

COURT OF APPEALS
STATE OF WASHINGTON

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NO. 35396-2

STATE OF WASHINGTON
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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

NELSON ALASKA SEAFOODS, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

RCW 82.27.020 imposes an excise tax on the commercial possession of enhanced food fish (“fish tax”). A geoduck is a large clam and is an enhanced food fish for fish tax purposes. Nelson Alaska Seafoods, Inc. (“Nelson Alaska”) was a commercial harvester and seller of geoducks. Nelson Alaska entered into contracts with the State of Washington Department of Natural Resources (“DNR”) to harvest geoducks from state land.

Nelson Alaska seeks a refund of the fish tax it paid on geoducks it commercially harvested from January 1998 through June 2001 (the “period at issue”). This case requires the Court to interpret and apply the version of the fish tax statute in effect during the period at issue.

II. ISSUES PRESENTED

1. Is Nelson Alaska responsible for the fish tax under the version of the tax statutes in effect before July 2001, which imposed the tax on the first commercial possession of shellfish in Washington by an owner, when Nelson Alaska extracted, harvested, and sold geoducks embedded in state-owned aquatic lands pursuant to commercial geoduck harvesting agreements with DNR?
2. Does a sale of the right to commercially harvest geoducks from state-owned land, pursuant to the Public Lands Act (RCW Title 79), make

DNR an owner with first commercial “possession” when DNR is neither a “person” nor a “taxpayer” as those terms are defined in the Revenue Act (Title 82 RCW) and incorporated into the fish tax statute?

III. COUNTERSTATEMENT OF THE CASE

A. Geoduck Harvesting Agreement And Contract Of Sale

DNR auctions off the right to commercially harvest geoducks on specified tracts of state owned land. CP at 56. After bidding, DNR and the successful bidder enter into a “Geoduck Harvesting Agreement and Contract of Sale.” CP at 28.

Pursuant to the harvesting agreements, “[t]itle to the geoducks ... and the risk of loss passes to the Purchaser when the Purchaser severs the geoducks from the Property.” CP at 30. The harvesting agreements granted Nelson Alaska “a nonexclusive right to enter upon the Property ... for the purpose of commercially harvesting geoducks” from “bedlands owned by the State of Washington[.]” CP at 28.

B. Statement Of Procedure

During the period at issue, Nelson Alaska paid approximately \$85,853.00 in fish tax on the geoducks it harvested. CP at 58. In April 2002, Nelson Alaska requested a refund of this tax from the Department of Revenue (“Department”). CP at 51. The Department denied Nelson Alaska’s request, and Nelson Alaska appealed to the Department’s

Appeals Division. CP at 50-51. Nelson Alaska contended that the party liable for the fish tax was DNR. CP at 52. The Department's Appeals Division denied the refund request, concluding that Nelson Alaska was the party liable for the fish tax. *Id.*

In December 2003, Nelson Alaska filed a *de novo* tax refund action under RCW 82.32.180 in Thurston County Superior Court. CP at 4-6, 64-66. Nelson Alaska again claimed the party liable for the fish tax was DNR. CP at 74-76.

The parties brought cross-motions for summary judgment before the Honorable Richard A. Strophy of the Thurston County Superior Court in June 2006. CP at 55-63; 67-78; 291. The trial court denied Nelson Alaska's motion for summary judgment and granted summary judgment to the Department. CP at 293. In its oral ruling, the trial court agreed with the Department that the 1985 amendment¹ which removed the phrase "after the food fish has been landed" from RCW 82.27.020(1) did not shift the incidence of the tax from a commercial shellfish harvester to a state agency:

But I am satisfied from the materials provided to me in reference to the purposes for which the statute was amended in '85, and then the legislative bill report explaining the 2001 "clarifications" that the legislature did not intend to change the focus of the entity – taxable entity

¹ The 1985 amendments to RCW 82.27 are found in Laws of 1985, ch. 413.

liable for the excise tax. Especially where nowhere in the statutory scheme would this Court reasonably conclude that the DNR or the public owner would be the entity who should be paying the excise tax.

RP at 49-50.

The trial court also agreed with the Department that a state agency such as DNR is not a taxable “person” for purposes of the fish tax:

It does not seem to me to be reasonable that the legislature would intend that the state who is imposing the tax, tax itself. And, to that extent, I adopt the rationale of the Department in its argument that the State is not a “person” who would be an owner intended to be taxed, based upon its constructive possession of the enhanced food fish prior to harvesting.

It’s clear to me that the intent of the statutory scheme was that the first harvester of the enhanced food fish be the entity who should pay the excise tax. The best I can explain my rationale beyond saying that I adopt the argument and rationale of the Department of Revenue, which I do, is that ... the ambiguous use of the word “owner” in the context of the statutory scheme would not apply to the taxing authority as owner but would apply to the first owner after severance of the food fish or landing of the food fish. And that would be Nelson Alaska.

