Cite as 10 WTD 1

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

In the Matter of the Petition For Refund of	)	F I N A L D E T E R M I N A T I O N
	)	No. 87-304A
. . .	)	Registration No. . . . Fish Tax Assessment No. . . .

[1] FISH TAX AND FORMER RCW 82.27.040: CREDIT -- TAXES PAID TO ANOTHER STATE -- IMPORT DUTIES PAID TO U.S. GOVERNMENT. Former statute allowed credit against food fish tax for tax paid to another state upon the same fish. Although import duty on fish is a tax, it is not a tax paid to another state. The credit is not allowed because U.S. Government is not a state. Accord: Det. No. 87-304, 4 WTD 113 (1987).

[2] FISH TAX AND FORMER RCW 82.27.040: PRESUMED CONSTITUTIONALITY. The statute is presumed to be constitutional. An administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power. Accord Bare v. Gorton, 84 Wn.2d 380, 383 (1974).

[3] FISH TAX AND FORMER RCW 82.27.040: CREDIT -- CONSTITUTIONALITY. The taxpayer has not shown that a credit against state fish tax for import duties paid on same fish is constitutionally required. Comments in U.S. Supreme decisions supporting credits to avoid multiple taxation are dicta. Accord: National Can v. Department of Revenue, 109 Wn.2d 878 at 889 (1988), Williams v. Vermont, 472 U.S. 14, 21-22 (1985), Goldberg v. Sweet, 109 S.Ct. 582 at 588 (1989) citing Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983).

[4] FISH TAX AND FORMER RCW 82.27.020(1): APPORTIONMENT -- MULTIPLE TAXATION -- CREDIT. Former fish tax is properly apportioned because under the statute, Washington is the only state where first possession by an owner after landing the fish occurs. Washington does not tax first possession elsewhere. Credits were allowed for taxes

paid on same fish to other states. Accord: Goldberg v. Sweet, at 109 S.Ct. 588-591.

[5] FISH TAX AND FORMER RCW 82.27.020(1): CREDIT -- CONSTITUTIONALITY -- COMMERCIAL ADVANTAGE TO LOCAL BUSINESS -- DISCRIMINATION AGAINST FOREIGN COMMERCE: Former fish tax did not provide a commercial advantage to businesses marketing domestic fish by its failure to provide a credit for duties paid on imported fish because the same state tax rate was imposed on foreign fish as on interstate or in-state fish. Accord: Department of Fisheries v. DeWatto Fish Co., 100 Wn.2d 568 (1983).

[6] FISH TAX AND FORMER RCW 82.27.020(1): EXEMPTION -- FIRST POSSESSION -- TAXABLE EVENT -- OUT OF STATE -- STATUTORY CONSTRUCTION -- RELATED STATUTES. The taxable event is the first possession by an owner after the fish has been landed. The statute need not state that first possession "in Washington" is the taxable event because Washington has no jurisdiction to assert a tax on possession outside its territory. The taxpayer held not to be exempt from fish tax merely because a person outside Washington had first possession of the fish. In giving effect to the legislature's intent in enacting a statute, the statute as a whole must be considered and harmonized with related statutes. Accord: Stewart Carpet Serv., Inc. v. Contractors Bonding & Ins. Co., 105 Wn.2d 353 (1986), State v. Bernhard, 108 Wn.2d 527 (1987). A statute is not to be interpreted in such a way that it produces an absurd result or renders meaningless its enactment. Accord: Kirk v. Moe, 114 Wn.2d 550, 554 (1990).

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 Final Determination.

TAXPAYER REPRESENTED BY: . . .

DEPARTMENT REPRESENTED BY DIRECTOR'S DESIGNEES:
Garry G. Fujita, Former Assistant Director
Edward L. Faker, Assistant Director

DATE OF HEARING: April 20, 1988

NATURE OF ACTION

The taxpayer appeals Det. No. 87-304, 4 WTD 113 (1987) and petitions for a refund of a portion of the state fish tax. The portion equals the amount of U.S. duties it paid on fish imported from Canada. Alternatively, the taxpayer seeks a refund of the full amount of state tax paid on the imported fish. If the taxpayer is granted a refund equal only to the import duties then

the balance of the state fish tax paid would not be refunded. However, if the taxpayer's claim is correct that the state tax does not apply at all to imported fish, a refund for the full amount of tax paid would be granted and not just an amount equal to the import duties.

