

Cite as Det. No. 97-087R, 18 WTD 280 (1999)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of)	<u>F I N A L</u>
Assessment)	<u>D E T E R M I N A T I O N</u>
)	
)	No. 97-087R
)	Replaces determination dated 4-3-98
...)	Registration No. ...
)	FY. . /Audit No. ...
)	

RCW 82.27.010; RCW 82.27.020: FISH BYPRODUCTS -- VALUE AT POINT OF LANDING. Roe, a salmon byproduct, is to be valued after it is extracted from a whole fish. It is not to be valued the same as a whole fish. Transportation, weighing, and packaging costs can be deducted from the price paid for the roe in determining its value at the point of landing.

NATURE OF ACTION:

Taxpayer appeals the Department's valuation of salmon roe at its sale price, rather than the per pound value of whole salmon at the point of landing.¹

FACTS:

Munger, A.L.J. -- The taxpayer, ... was audited by the Department of Revenue (the Department) for the period January 1, 1992 through December 31, 1995. An assessment was issued for additional Enhanced Food Fish tax under RCW 82.27.020. The assessment was upheld in Determination No. 97-087. The facts are repeated here for clarity on reconsideration.

The taxpayer purchases roe (salmon eggs) from suppliers, packages it, and resells it in Japan. The taxpayer has suppliers in Oregon, Alaska, and British Columbia, Canada as well as from Washington. The taxpayer's primary suppliers are in Oregon who purchase whole salmon from fishermen. The supplier removes the roe and sells it to the taxpayer. The taxpayer asserts that the tax should be based on the per pound value of the whole fish "at the point of landing" as that term is used in RCW 82.27.020. The Department's assessment is based on the per pound value of the roe.

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410

The taxpayer states that during the audit it offered to supply the Department with evidence of what a whole salmon's value per pound at the point of landing would have been. This offer was refused and the roe's per pound value for tax purposes was determined to be the purchase price paid by the taxpayer to the supplier.

On reconsideration, the taxpayer again argues that the value of the roe, for Washington tax purposes, should be the same as a whole salmon. Alternatively, it argues that it should be allowed to present evidence of the roe's value other than just the purchase price relied on by the Department.

On reconsideration, the taxpayer's attorney again raised a constitutional challenge to RCW 82.27.020. As we stated previously, the Appeals Division of the Department, being an administrative agency, has no authority to rule on the constitutionality of statutes. *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1974).

ISSUES:

1. Whether the value of salmon roe at the point of landing should be that of a whole salmon or of the roe.
2. Whether the measure of the tax should be based on anything other than the price the taxpayer paid for the roe.

DISCUSSION:

The terms "Enhanced Food Fish" and "Landed" are defined in RCW 82.27.010(1) & (5) as follows:

(1) "Enhanced food fish" includes all species of food fish, shellfish, and anadromous game fish, including byproducts and parts thereof, ...

...

(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.

The taxable event and the measure of the tax are set forth in RCW 82.27.020:

(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.

...

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

The taxpayer asserts that the value of the roe should be the value per pound of a whole salmon when landed. As described in its appeal:

[Taxpayer] pays the Washington fish tax upon entry into the state of Washington. If the foreign supplier purchases salmon from the fisherman in the round, it may pay \$2.00 per pound. If [taxpayer] purchases the roe from the foreign supplier, it may pay \$5.00 per pound. [Taxpayer] asserts that the tax is imposed on the "value" at the "point of landing without the state of Washington"--or \$2.00 per pound of roe and not the \$5.00 per pound price of the roe which is paid to the foreign supplier.

(Bracketed material ours.)

In its written reply to the taxpayer's appeal, the Department stated:

In the case of salmon eggs the value has been determined based on the purchase price of the salmon eggs by [taxpayer]. [Taxpayer] feels the tax should be determined based on the price per pound of a complete salmon (in the round) at the point of landing rather than the value of the eggs at the point of landing.

There are some commercial fisherman who take the eggs out of the salmon and sell the salmon for one price and the eggs for another price at the point of landing. The byproducts and parts thereof have a value at the point of landing. That value is determined by the price the byproducts or parts thereof are sold for.

[Taxpayer] is proposing that all parts of the salmon have equal value. The salmon in British Columbia could be butchered and the eggs sold, the body sold and some of the byproducts or parts thereof sold for cat food.

(Bracketed material ours.)

On reconsideration, there is the issue of whether the value per pound of roe at the point of landing should be of a whole fish or of the roe. Secondly, if we focus only on the value of the roe itself, should anything other than the price paid for it be considered in determining its value.

[1] The roe was apparently extracted by the wholesaler at a processing location other than dockside. Because the roe did not exist as a separate product at the point of landing or dockside, the taxpayer asserts that the only value that can be utilized is the only value that did exist at landing, i.e. a whole fish. On reconsideration, the taxpayer asserts that it knows of no legal or sanitary wholesale sales of roe made at the dock which it considers the point of landing.