RP at 50.

Nelson Alaska timely appealed from the trial court’s judgment.

CP 294-298.

IV. SUMMARY OF ARGUMENT

Nelson Alaska is responsible for the tax by the plain language of any version of the statute. Nelson Alaska became the first commercial

possessor when it extracted the geoducks embedded in state-owned aquatic lands. The 1985 amendment did not shift the incidence of the tax from a taxable commercial possessor to a nontaxable state agency. The tax is imposed on the person who first takes the geoducks into possession for commercial purposes, not on the State as landowner on whose land geoducks are naturally embedded. DNR is not liable for the tax because it is not a “person” in commercial possession of the geoducks. Nor is DNR a “taxpayer” subject to the tax. The trial court properly entered summary judgment for the Department.

V. ARGUMENT

A. Standard Of Review

The material facts are not in dispute. On appeal from a summary judgment ruling, this Court engages in the same inquiry as the trial court. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). This Court may affirm the trial court’s judgment on any basis established by the pleadings and proof even if the trial court did not consider it. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

B. Under The Plain Language Of Any Version Of RCW 82.27.020(1), Nelson Alaska Was Liable For The Tax Because It Was The Owner With First Commercial Possession Of The Geoducks.

The Legislature directed the Department to collect tax on the commercial possession of geoducks in Washington. The version of the fish tax statute in effect during the period at issue provided:

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. 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.

Former RCW 82.27.020(1) (2000) (amended 2001).²

The tax imposed by RCW 82.27.020 is an excise tax on “the first commercial possession of the fish in Washington by the owner[.]” New W. Fisheries, Inc. v. Dep’t of Revenue, 106 Wn. App. 370, 378, 22 P.3d 1274 (2001). The Washington Supreme Court summarized RCW 82.27.020(1) thusly: “The tax is imposed upon an owner’s exercising control over fish for purposes of disposing of them for profit[.]” High Tide Seafoods v. State, 106 Wn.2d 695, 700, 725 P.2d 411 (1986).

² A complete copy of RCW 82.27 in effect during the period at issue is attached to this brief as Appendix A.

Nelson Alaska argues that the State DNR, as the owner of the aquatic lands in which the geoducks were embedded, was the first commercial possessor of the geoducks and therefore Nelson Alaska was not liable for the tax. In essence, Nelson Alaska argues that DNR was liable for the fish tax under the statutory language in effect during the period at issue. Appellant's Br. at 19, 23. However, the plain language of the statute places the incidence of the tax on the first commercial possessor of enhanced food fish. Here, the incidence of the tax falls on Nelson Alaska.

Read in its entirety, the plain language of RCW 82.27 supports the conclusion that Nelson Alaska was responsible for the tax because it was the owner that first severed and harvested the geoducks and took them into possession for commercial purposes. DNR's actions as the agency charged with administering state-owned aquatic lands was not a commercial possession of shellfish taxable under the RCW 82.27 fish tax scheme. The State through DNR owned the aquatic lands in which the geoducks were embedded, but it did not "possess" the geoducks for commercial purposes.

1. The 1985 amendment did not shift the incidence of the tax from the commercial harvester of geoducks to the state as owner of the aquatic lands.

Looking at one sentence of the fish tax statute in isolation, Nelson Alaska asserts that the 1985 amendment of RCW 82.27.020(1) plainly and unambiguously changed the legal incidence of the tax from the first owner after landing of the geoducks to the owner of the aquatic lands where the geoducks are embedded, and that the first commercial possessor of geoducks harvested from July 1985 until July 2001 was DNR. Appellant's Br. at 19-20, 23. The opposite is true. Read as a whole, the version of RCW 82.27.020(1) in effect during the tax period plainly and unambiguously imposed the tax upon the person who first takes geoducks into possession for commercial purposes --- Nelson Alaska.

In determining whether a statute conveys a plain meaning, "that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The meaning of a statute should be construed by reading it in its entirety and considering its relation with other statutes. Id.

In this case, reading the plain language of the former version of RCW 82.27.020 in its entirety, and in relation to the plain language of other provisions of RCW 82.27, leads to the conclusion that Nelson

Alaska was liable for the fish tax. The statute imposed the tax on the owner with first commercial possession in Washington. Nelson Alaska became the owner with first commercial possession in Washington when it severed the geoducks embedded in state aquatic lands. The State did not “possess” the geoducks for commercial purposes. By analogy to the harvest of free swimming fish, the fisherman who lands the fish has taxable commercial possession, not the State that has sovereign authority over fish and game.³

Here, the nature of Nelson Alaska’s business activities – extracting, landing, processing, transporting and selling geoducks – demonstrates that Nelson Alaska was the owner with first commercial possession in Washington.⁴

