Cite as Det. No. 87-147, 3 WTD 111 (1987)

THIS DETERMINATION HAS BEEN OVERRULED OR MODIFIED IN WHOLE OR PART BY DET. NO. 00-063, 20 WTD 164 (2001)

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

In the Matter of the Petition	)	D E T E R M I N A T I O N
For Correction of Assessment	)	
Of	)	No. 87-147
	)	
	)	Registration No. . . .
	)	Tax Assessment No. . . .
	)	Notice of Balance Due
	)	Tax Warrant Nos. . . .

[1] **RULE 192, RCW 82.27.020(5), AND RCW 82.27.020(1):** FISH TAX -- INDIANS -- LIABILITY FOR -- USUAL AND ACCUSTOMED WATERS. Fish tax is imposed on the first person having commercial possession after landing in Washington. Commercial Indian fish buyers, however, are exempt of fish tax where the fish are landed on their own reservation or in the usual and accustomed waters of their tribe. They are not exempt if the fish are landed elsewhere. F.I.D.

[2] **RULE 192, RCW 82.27.010(5), RCW 82.27.020(1), RCW 82.27.050, and RCW 82.04.030:** FISH TAX -- INDIAN/NON-INDIAN MARITAL COMMUNITY -- LIABILITY FOR. An Indian husband and his non-Indian wife operating a commercial fish buying business on a sole proprietorship basis will be treated as one with respect to their liability for fish tax. Any exemptions for which the husband is eligible are, thus, extended to the wife as well. F.I.D.

[3] **RCW 82.27.010(5) AND RCW 82.27.020:** FISH TAX -- PERSON LIABLE -- TAXABLE EVENT -- LANDING -- LEGISLATIVE AMENDMENT -- EFFECT OF. Because of the doctrine of para materia, a statutory amendment which deleted reference to "landing" does not change primary liability for the tax from fish buyers to the people who catch them. F.I.D.

[4] **RULE 192 AND RCW 82.27.040:** FISH TAX -- CREDIT -- TAXES PAID TO OTHER JURISDICTION -- LEGISLATIVE AMENDMENT -- EFFECT OF. Before the statute was changed effective July 28, 1985, persons liable for fish tax

> were allowed a credit for taxes paid other states on the same fish. After that date credit will be allowed for fish tax paid any recognized taxing jurisdiction including Indian tribes.

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 HEARING: March 27, 1987

NATURE OF ACTION:

Petition to abate fish tax based on Indian status of taxpayers.

FACTS AND ISSUES:

Dressel, A.L.J.-- . . . (taxpayer) dba . . . are wholesalers of fish. An examination of fish tickets filed with the Department of Fisheries for the period April 1, 1984 through December 31, 1984 disclosed that additional tax was due under Chapter 82.27 RCW, Tax on Food Fish and Shellfish.[1] Hereafter, the tax will be referred to as the "fish tax." As a result of the referenced examination, Tax Assessment No. . . . was issued in the amount of $ . . . which included a 20% late-payment penalty of $ . . . . Apparently, after that, notices were also sent by the Department of Revenue (Department) for fish tax alleged to be due for 1985 and 1986 as the captioned tax warrants reflect those years as well.

Taxpayer . . . is a full-blooded Suquamish Indian. The Suquamish is one of several tribes which reside on the Port Madison Reservation. Since April 13, 1984, . . . and his wife, . . . , who is Caucasian, have been conducting a fish wholesaling business on the Olympic Peninsula. They have a tender boat which they operate in the usual and accustomed Puget Sound fishing waters of several different Indian tribes including the Suquamish. As fishing boats head for shore with their daily catches the taxpayers meet them and purchase fish in varying varieties. The persons from whom they buy are almost exclusively Indian. The fish are transferred out on the water from the fishing boats to the taxpayers' tender. The taxpayers pay for the fish on the spot. The taxpayers then transport the fish to shore. From there about 1/2 of the fish are taken via the taxpayers' truck to various fish companies and the Pike Place Market where they are sold. The other 1/2 is taken to the taxpayers' own "processing" facility located in . . . then distributed and sold to essentially the same markets. The . . . facility is located about a mile off the Skokomish Indian Reservation. 90% of the fish sold by the taxpayers are delivered to buyers who are not located on the Port Madison or other Indian reservation. On all of these purchases from Indians, the taxpayers also pay a 5% tribal fish tax to the tribe of which the particular Indian fishermen and women (hereafter referred to as "fishers") are members. Each transaction is documented by a "Treaty Indian Fish Receiving Ticket"

