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BEFORE THE INTERPRETATION AND 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. 90-219
. . .	)	Registration No. . . .
	)	Assessment No. . . .

[1] RULE 159: AGENT OR BROKER -- PRINCIPAL -- FISH BROKER/AGENT -- CLAIM OF PRINCIPAL -- PROOF. The taxability of seafood principals as actual sellers is determined on the basis of the evidence available to the Department. Where the only evidence provided for the audit period is the written agreements of the parties, those agreements will control.

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 TELEPHONE CONFERENCE: . . .

NATURE OF ACTION:

Taxpayer protests the assessment of tax on sales of fish that it claims were made through a broker to an out-of-state buyer, and assorted use tax issues.

FACTS AND ISSUES:

Hesselholt, A.L.J. (successor to Potegal, A.L.J.) -- Taxpayer is an Alaska corporation authorized to transact business in Washington. It maintains a Washington sales office and some of its product is stored in Washington. Its primary business is the operation of a salmon cannery in . . . , Alaska. Canned salmon product is shipped to Washington for ultimate sale at wholesale to grocery stores, other retailers, and wholesalers. Some sales of fresh or frozen salmon are made directly from Alaska. Its books

and records were examined for the period . . . through . . . . An assessment was issued in the total amount of $ . . ., which remains outstanding.

According to taxpayer, while some of its sales of canned and frozen salmon were made directly by it, the majority were made through a commissioned agent, . . . (broker). Taxpayer asserts that broker would make arrangements for the sale of the product and would generally have authority to sell its product at current market prices. If the price was below market, one of taxpayer's principals would have to authorize the sale to the ultimate purchaser. Broker would bill the purchaser, would receive payment from the purchaser, and would transmit the funds to taxpayer after deducting his sales commission, prompt payment discount, and a labelling allowance, as appropriate. Taxpayer asserts that the risk of a failure to pay was upon it, and that there was no recourse against broker for payment if a purchaser failed to make a payment.

Taxpayer also states that some sales were made on a consignment basis, as to certain supermarkets. In those cases, broker would make the arrangements for the sale, the product would receive the supermarket's label and would be shipped to the supermarket's warehouse. Taxpayer would be the shipper of the product and the supermarket would be shown as the consignee. Delivery would be F.O.B. Seattle and shipments were by common carrier. Broker would also receive a commission on those sales.

Other sales were shipped directly to the ultimate purchaser and would show taxpayer as the shipper and buyer as the consignee. Shipment would again be by common carrier and would be F.O.B. Seattle.

Taxpayer attached a series of documents "reflecting a typical transaction" with broker. The first document confirmed a sale of taxpayer's product. The second document was a trust receipt record sheet showing that broker was taxpayer's agent to remove its product from the warehouse. The third shows a sale of the product to a firm in California shipped by broker, and the final shows a payment accounting to taxpayer for the sale.

Taxpayer states that it has been extremely difficult to determine which sales were included in the audit because the broker's invoice numbers are the reference numbers used in the schedules. Taxpayer states that it does not have access to those invoices, but it has determined that tax has been paid on some of the items.

In February . . . the taxpayer and broker had a written agreement that referred to taxpayer as the "seller" and broker as the "buyer." This agreement provided that buyer (broker) would purchase seller's (taxpayer's) entire production of canned salmon and frozen salmon produced during the 1981 season. Buyer/broker

agreed to purchase all products at "competitive market prices." Buyer/broker agreed to pay for purchase of products immediately upon receipt of funds from its customers and further agreed "that all products will be paid for by January 31, ..." At that time, title of any products not shipped would be transferred to buyer/broker "at the time he finalizes settlement and payment to seller." Buyer was also given the right of first refusal on taxpayer's "entire production of products" on the same terms for the 1982 season.

In April . . . , taxpayer and broker entered into another agreement which provided that broker would be the taxpayer's exclusive agent in marketing and selling its fish. The agreement stated that broker would be paid 5% of the net sales price of all products marketed, sold, or brokered. Taxpayer would maintain product liability and rejection insurance on all products.

In August . . . , taxpayer and broker executed an agreement which stated, in part:

> . . . we will operate on more or less a spot basis, contacting you as we wish to purchase from you to confirm availability, quality, and prices. As in our past purchases from you, we will buy on a net price basis and remit to you on this basis.
>
> We would also like you to confirm that your canned salmon is covered by products liability insurance. . . .

The auditor assessed tax on the sales to broker for the years . . . , because of the written agreements of the parties. The auditor stated that the taxpayer had informed him that broker had always been acting as an broker, regardless of the wording of the various agreements, but believed that the written agreements between the parties should control the tax consequences. The auditor therefore assessed wholesaling B&O tax on the sales to broker, and disallowed taxpayers interstate sales deductions. The auditor also stated that taxpayer should be able to reconcile the transactions listed on Schedule II (unreported wholesale sales) to the settlement sheets it received from broker, if it could not reconcile them to its own books.