³ It is well established that the State has sovereign authority over free swimming fish and wild game. *E.g.*, Cawsey v. Brickey, 82 Wash. 653, 144 P. 938 (1914); Purse Seine Vessel Owners Ass’n v. State, 92 Wn. App. 381, 391, 966 P.2d 928, 933 (1998), review denied, 137 Wn.2d 1030, 980 P.2d 1284 (1999). That authority is sometimes described as the State “owning” fish and game. Purse Seine, 92 Wn. App. at 391; see Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 283-84, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977); RCW 77.04.012. But where embedded shellfish are involved, the State has both a sovereign power and a property interest in the shellfish. See Wash. State Geoduck Harvest Ass’n v. Dep’t of Natural Res., 124 Wn. App. 441, 449-50, 101 P.3d 891 (2004). That the State has both sovereign and property interests in geoducks, however, is not a reason to construe the fish tax statute differently. With respect to free swimming fish and embedded shellfish, the tax applies to the commercial harvester who takes actual possession of the creature.

⁴ Under Washington’s tax structure, a person who takes shellfish for commercial use is an “extractor” taxable under the “extracting” business and occupation tax, in addition to the fish tax. An “extractor” is “every person who from the person’s own land or from the land of another under a right or license ... for sale or for commercial or industrial use ... takes fish, shellfish, or other sea or inland food products.” RCW 82.04.100. This illustrates that DNR is not considered to be in a “commercial” business merely by licensing harvesters to take shellfish from aquatic lands.

2. The legislative history of the 1985 amendment discloses no legislative intent to shift the incidence of the tax on shellfish to the state.

Nelson Alaska mistakenly contends that the 1985 amendments “changed the incidence of the tax simply by removing from the statutory language defining the taxable event the phrase ““after the food fish have been landed.”” Appellant’s Br. at 21. However, the history of the 1985 amendment shows that the Legislature amended the statute for reasons unrelated to taxation of geoducks harvested from state-owned land. The amendment, which became effective on July 27, 1985, did not shift the incidence of the tax from commercial geoduck harvesters such as Nelson Alaska to the State or its agencies.

In 1985, the Legislature enacted Substitute House Bill 1060 to modify provisions of the statute pertaining to the taxation of food fish and shellfish. Laws of 1985, ch. 413. The background section of the final bill report on SHB 1060 provides insight into the principal reason why the fish tax statute was amended. This was to restrict application of the fish tax so that the tax applied only to fish caught or originating in Washington territorial and adjacent waters:

The tax does not apply to fish entering the state frozen or packaged for retail. However, there has been continuing disagreement on the application of the tax to fish caught outside of Washington waters. As a result, many accounts are open pending a resolution of this issue.

Final Legislative Report, 49th Leg., at 172 (Wash. 1985).

The summary section of the final bill report then goes on to explain what fish tax provisions were modified as a result of SHB 1060:

The regions in which fish are subject to tax are defined. For all fish, this region is the territorial waters of Washington and any adjacent waters. For salmon, a broader definition is employed. This definition includes salmon from the territorial or adjacent waters of Oregon, Washington and British Columbia as well as all troll-caught salmon from southeast Alaska.

Fish are valued for tax purposes at the point of landing which is defined as physically placing fish on any land, wharf, or pier.

An exemption from the tax is provided for fish shipped into the state.

The credit allowed for taxes paid to another jurisdiction is expanded to include any taxing authority and not just states.

Final Legislative Report, 49th Leg., at 172 (Wash. 1985).

Nothing in the final legislative report indicates any intention whatsoever to shift the incidence of the tax from commercial harvesters to the State. In addition, nothing in the House Bill Report on HB 1060, as reported by the Ways and Means Committee on March 7, 1985, and nothing in the House Bill Report on SHB 1060, as passed by the House on March 19, 1985, indicates any such intent. In sum, the Legislature

amended the statute for reasons unrelated to taxation of geoducks commercially harvested from state-owned lands.

C. DNR Was Not An “Owner” With Commercial Possession Of Geoducks Because DNR Was Not A “Person” With Actual Or Constructive Possession Of Geoducks.

Nelson Alaska contends that it cannot be liable for the fish tax because it did not own the aquatic lands from which it harvested the geoducks; it characterizes its activities as merely purchasing geoducks in “commercial sales transaction[s].” Appellant’s Br. at 22. It relies on the Uniform Commercial Code. From this, Nelson Alaska argues that DNR was the “owner” of the geoducks before they were landed, and therefore, DNR was liable for the fish tax. Appellant’s Br. at 22, 23.

Nelson Alaska’s argument misses the mark for three reasons. First, the tax was imposed on the commercial possession of geoducks, not on the ownership of land in which geoducks were naturally embedded. Second, DNR sold the right to commercially harvest geoducks pursuant to sales procedures set forth in the Public Lands Act, not the Uniform Commercial Code. Third, Nelson Alaska ignores that DNR is neither a taxable “person” nor a “taxpayer” for fish tax purposes.