[1] Effective July 28, 1985 the name of the RCW chapter and the tax was changed to "Tax on Enhanced Food Fish."

which shows the type of fish, weight, price per pound, value, and area where caught. The taxpayers are conscientious about keeping accurate records so that the Department of Fisheries, among other authorities, can determine the "harvest" and restock the depleted areas accordingly.

The . . . claim that theirs is an Indian-owned business which operates primarily on an Indian reservation and for those reasons is not subject to fish tax. That is the issue to be decided herein.

DISCUSSION:

On January 21, 1855 at Point Elliott, Washington Territory, a treaty was concluded between the United States and various Pacific Northwest Indian tribes including the Suquamish. It provided in Article V:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands; provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens. (Emphasis added.)

The U.S. Supreme Court had occasion to construe a similar treaty provision in Tulee v. Washington, 315 U.S. 681 (1942). There they addressed the issue of a non-Indian government raising revenue from the enjoyment of the Indian Treaty fishery. In this case the State of Washington had arrested a Yakima Indian fisherman for commercial off-reservation fishing without a state license. The Court held that both the licensing requirement and the support of the general government from the license fee were inconsistent with the Treaty fishing right. The Court stated:

> . . . We think the state's construction of the treaty is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.
>
> . . .
>
> Viewing the treaty in this light we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both

> convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied to this case . . . (Footnotes omitted.)
>
> 315 U.S. at 685.

Thus, a state is prohibited from raising revenue through an otherwise non-discriminatory and fair impost upon the enjoyment of the fishery by Indians.

In addition, the Supreme Court has explicitly recognized that the Indian fishery was both a subsistence and a commercial endeavor at the time of the Point Elliott Treaty. The Indians plainly understood then that their reserved treaty right included commerce in the fish. In Washington v. Washington Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), the court said:

> 7. At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this Intra-tribal trade was substantial, but it is not possible to compare it with the volume of present day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for exports, as well as to provide money for purchases of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of non-Indian movement into the area. Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters. 384 F. Supp. at 351-352 (citations to record omitted). See also 384 F. Supp. at 364 (Makah Tribe "maintained from time immemorial a thriving economy based on commerce in 'marine resources'").

Fishing Vessel, 443 U.S. at 665, n.7.

The right of commercial fishing, and enjoyment of the fruits of the trade, are thus explicitly a part of the reserved treaty fishing right. This right is protected against governmental regulation or reduction which is not conservation or allocation related. 443 U.S. at 684.

In the instant case although the taxpayers do not themselves catch the fish, the husband, at least, is an Indian participating in the commerce of fishing.

Under RCW 82.27.020 the fish tax is imposed on the commercial possession of fish. The Department of Revenue has concluded that the taxpayers have such possession and has, accordingly, levied the tax at issue.

[1] Tulee and the Point Elliott Treaty suggest that the fishing rights of Indians may not be infringed upon on their land or in their usual and accustomed fishing places even if those are off reservation land. With respect to fishing, Indians enjoy greater freedom from taxation than they do for other activities. Generally speaking, on-reservation transactions involving Indians of the same reservation are not subject to excise taxation whereas off-reservation activities are so subject. WAC 458-20-192 (Rule 192). The matter of fish tax is not specifically addressed in the rule, however, either because of oversight or out of recognition that such taxation requires different considerations. One consideration that we think may be extended to fish tax, though, is the idea of limiting tax-exempt status to activities by Indians in their particular areas only . Rule 192 reads in part:

> NOTE: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Thus, transactions by Indians of one tribe conducted upon the reservation of another are generally taxable. In the instant case the event which the Department would tax is the "landing" of fish. See RCWs 82.27.010(5) and 82.27.020(1). "Landed" is defined in the former authority as:

> (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 place of landing, then, is crucial as according to RCW 82.27.020(1) the fish tax is levied on the owner of the enhanced food fish who has the first possession after landing. In the situation before us the great majority of landings take place when fish are placed aboard the taxpayers' tender boat while in Puget Sound or the Pacific Ocean. The landings, then, are generally accomplished off reservation land but, according to the taxpayers, in the usual and accustomed fishing waters of one tribe or another.

