 82.27.010(5), defines the term "landed" to mean: "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." (Emphasis added.)

9. The excise tax statutes do not define the term "tender". Words in a statute are given their ordinary meaning absent a contrary statutory definition. Resort to dictionaries may be had to ascertain the ordinary meaning of words. Sellen Construction v. Department of Revenue, 87 Wn.2d 878, 558 P.2d 1342 (1976). Webster's II New Riverside University Dictionary (1984) at 1192 has the following "nautical" definition for the term "tender": "A vessel that tends another vessel or vessels, esp. one that ferries supplies between ship and shore."

The aquaculturally-grown mussels are "landed" when they are physically placed on the floating barge within the territorial waters of Washington. Landing does not occur when the larvae attach themselves to the rope.

The measure of the tax is the value of the mussels at the time the uncleaned mussels are brought on the barge. In this case, there is evidence of one sale at \$.30 per pound. Such sale was consummated under duress and may not accurately reflect fair "value". The "value" of the mussels can be best determined from the selling price less deductions for delivery costs, including the costs of the boat/tender operation, cleaning, refrigerating, transporting, and other such varieties of expenses. Appellant must present information to the Department to establish such value.

SUMMARY

10. Appellant's aquaculturally-grown mussels are not exempt from the fish tax.

11. The lower tax rate for oysters does not apply to Appellant's aquaculturally grown mussels.

12. The measure of the tax is Appellant's selling price of the uncleaned mussels after "landing" of the mussels in a tender (barge) or on shore. The "value" of the mussels can also be determined from the selling price less deductions for delivery costs, including the costs of the boat/tender operation, cleaning, refrigerating, transporting, and other such varieties of expenses.

From these conclusions, the Board enters this

DECISION

The Determination of the Department is affirmed, insofar as it is consistent with this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1990.

BOARD OF TAX APPEALS

\_\_\_\_\_  
RICHARD A. VIRANT, Chair

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LUCILLE CARLSON, Member

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A timely Petition for Reconsideration may be filed to this Final Decision within ten days pursuant to WAC 456-09-955.