1. The tax was imposed on commercial possession of geoducks, not on the ownership of land in which geoducks were embedded.

Nelson Alaska confuses ownership of public lands with first commercial possession of shellfish. See Appellant’s Br. at 29. The fish tax, however, was not imposed by reason of ownership of the real property in which the geoducks were embedded. In the context of deep water shellfish, the first commercial owner was the person that extracted, landed, and sold the geoducks in the commercial market.

In High Tide Seafoods v. State, 106 Wn.2d 695, 699, 725 P.2d 411 (1986), the plaintiff taxpayers claimed that the fish tax was a property tax because the tax was “levied upon the owner’s ‘ownership’ of the fish.” The court disagreed, holding that the fish tax was an excise tax, not a property tax, because it was “imposed upon an owner’s exercising control of the fish for ‘commercial’ purposes.” Id. Furthermore, the Court stated that the fish tax was not based “just on the ownership of the fish.” Id. at 700.

Although the Court in High Tide was interpreting a previous version of RCW 82.27.020(1), the holding that the tax was based on commercial possession and not on mere ownership should control the issue to be decided in this case. That is because Nelson Alaska’s

argument, at its core, is that the State, through DNR, was liable for the tax because it owned the land in which the geoducks were embedded.

The role of DNR was to manage geoduck resources for the benefit of the public as a whole by entering into agreements for the harvesting of state-owned geoducks. Former RCW 79.96.080 (recodified at RCW 79.135.210). In contrast, Nelson Alaska's harvesting, processing, and sales activities demonstrated the commercial nature of its possession of the geoducks. CP at 13-15, 17-18, 57.

2. DNR's sale of the right to harvest geoducks as valuable materials pursuant to the Public Lands Act did not make DNR the first commercial possessor of geoducks for Revenue Act purposes.

Nelson Alaska characterizes the geoduck harvesting agreements as commercial sales contracts and likens the agreements to contracts for the sale of goods governed by Article 2 of the Uniform Commercial Code. Appellant's Br. at 7-8. According to Nelson Alaska, it "merely purchased those geoducks in a commercial sales transaction from the 'owner' of the tidelands located in Washington" and that "[t]his sale was the first act of 'commercial possession' of the geoducks by an 'owner'[" Appellant's Br. at 22. It also argues that because geoducks were to be sold as valuable materials pursuant to RCW 79.96.080, the incidence of the tax was on DNR. Appellant's Br. at 29-30.

While the geoduck harvesting agreements included warranty provisions similar to those one might find in a contract for the sale of goods, the DNR was not making a commercial sale of goods governed by the Uniform Commercial Code. Rather, DNR sold the right to commercially harvest geoducks from public land. See Wash. State Geoduck Harvest Ass'n v. Dep't of Natural Res., 124 Wn. App. 441, 445, 101 P.3d 891 (2004).⁵

During the period at issue, RCW 79.96.080 merely specified that, in the course of managing the State's aquatic lands, geoducks were to be "sold as valuable materials under the provisions of chapter 79.90 RCW."⁶ The sales procedures were specified in RCW 79.90.170 to 79.90.240. Those sales procedures required a process in which DNR identified a proposed sale of a resource, appraised an initial value, announced the proposed sale by public notices, auctioned the product to the highest bidder, and then entered into an agreement that allowed the winning

⁵ As this Court noted, "[t]he public trust doctrine, as applied to DNR's regulation of commercial geoduck harvesting, protects the public right to recreation, commerce, and commercial fishing, all of which are bolstered by the state's system of facilitating sustainable geoduck harvesting and natural regeneration of the resource. And the proceeds from the sale of harvesting rights go to support aquatic resource management and enhancement of aquatic lands for all uses by the public." Wash. State Geoduck Harvest Ass'n, 124 Wn. App. at 452.

⁶ RCW 79.96.080 was recodified as RCW 79.135.210 by Laws of 2005, ch. 155, § 708.

bidder the right to enter upon a specific tract of state-owned aquatic lands to commercially harvest the embedded geoducks.⁷

The amount Nelson Alaska paid to DNR under the harvesting agreements for each pound of geoducks harvested represented the measure of compensation for the right to harvest. It was not a commercial sale of goods from DNR to Nelson Alaska. It was a sale of harvesting rights regulated under former chapter 79.90 of the Public Lands Act. Selling the right to commercially harvest geoducks should not have been the event triggering the tax because there was no guarantee a harvest would actually occur.