FACTS

Faker, A.D.[1] -- The facts are as reported in 4 WTD 113 and are not repeated except where necessary. The taxpayer is in the fish business. It imports some of the fish it markets from Canada. The taxpayer claims it paid U.S. Customs duties in addition to the state fish tax on the imported fish. The audit period was from . . . through . . . .

ISSUES

1) Did former RCW 82.27.040 violate the commerce clause by failing to give a credit for U.S. Government import duties paid on the fish.

2) Did former RCW 82.27.020(1) preclude taxation of fish caught outside Washington and shipped into the state.

TAXPAYER'S EXCEPTIONS

The taxpayer argues former RCW 82.27.040 illegally discriminated against foreign commerce by failing to allow a credit for import duties. During the audit period, the statute allowed credit only for taxes paid on the same fish to other states.[2] The taxpayer claims the lack of a credit provided a commercial advantage to local businesses which marketed fish caught in Washington or other states. The taxpayer cites Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) and Maryland v. Louisiana, 451 U.S. 725 (1981) as its authority.

The taxpayer also contends that former RCW 82.27.020(1) precluded taxation of fish which had been caught outside Washington and shipped into the state. The taxpayer cites Vita Food Products v. State, 91 Wn.2d 132 (1978) to support its argument that Det. No. 87-304 "erred by adding words to the statute to ascribe legislative intent" when the determination held the statutory term "first possession" means in Washington.

---

[1]Administrative Law Judge David M. De Luca also participated in this Final Determination.

[2]RCW 82.27.040 was amended in 1985 to allow a credit for taxes paid on the same fish to "any other legally established taxing authority".

DISCUSSION

[1], [2] We hold Determination No. 87-304 properly applied former RCW 82.27.040 as it was written. The statute plainly stated that credit was allowed only for fish taxes paid to other states, which does not include the U.S. Government. The statute is presumed to be constitutional. Furthermore, under Bare v. Gorton, 84 Wn.2d 380, 383 (1974) "an administrative body does not have the authority to determine the constitutionality of the law it administers; only the courts have that power."

With the presumption of validity and Bare v. Gorton in mind, we will provide our reasons why we believe former RCW 82.27.040 is constitutionally sound. Complete Auto Transit, supra, has a four prong test. The taxpayer contends that the statute violated only the third prong by discriminating against foreign commerce. Clearly, the first and fourth prongs of the test are not at issue. The state has sufficient nexus with the taxpayer which is located in Washington. Also, the tax is fairly related to the presence and activities of the taxpayer within the state. The burden is not placed upon persons who do not benefit from services provided by the state. Goldberg v. Sweet, 109 S.Ct. 582 at 591-592 (1989). The remaining prong is whether the tax is fairly apportioned. The taxpayer has not raised this issue, but it deserves discussion in light of the issue of multiple taxation and credits.

[3] First, the taxpayer has not shown that a credit is constitutionally mandated. The taxpayer has not cited any authority which requires such a provision. Complete Auto Transit, supra, itself does not address the issue. The U. S. Supreme Court in recent cases applied the Complete Auto Transit test and discussed credits as a way to avoid multiple taxation. However, it has not mandated them. See Tyler Pipe Indus., Inc. v. Department of Rev., 107 S.Ct. 2810, 2821 (1987) and Goldberg, 109 S.Ct. at 588, 591. In fact, the Washington Supreme Court in the remanded case National Can v. Department of Revenue, 109 Wn.2d 878 at 889 (1988) described the comments in Tyler about the "suggested" use of credits to avoid multiple taxation as "dicta."

Further, Tyler cited Williams v. Vermont, 472 U.S. 14, 21-22 (1985) where the Supreme Court stated:

> This Court has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax. *** Appellants urge us to hold that it is a constitutional requirement. *** Once again, we find it unnecessary to reach this question.

Since Williams, it does not appear that the Court has yet decided to reach the issue. See also Goldberg, 109 S.Ct. at 588 quoting

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983):

> ... we have long held that the Constitution imposes no single [apportionment] formula on the States, [citations], and therefore have declined to undertake the essentially legislative task of establishing a single constitutionally mandated method of taxation. [citations].