Taxpayer also objects to the assessment of use tax on capital purchases on several items. It has conceded the tax is due on the . . . , . . . , and . . . transactions. With respect to the others, taxpayer states that it is unable to determine how the auditor determined that use tax was due on these items.

According to the auditor, he picked up the items from the taxpayer's books. Because he could not locate any receipts, he assessed use tax on the items.

DISCUSSION:

1. Agency

RCW 82.04.270 provides that every person engaging in the state in the business of making sales at wholesale is taxable at the wholesale rate. A sale at wholesale is any sale that is not a sale at retail. RCW 82.04.060. Sales made to out-of-state customers are generally not taxable when delivery is made to the customer out of state. WAC 458-20-193A,B. In this case, if the sales were made by taxpayer, with broker acting as an agent, the out-of-state sales would not be taxable. If, instead, taxpayer is found to have actually sold its salmon to broker, then the wholesale sales were made in this state (to the broker) and are fully taxable under the wholesaling category of the B&O tax.

WAC 458-20-159 (Rule 159) is the Department's duly authorized administrative rule regarding sales by agents or brokers. It provides, in part:

> . . . Every consignee, bailee, factor, agent or auctioneer having either actual or constructive possession of tangible personal property, or having possession of the documents of title thereto, with power to sell such tangible personal property in his or its own name and, actually so selling, shall be deemed the seller of such tangible personal property and taxable under the retailing or wholesaling classification of the business and occupation tax, depending upon the nature of the transactions. In such case the consignor, bailor, principal or owner shall be deemed a seller of such property to the consignee, bailee, factor or auctioneer and taxable as a wholesaler with respect to such sales. The mere fact that consignee, bailee or factor makes a sale raises a presumption that such consignee, bailee or factor actually sold in his or its own name. This presumption is controlling unless rebutted by proof satisfactory to the department of revenue.

In this case, we are not concerned with the claim of the broker, but with that of the principal. Rule 159 is of limited value in evaluating such claims. Over the years, the Department has recognized the custom of the seafood industry that the agents sell in their own names and that agency agreements are seldom written. Rule 159 does provide that the burden is upon the taxpayer to provide proof satisfactory to the Department that the sales were made via an agent.

In this case, the taxpayer and broker entered into three written agreements. The first agreement is clearly a buy-sell contract for the 1981 fishing season. Buyer/broker agreed to buy all taxpayer's product. Buyer/broker agreed to pay for such products immediately

upon receipt of funds. Buyer/broker also agreed that all products would be paid for by a certain time. Title on unsold product would be transferred to buyer/broker at the time he finalized settlement and payment to taxpayer. The agreement also provided that buyer/broker had the right of first refusal on all of taxpayer's product for the 1982 season. Taxpayer has provided nothing from that time period to show that the written agreement between taxpayer and broker is not accurate. We find that taxpayer made wholesale sales to broker for the years 1981 and 1982.

In April . . . taxpayer and broker entered into another agreement. This agreement clearly provided that broker would be the agent/broker for taxpayer's products, and that broker would be paid 5% of the net sales price. The agreement was to be in effect as long as the joint venture between broker and another entity was in effect. As the . . . agreement clearly provides that the taxpayer had entered into an agency agreement with broker, sales made through broker for the time that the agreement was in effect will be considered to be though an agent.

In August . . ., taxpayer and broker executed an another agreement. In this agreement, taxpayer was no longer selling its products on an exclusive basis. The agreement states that broker will "buy" on a net price basis and pay on that basis, and that broker will contact taxpayer "as we wish to purchase from you to confirm availability, quality, and prices." We find that this agreement also establishes a buyer-seller relationship rather than an agent-principal relationship.

The documents submitted by taxpayer regarding broker's withdrawal and sale of product are from March of . . . , when the Department agrees that the agency agreement was in effect. We do not believe that they provide proof of the relationship between the parties for the other times covered in the audit period.

The auditor, in making the assessment, reached the same conclusion that we have reached. For the years 1981 and 1982, taxpayer was treated as a wholesale seller to broker. All of taxpayer's instate transactions were listed, totaled and taxed. Taxpayer had reported no taxable business in 1981 or 1982, and no taxes were paid on any of this income. From April of 1983 until August of 1985, sales through broker should be treated as being made through an agent, and interstate sales deleted from the measure of tax. We are unable to tell from the audit schedules if this has been done. It is clear that taxes paid were credited against the listed sales for that time period. From August, 1985, through the end of the audit period, sales to broker should be treated as wholesale sales.

2. Use Tax.

Taxpayer has argued that use tax is not due on all but three of the items on which the tax was assessed. The auditor picked the items

up from the taxpayer's books and, because he was unable to locate receipts or invoices showing tax paid, assessed tax. Taxpayer has provided no documentation showing that tax has been paid on these items or that the tax is not due. If taxpayer can show that it has been paid, or that the transaction should not be subject to tax because it took place entirely in Alaska, the tax will be deleted. Otherwise, the assessment will stand.

DECISION AND DISPOSITION:

The auditor's treatment of the transactions between taxpayer and broker is sustained.

DATED this 25th day of May 1990.