It does not make sense to say that DNR owed the tax, when the amount owed was entirely dependent on how much the commercial business ultimately harvested. Likewise, it is incongruous to say that DNR owed the tax when it was Nelson Alaska that landed the geoducks because the measure of the tax was “the value of the [geoducks] at the point of landing.” RCW 82.27.020(3).⁸ Constructions of a statute that yield absurd or strained consequences should be avoided. Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

⁷ These sales procedures were recodified in 2005 and are now found at RCW 79.140.010 to 79.140.080. See Laws of 2005, ch. 155, §§ 801-808.

⁸ “Landed” was defined as “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.” RCW 82.27.010(5).

That DNR had a statutory mandate to “sell” geoducks as “valuable materials” under the Public Lands Act, RCW Title 79, did not make DNR the “first commercial possessor” under the fish tax statutes, chapter 82.27 RCW. The fish tax was not imposed on the basis of land ownership or mere real or personal property interests. It was imposed on owners of shellfish with first commercial possession in Washington. Even if naturally embedded geoducks may have been owned by DNR, and even if DNR had a property interest in embedded geoducks, those geoducks were not subject to first commercial possession for fish tax purposes until Nelson Alaska extracted them from the ocean floor.

3. DNR was not a “person” liable for fish tax under RCW 82.27.

Citing RCW 82.27.010(3), Nelson Alaska argues that “[c]onstructive possession only requires legal ownership,” Appellant’s Br. at 24, and that DNR “was in ‘constructive possession’ of the geoducks under the definition provided” in the statute before they were harvested. Appellant’s Br. at 28. Nelson Alaska is mistaken. The statutory definition of “constructive possession” clearly required something more than legal ownership. It required that a “person” have legal ownership: “Constructive possession occurs when the person has legal ownership but not actual possession of the enhanced food fish.” RCW 82.27.010(3)

(emphasis added). As Nelson Alaska points out, statutory definitions are controlling. Appellant's Br. at 37.

The fish tax statute defined "commercial" and "possession." "Commercial" was defined as "related to or connected with buying, selling, bartering, or processing." RCW 82.27.010(2). "Possession" was defined as "the control of the 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." RCW 82.27.010(3). The word "owner" was not defined in RCW 82.27.010, but it was used interchangeably with the word "person" in RCW 82.27.010(3).

From the statutory definitions of "commercial" and "possession," it follows that Nelson Alaska, not DNR, was the first taxable commercial possessor. Nelson Alaska gained "actual possession" of and title to the geoducks when it severed them from the state-owned aquatic lands. DNR did not earlier have "actual possession" because the geoducks were embedded in the ocean floor. DNR also did not have "constructive possession" because it was not a "person" for fish tax purposes.

The statutory definition of "person" in RCW 82.04.030 was incorporated into the fish tax statute by RCW 82.27.050: "The meaning attributed to words and phrases in chapter 82.04 RCW, insofar as

applicable, shall have full force and effect with respect to taxes imposed under this chapter.” A “person” for purposes of chapter 82.04 RCW does not include the State of Washington or any state agency:

“Person” or “company”, herein used interchangeably, means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof.

RCW 82.04.030.⁹ Therefore, the State of Washington and state agencies are not included as “persons” under chapter 82.27 RCW.

The only reasonable explanation for the Legislature’s enactment of RCW 82.27.050 is that the Legislature did not intend the fish tax to be imposed on any agency of the State of Washington, including DNR. Arguing that DNR was the party responsible for the tax, as Nelson Alaska must,¹⁰ ignores the Legislature’s express incorporation into chapter 82.27 RCW of the statutory definition of “person” in RCW 82.04.030. Nelson Alaska also fails to notice that when the Legislature intends the word

⁹ In addition to the use of the word “person” in RCW 82.27.010(3), other indications that the Legislature did not intend the fish tax to be imposed on any agency of the State of Washington included the use of the same word in RCW 82.27.020(1) and (2). A copy of RCW 82.04.030 is attached to this brief as Appendix B.

¹⁰ At the same time that it argues that DNR was liable for the tax, Nelson Alaska asserts that it is “not necessary for the Court to decide whether DNR is liable for the food fish tax.” Appellant’s Br. at 25. To the contrary, it is necessary for the Court to decide whether DNR was liable, because if DNR was not liable, Nelson Alaska necessarily was.

“person” to include a state agency, it is clear about doing so. For example, a “person” is defined in the Public Lands Act to include an “agency of a federal, state, or local governmental unit[.]” RCW 79.02.010(8). But the Legislature excluded the State and its agencies from the definition of “person” for excise tax purposes. When the Legislature intends to impose a tax on the State or its agencies, it clearly states its intention to do so.¹¹

It is impossible to conclude that DNR was liable for the fish tax if one reads the fish tax statutory scheme in its entirety. At its core, Nelson Alaska’s argument requires reading one sentence of the statute in isolation. But statutes must be construed in such a manner that all language in the statute is given effect and no part is rendered meaningless or superfluous. New W. Fisheries, Inc. v. Dep’t of Revenue, 106 Wn. App. 370, 376, 22 P.3d 1274 (2001).