Instead, the U.S. Supreme Court in Goldberg applied two tests to determine whether a telecommunications tax was fairly apportioned - internal consistency and external consistency. Internal consistency means "a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result." 109 S.Ct. at 588-589.

If there is a risk of multiple taxation by other states, then the external consistency test examines " whether the State has taxed only that portion of revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." This test is a practical inquiry, which means the apportionment must be feasible. 109 S.Ct. at 589-591.

[4] We believe the tax at issue is properly apportioned because under RCW 82.27.020(1) Washington is the only state where first possession by an owner after landing the fish occurs. The law does not tax first possession elsewhere. Furthermore, the dicta about credits in Tyler Pipe and Goldberg speak in terms of taxes paid only to other states. However, the Supreme Court decisions do not mention that a state should allow credit for U.S. Customs duties in order to avoid multiple taxation. Accordingly, former RCW 82.27.040 allowed credits for taxes paid upon the same fish to other states, thereby preventing the risk of multiple state taxation.

The taxpayer also argues the failure to give a credit for duties paid on foreign fish discriminates against foreign commerce by providing a direct commercial advantage to local businesses which market fish caught in Washington or other states. The taxpayer cites Maryland v. Louisiana, supra, to support its argument.

[5] The taxpayer concedes the Supreme Court in Department of Fisheries v. DeWatto Fish Co., 100 Wn.2d 568 (1983) held former RCW 75.32[3] did not provide a commercial advantage to local non-Indian business over interstate or Indian commerce. The fish tax scheme imposed an equal tax burden on all fish transactions regardless of where or by whom the fish was caught. 100 Wn.2d at 578. The DeWatto court rejected the taxpayer's reliance on Maryland v.

[3]RCW 75.32 was replaced by RCW 82.27 effective July 1, 1980.

Louisiana and Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977). The court stated:

> Both cases are inapposite because they involved schemes that imposed higher total taxes on out-of-state goods than on in-state goods and thereby provided a direct commercial advantage to in-state businesses.

100 Wn.2d at 577. The reasoning in DeWatto for former RCW 75.32 also applies to its successor. Unlike the taxes of Louisiana and New York, former RCW 82.27 imposed the same nondiscriminatory tax rate on interstate and foreign fish as it did on in-state fish. In sum, the Washington fish tax did not cause the imbalance. The federal import duties did. The state fish tax is constitutional unless the taxpayer can show that a credit for import duties is required, which it has not done.

The taxpayer also raises the issue whether former RCW 82.27.020(1) precluded taxation of fish which had been caught outside Washington and shipped into the state. The statute provided:

> ...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.[4]

The taxpayer cites Vita Food Products v. State, supra, in support of its argument that Det. No. 87-304 "erred by adding words to the statute to ascribe legislative intent" when it held first possession means in Washington.

[6] We disagree with the contention and agree with the Determination's reasoning. First possession could only mean in Washington. Washington has no jurisdiction to assert a tax on possession of fish outside its borders. Washington can only tax the fish when it enters the state.

The taxpayer's reasoning would exempt any fish brought into Washington from out of state where it was first landed. If the law were such, then there would be no purpose in having the credit provision of RCW 82.27.040 for taxes paid on fish previously possessed in other states. Likewise, the taxpayer's analysis would render meaningless the exemption under RCW 82.27.030(1) for fish frozen or packaged-for-retail sales which is landed out of state and shipped into Washington. In giving effect to the legislature's intent in enacting a statute, the statute as a whole must be considered and harmonized with related statutes. Stewart Carpet

---

[4]In 1985 RCW 82.27.010 was amended in part to define the terms "possession" and "landed".

Serv., Inc. v. Contractors Bonding & Ins. Co., 105 Wn.2d 353 (1986), State v. Bernhard, 108 Wn.2d 527 (1987). "A statute is not to be interpreted in such a way that it produces an absurd result or renders meaningless its enactment." Kirk v. Moe, 114 Wn.2d 550, 554.

DECISION AND DISPOSITION

We conclude Determination No. 87-304 reached the correct decisions under the former statutes. Accordingly, we deny the appeal.