The first issue is resolved by reference to the statute. Roe, as a salmon part or byproduct, is itself a form of "Enhanced food fish" under RCW 87.27.010(1). Under RCW 87.27.020(3), the measure of

the tax is the value of the enhanced food fish, which was roe in this case.² There is no statutory basis for the taxpayer's position that roe should be valued the same as whole salmon. The taxpayer purchases roe, and the tax is based on what it purchased. Just because the roe may not be extracted at the point of landing, does not mean that its value is the same as that of a whole fish. The taxable event per RCW 82.27.020(1) is the first possession in Washington. The taxpayer only possessed roe, it never possessed whole salmon.

The taxpayer's appeal does point out the fact that RCW 82.27.020(3) refers to valuing the enhanced food fish for tax purposes at the point of landing without reference to the fact that some by-products are not separated from the fish until a later date and at a location other than the point of landing. The taxpayer's proposed interpretation of this statute in effect eliminates the distinction between fish and fish by products. It would be difficult to "land" a fish byproduct or fish part, although its possible that roe could be extracted on a "factory trawler" or be extracted at dockside, a process the taxpayer contends would be unsanitary. Generally, however, roe is extracted after landing and at a place different from the landing location. In defining "Enhanced food fish" RCW 82.27.010(1), however, specifically refers to "byproducts and parts thereof".

The taxpayer's position would lead to two results not intended by RCW 82.27.010(1), which clearly differentiates between fish and fish by-products/parts. First, those taxpayers buying more valuable fish by-products, such as roe, would be taxed only on the lesser per pound value of a whole fish. Other taxpayers purchasing byproducts worth less per pound than whole fish, such as fish heads used for cat food, would be paying tax at a rate based on a more expensive product that they never purchased. The Legislature, if it had intended such an unusual result, would not have made the distinction between fish and fish by-products and parts. Nothing in the tax code supports taxpayer's contention that the tax should be assessed on the value of a whole fish, something the taxpayer never purchased.

Consequently, we conclude that the valuation of fish byproducts and parts may, by necessity, take into consideration events and activities that occur after the whole fish is landed at a dock due to a lack of evidence of any sales occurring at dockside. Whole fish can be sold and valued when landed at the dock. Fish parts and byproducts can not be valued until they exist as separate items to be sold, i.e., after they have been extracted. WAC 458-20-135(3) defines extracting as it relates to seafood as follows:

(3) Fishing operations, including the taking of any fish, or the taking, cultivating, or raising of shellfish, or other sea or inland water foods or products (whether on publicly or privately owned beds, and whether planted and cultivated or not) for sale or commercial use. It includes the removal of the meat from the shell, and the cleaning and icing of fish or sea products by the person catching or taking them. It does not include cultivating or raising fish entirely within confined rearing areas under RCW 82.04.100.

² Although the context was not the same as in the current case, the Board of Tax Appeals in *Cresting Wave Seafoods, Inc., v. Department of Revenue*, Docket No. 32086 (1987), upheld an assessment of enhanced food fish tax based on the value of salmon roe purchased by a Washington taxpayer from an Alaska supplier.

Roe, as an enhanced food fish only can be valued once it has been extracted. The value after extraction at a processing plant would be the same as the value after extraction at dockside, which is the point of landing. It is possible that the taxpayer's purchase price reflected not only its value at landing, but also other expenses of the seller incurred after extraction.

[2] The Department used the price the taxpayer paid for the roe as its value for purposes of RCW 82.27.020(3). Given that the audit focused on the whole fish value vs. roe sale price issue, no other evidence was considered to show that the roe's value was anything other than the price paid for it. The taxpayer, on reconsideration, requests a remand to present evidence of the value of the roe other than the sale price.³

Our review of the relevant statutes and case law discloses several possible factors that would be relevant to "value" other than the sale price. In Det. No. 89-268, 7 WTD 359 (1989), we indicated that delivery costs could be deducted from the purchase price for RCW 82.27.020(3) valuation purposes. In *Olympia Oyster Co. v. Dept. of Revenue*, BTA Docket No. 89-12 (1991), the Board of Tax appeals also discussed the problem of valuing shellfish at the point of landing where the evidence of sales at that point was inadequate. That case dealt with an audit prior to the enactment of the definition of "landing", however, the Board's use of that term was not inconsistent with the current definition contained in RCW 82.27.020(5). The Board ruled that to reach a correct value at the point of landing, the Department was entitled to start with the wholesale price charged by the seller and then deduct the seller's costs of weighing, packaging, and shipping.⁴ The purpose of considering these deductions from the wholesale price was to reach the correct value at the point of landing. This issue was not considered by the parties previously, so consequently, we will remand the file to the Audit Division for consideration of whether the taxpayer's purchase price of the roe included any of the above described costs from the time of extraction to its receipt by the taxpayer. It is the taxpayer's burden to produce such evidence.

DECISION AND DISPOSITION:

The taxpayer's petition is denied in part and granted in part.

Dated this 27th day of July 1998.

³ Evidence of the value of whole fish will not be considered on remand. Only evidence of the value of roe, as reduced by applicable seller's expenses will be considered on remand. If the only evidence of the value of the roe is the price paid for it by the taxpayer, then the assessment shall be affirmed.

⁴ The Board also allowed a deduction for shrinkage and profit. Given that roe is not separated from the whole fish until after the fish is landed, and away from the point of landing, unlike the shellfish in the BTA case, there would be no shrinkage or additional profit being gained from the point of landing to the place of extraction. Consequently these two deductions do not apply in the present case.