4. DNR was not a “taxpayer” liable for the fish tax.

In addition to not being a “person” for purposes of chapter 82.27 RCW, DNR was not a “taxpayer” liable for the fish tax. During the period at issue, the statutory definitions in RCW 82.02.010 were incorporated into the fish tax statute by RCW 82.27.050: “All of the provisions of chapters 82.02 and 82.32 RCW shall be applicable and have full force and

¹¹ For example, the definition of “buyer” for purposes of the retail sales tax expressly includes “the state, its departments and institutions[.]” RCW 82.08.010(3).

effect with respect to taxes imposed under this chapter.” “Taxpayer” was defined in RCW 82.02.010(3):¹²

The word “taxpayer” includes any individual, group of individuals, corporation, or association liable for any tax or the collection of any tax hereunder, or who engages in business or performs any act for which a tax is imposed by this title[.]

This definition of “taxpayer” did not include the State of Washington or its agencies.

Only “taxpayers” were required to report and pay the fish tax:

The taxes levied by this chapter shall be due for payment monthly[.]... The taxpayer on or before the due date shall make out a signed return, setting out such information as the department of revenue may require, including the gross measure of the tax, any deductions, credits, or exemptions claimed, and the amount of tax due for the preceding monthly period, which amount shall be transmitted to the department along with the return.

The department may relieve any taxpayer from the obligation of filing a monthly return and may require the return to cover other periods[.]

RCW 82.27.060 (emphasis added). Use of the defined term “taxpayer” in this section shows the Legislature did not intend to shift the incidence of the fish tax to DNR when it amended RCW 82.27.020(1) in 1985. The legal incidence of a tax falls upon the person who has the legal obligation to pay the tax. Canteen Service, Inc. v. State, 83 Wn.2d 761, 762, 522

¹² A copy of RCW 82.02.010 is appended to this brief as part of Appendix B.

P.2d 847 (1974). Here, that person was Nelson Alaska, not DNR. Nelson Alaska was the “taxpayer,” and it properly paid the fish tax after it harvested the geoducks.

The goal in construing a statute is to give effect to legislative intent. New W. Fisheries, Inc. v. Dep’t of Revenue, 106 Wn. App. at 375. “Legislative intent is ascertained from the statutory text as a whole, interpreted in terms of the general object and purpose of the legislation.” Id., citing Group Health Coop. of Puget Sound, Inc. v. Dep’t of Revenue, 106 Wn.2d 391, 401, 722 P.2d 787 (1986). By incorporating “with full force and effect” all of the provisions of chapters 82.02 RCW, as well as the definitions of words and phrases in chapter 82.04 RCW, the Legislature expressed its intent that the purpose of the fish tax was to tax commercial businesses engaged in the harvesting and sale of food fish and shellfish.¹³

¹³ The fish tax statute was enacted by the 1980 Legislature. Laws of 1980, ch. 98, § 1. It replaced a previous fish “privilege” tax pursuant to chapter 75.32 RCW which was administered by the Department of Fisheries. The tax was effective on July 1, 1980, and the statute incorporated all of the provisions of RCW 82.02 and the meaning attributed to words and phrases in RCW 82.04. Laws of 1980, ch. 98, § 5. By expressly incorporating the Revenue Act’s general provisions and definitions into the fish tax statute, the Legislature demonstrated intent that the tax be applied to business activities taxable under the Revenue Act. Nowhere in the history of the fish tax is there any indication that the Legislature intended to tax the regulatory or proprietary activities of a state agency that is statutorily mandated to sell the right to harvest geoducks under the Public Lands Act, Title 79 RCW.

D. The Department Has Consistently Interpreted The Fish Tax Statute As Being Imposed On Geoduck Harvesters, Not DNR.

Nelson Alaska is mistaken when it contends that the Department interpreted the 1985 amendment to mean that the fish tax was no longer imposed on Nelson Alaska. Appellant's Br. at 30. It relies on a published decision by the Department's Appeals Division, Det. No. 87-147, 3 WTD 111 (1987).¹⁴ Without any reference to any of the facts involved, Nelson Alaska takes a portion of that decision entirely out of context and concludes that the Department "has recognized and acknowledged that the plain, natural, unambiguous, literal interpretation of the 1985 version of RCW 82.27.020(1) does not place the burden of the food fish tax on Nelson Alaska." Appellant's Br. at 30. Nelson Alaska completely mischaracterizes the Department's conclusion in that determination.

In Det. No. 87-147, 3 WTD 111 (1987), the Department held that the taxpayers, a marital community consisting of an Indian and his non-Indian spouse who purchased fish out on the water, transferred the fish to their own boat, later processed the fish, and sold them to a wholesaler, were liable for the fish tax. The Department reasoned that interpreting the phrase "first possession in Washington by an owner" in isolation could

¹⁴ This determination can be found by accessing <http://taxpedia.dor.wa.gov/index.html> and entering Det. No. 87-147, 3 WTD 111 in the search term box.