As to landings that occur on the Suquamish reservation of which the husband taxpayer is a member or landings which occur in the usual and accustomed fishing waters of the Suquamish tribe only, the fish tax does not apply. Its application to those situations would be an infringement upon the referenced treaty rights and contrary to the holding of the Tulee case. Landings accomplished elsewhere, however, are subject to the fish tax. We do not view either the treaty or Tulee as extending the prohibition against taxation to the usual and accustomed fishing waters of other tribes. As long as Indians are free to fish and engage in fishing commerce on their particular reservation or

in their particular "usual and accustomed fishing waters," which we are advised are specifically delineated by the Indian tribes, the Department of Fisheries or some such recognized authority, there is no impermissible interference if the state chooses to regulate and/or tax their other fishing activity in a fashion equivalent to the state's regulation of non-Indian fishing. Indeed, the U.S. Supreme Court recognized that right to regulate in Tulee but would not allow a license fee to be charged Yakima Indians fishing in their "usual and accustomed places." Fees in the form of licenses, fish tax, or whatever are not necessarily prohibited in somebody else's usual and accustomed fishing places if imposed in a non-discriminatory fashion for legitimate purposes of regulation or conservation.

Here, it is our understanding that the taxpayers buy most of their fish outside of both the Suquamish Reservation and the usual and accustomed Suquamish fishing waters. As to those purchases which otherwise satisfy the landing definition alluded to earlier, the fish tax applies. As to landings on Suquamish land or usual and accustomed Suquamish waters, the tax does not apply.

[2] For purposes of this ruling, the Department will not make an attempt to bifurcate the tax liability of this business based on the differing identities of the couple which owns it. Even though the wife is a non-Indian and is as active in the business as her husband, she will be permitted to benefit as well from the limited exemptions afforded above and below for her husband. The exemptions will be applied to the business and the marital community as a single entity. The exemptions for which the husband is eligible will not be diluted on a pro rata or other basis because the wife is not an Indian. To do so would be impractical from a mathematical and administrative point of view.

[3] As indicated above, the place of "landing" is crucial in establishing liability for the fish tax. Because we perceive, however, that certain legislative changes have clouded the significance of that term, we are going to inject a somewhat academic discussion about the concept of "landing." Before July 28, 1985, the fish taxable event was defined in RCW 82.27.020(1) as "the first possession by an owner after the food fish or shellfish have been landed." (Emphasis added.) The same statute after July 27, 1985 reads:

> . . . 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.

Note that the taxable event is now "the first possession in Washington by an owner." It is no longer the first possession after the fish have been landed.

Curiously, "landed" is statutorily defined in the new law while it was not in the old law. The present definition is found in RCW 82.27.010 and was quoted earlier. Because it is short, we will repeat it.

> (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.

It is presumed that this definition comports with previous administrative interpretation of the term. The taxpayers, then, when they bought and received the fish at their tender had first ownership and possession after landing so, absent Indian considerations, would have been primarily liable for the tax. However, after the law was amended effective July, 1985, RCW 82.27.020(1) reads such that the first possessor/owner in Washington is responsible for the tax without regard to whether or not the fish have been landed. If one interpreted the new amended language literally, the effect would be that the persons who caught the fish, not buyers like the taxpayers, would be primarily liable for the tax because most often, it is presumed, they would transfer their catches to fish buyers in waters situated within 3 miles of the Washington coast.[2] Thus, the fishers would be the first owners in possession in Washington and liable for the tax.