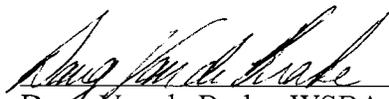
mean that those who caught the fish but sold them while still out on the water were liable for the tax. But construing the statute as a whole, the Department concluded that the Legislature intended that those who purchased the fish on the water, placed the fish directly in their boat, and processed the fish for later sale were liable for the tax. Contrary to Nelson Alaska's assertion, the Department's conclusion in the determination was entirely consistent with its position in this case.

VI. CONCLUSION

Nelson Alaska was the owner with first commercial possession of the geoducks in Washington. Therefore, Nelson Alaska was the person liable for the fish tax. This Court should affirm the summary judgment entered by the trial court.

Respectfully submitted this 23rd day of July, 2007.

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- 82.27.050 Application of excise taxes' administrative provisions and definitions.
- 82.27.060 Payment of tax—Remittance—Returns.
- 82.27.070 Deposit of taxes.
- 82.27.900 Effective date—Implementation—1980 c 98.
- 82.27.901 Severability—1985 c 413.

82.27.010 Definitions. 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, except all species of tuna, mackerel, and jack; shellfish; and anadromous game fish, including byproducts and parts thereof, originating within the territorial and adjacent waters of Washington and salmon originating from within the territorial and adjacent waters of Oregon, Washington, and British Columbia, and all troll-caught Chinook salmon originating from within the territorial and adjacent waters of southeast Alaska. As used in this subsection, "adjacent" waters of Oregon, Washington, and Alaska are those comprising the United States fish conservation zone; "adjacent" waters of British Columbia are those comprising the Canadian two hundred mile exclusive economic zone; and "southeast Alaska" means that portion of Alaska south and east of Cape Suckling to the Canadian border. For purposes of this chapter, point of origination is established by a document which identifies the product and state or province in which it originates, including, but not limited to fish tickets, bills of lading, invoices, or other documentation required to be kept by governmental agencies.

(2) "Commercial" means related to or connected with buying, selling, bartering, or processing.

(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.

(4) "Anadromous game fish" means steelhead trout and anadromous cutthroat trout and Dolly Varden char and includes byproducts and also parts of anadromous game fish, whether fresh, frozen, canned, or otherwise.

(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. [1995 c 372 § 4; 1985 c 413 § 1. Prior: 1983 1st ex.s. c 46 § 180; 1983 c 284 § 5; 1980 c 98 § 1.]

Findings—Intent—1983 c 284: See note following RCW 82.27.020.

82.27.020 Excise tax imposed—Deduction—Measure of tax—Rates—Additional tax imposed. (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. 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.

(2) A person in possession of enhanced food fish and liable to this tax may deduct from the price paid to the

Chapter 82.27

TAX ON ENHANCED FOOD FISH

Sections	
82.27.010	Definitions.
82.27.020	Excise tax imposed—Deduction—Measure of tax—Rates— Additional tax imposed.
82.27.030	Exemptions.
82.27.040	Credit for taxes paid to another taxing authority.

person from which the enhanced food fish (except oysters) are purchased an amount equal to a tax at one-half the rate levied in this section upon these products.

(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:

(a) Chinook, coho, and chum salmon and anadromous game fish: Five and twenty-five one-hundredths percent;

(b) Pink and sockeye salmon: Three and fifteen one-hundredths percent;

(c) Other food fish and shellfish, except oysters, sea urchins, and sea cucumbers: Two and one-tenth percent;

(d) Oysters: Eight one-hundredths of one percent;

(e) Sea urchins: Four and six-tenths percent through December 31, 2005, and two and one-tenth percent thereafter; and

(f) Sea cucumbers: Four and six-tenths percent through December 31, 2005, and two and one-tenth percent thereafter.

(5) An additional tax is imposed equal to the rate specified in RCW 82.02.030 multiplied by the tax payable under subsection (4) of this section. [1999 c 126 § 3; 1993 sp.s. c 17 § 12; 1985 c 413 § 2; 1983 2nd ex.s. c 3 § 17; 1983 c 284 § 6; 1982 1st ex.s. c 35 § 10; 1980 c 98 § 2.]

Effective date—1999 c 126 § 3: "Section 3 of this act takes effect January 1, 2000." [1999 c 126 § 5.]

Finding—Contingent effective date—Severability—1993 sp.s. c 17: See notes following RCW 77.32.520.

Construction—Severability—Effective dates—1983 2nd ex.s. c 3: See notes following RCW 82.04.255.

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 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.]

Severability—Effective dates—1982 1st ex.s. c 35: See notes following RCW 82.08.020.