Frankly, one is forced to strain, grope and scramble to avoid the most likely unintended consequence of this inartfully drafted replacement legislation. To do so we observe first that a statute should be construed as a whole in order to ascertain legislative purpose, and thus avoid unlikely, strained or absurd consequences which could result from a literal reading. That the spirit or the purpose of legislation should prevail over the express but inept language is an ancient adage of the law. Alderwood Water Dist. v. Pope & Talbot, Inc., 62 Wn.2d 319, 321 (1963).

Secondly, statutes in pari materia must be construed together. Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things; and in construing a statute, or statutes, all acts relating to the same subject matter or having the same purpose, should be read in connection therewith as together constituting one law. The object of the rule is to ascertain and carry into effect the intent of the legislature, and it proceeds upon the supposition that the several statutes having to do with related subject matters were governed by one spirit or policy, and were intended to be consistent and harmonious in their several parts and provisions. State v. Houck, 32 Wn.2d 681-45 (1949).

Looking at Chapter 82.27 RCW as presently in effect as a whole, we find at least two counter indications to a literal interpretation of the new language. First of all, like it did before, RCW 82.27.020(2) allows a person liable for the fish tax to deduct one-half of the tax from the amount paid to the party from whom the fish are purchased. It is assumed that such provision would have been deleted had the legislature intended the primary tax burden be on the fishers because they, in most instances, would not have purchased the fish from anyone. Generally such people catch the fish, they do not buy them. Secondly, in the note following the amended version of RCW 82.27.020, as indicative of intent, the following portion of Washington Laws of 1983, section 8 is quoted:

> Findings--Intent--1983 c 284: "The legislature finds that there are commercial fish buyers benefiting financially from the propagation of game fish in the state. The

[2] According to the Washington State Constitution, Article 24, the western boundary of the state is a line 3 nautical miles from and running parallel to the coast.

> legislature recognizes that license fees obtained from sports fishermen support the majority of the production of these game fish. The legislature finds that commercial operations which benefit from the commercial harvest of these fish should pay a tax to assist in the funding of these facilities. However, the intent of the legislature is not to support the commercial harvest of steelhead and other game fish." [1983 c 284 + 8.] (Emphasis added.)

Had their intent changed vis-a-vis who is to bear the primary burden of the fish tax, the legislature would have amended or deleted this language. Consequently, it is concluded that the tax should be applied after the effective date of the new law just as it was before, namely, on the first possessor after landing who is most often the fish buyer, not the fish catcher. This community business, then, must pay fish tax on the same basis both before and after the law was amended on July 28, 1985.

[4] To add to the confusion, however, there is an aspect of the taxpayers' net fish tax liability that does change effective July 28, 1985. Under the new law and specifically under RCW 82.27.040, a taxpayer can take a credit for any taxes paid to "any other legally established taxing authority" on the same enhanced food fish. In a recent unpublished Determination this section recognized Indian tribes as such taxing authorities and allowed a credit for the payment of tribal fish taxes. We do so again here. From their already diminished liability for tax under RCW 82.27, the taxpayers may deduct fish tax amounts they can document they paid to Indian tribes recognized by the Department in Rule 192, but only for fish acquired after July 27, 1985 and only on those fish purchases which are not exempt of state fish tax because of the husband's status as an Indian. Furthermore, this deduction may only be taken for fish purchased on Indian reservations per se. It may not be taken for fish purchased in usual and accustomed waters which are located outside reservation boundaries. We do not read either the Point Elliott Treaty or the Tulee case as extending beyond reservation borders the Indian tribes' right to tax in a fashion similar to the manner in which their right to fish is extended.

SUMMARY:

The taxpayers' liability is easily capsulized. They owe the fish tax assessed with the following exceptions:

> 1. As to fish landed in the usual and accustomed waters of the Suquamish tribe or on the reservation of the Suquamish tribe, the value of the fish should be subtracted from the measure of tax.
>
> 2. As to fish landed on the actual reservations of other tribes, credit may be taken for fish taxes paid to those tribes for fish acquired after July 28, 1985.

DECISION AND DISPOSITION:

The taxpayer's petition is granted in part and denied in part. Taxpayers must have documentation to

support any tax adjustments per RCW 82.32.070.

DATED this 6th day of May 1987.