82.27.030 Exemptions. The tax imposed by RCW 82.27.020 shall not apply to: (1) Enhanced food fish originating outside the state which enters the state as (a) frozen enhanced food fish or (b) enhanced food fish packaged for retail sales; (2) the growing, processing, or dealing with food fish or shellfish which are raised from eggs, fry, or larvae 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, and byproducts or parts of food fish shipped from outside the state which enter the state, except as provided in RCW 82.27.010, provided the taxpayer must have documentation showing shipping origination of fish exempt under this subsection to qualify for exemption. Such documentation includes, but is not limited to fish tickets, bills of lading, invoices, or other documentation required to be kept by governmental agencies. [1995 2nd sp.s. c 7 § 1; 1985 c 413 § 3; 1980 c 98 § 3.]

Effective date—1995 2nd sp.s. c 7: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [1995 2nd sp.s. c 7 § 2.]

82.27.040 Credit for taxes paid to another taxing authority. A credit shall be allowed against the tax imposed by RCW 82.27.020 upon enhanced food fish with respect to any tax previously paid on that same enhanced food fish to any other legally established taxing authority. To qualify for a credit, the owner of the enhanced food fish must have documentation showing a tax was paid in another jurisdiction. [1985 c 413 § 4; 1980 c 98 § 4.]

82.27.050 Application of excise taxes' administrative provisions and definitions. All of the provisions of chapters 82.02 and 82.32 RCW shall be applicable and have full force and effect with respect to taxes imposed under this chapter. The meaning attributed to words and phrases in chapter 82.04 RCW, insofar as applicable, shall have full force and effect with respect to taxes imposed under this chapter. [1980 c 98 § 5.]

82.27.060 Payment of tax—Remittance—Returns. The taxes levied by this chapter shall be due for payment monthly and remittance therefor shall be made within twenty-five days after the end of the month in which the taxable activity occurs. The taxpayer on or before the due date shall make out a signed return, setting out such information as the department of revenue may require, including the gross measure of the tax, any deductions, credits, or exemptions claimed, and the amount of tax due for the preceding monthly period, which amount shall be transmitted to the department along with the return.

The department may relieve any taxpayer from the obligation of filing a monthly return and may require the return to cover other periods, but in no event may periodic returns be filed for a period greater than one year. In such cases tax payments are due on or before the last day of the month next succeeding the end of the period covered by the return. [1990 c 214 § 1; 1980 c 98 § 6.]

82.27.070 Deposit of taxes. All taxes collected by the department of revenue under this chapter shall be deposited in the state general fund except for the excise tax on anadromous game fish, which shall be deposited in the wildlife fund, and, during the period January 1, 2000, to December 31, 2005, twenty-five forty-sixths of the revenues derived from the excise tax on sea urchins collected under RCW 82.27.020 shall be deposited into the sea urchin dive fishery account created in *RCW 75.30.210, and twenty-five forty-sixths of the revenues derived from the excise tax on sea cucumbers collected under RCW 82.27.020 shall be deposited into the sea cucumber dive fishery account created in *RCW 75.30.250. [1999 c 126 § 4; 1988 c 36 § 61; 1983 c 284 § 7; 1980 c 98 § 7.]

***Reviser's note:** RCW 75.30.210 and 75.30.250 were recodified as RCW 77.70.150 and 77.70.190, respectively, pursuant to 2000 c 107 § 132.

Findings—Intent—1983 c 284: See note following RCW 82.27.020.

82.27.900 Effective date—Implementation—1980 c 98. This act shall take effect on July 1, 1980. The director of revenue is authorized to immediately take such steps as are necessary to insure that this act is implemented on its effective date. [1980 c 98 § 11.]

82.02.010 Definitions. For the purpose of this title, unless otherwise required by the context:

(1) "Department" means the department of revenue of the state of Washington;

(2) The word "director" means the director of the department of revenue of the state of Washington;

(3) The word "taxpayer" includes any individual, group of individuals, corporation, or association liable for any tax or the collection of any tax hereunder, or who engages in any business or performs any act for which a tax is imposed by this title;

(4) Words in the singular number shall include the plural and the plural shall include the singular. Words in one gender shall include all other genders. [1979 c 107 § 9; 1967 ex.s. c 26 § 14; 1961 c 15 § 82.02.010. Prior: 1935 c 180 § 3; RRS § 8370-3.]

82.04.030 "Person," "company." "Person" or "company", herein used interchangeably, means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof. [1995 c 318 § 1; 1963 ex.s. c 28 § 1; 1961 c 15 § 82.04.030. Prior: 1955 c 389 § 4; prior: 1949 c 228 § 2, part; 1945 c 249 § 1, part; 1943 c 156 § 2, part; 1941 c 178 § 2, part; 1939 c 225 § 2, part; 1937 c 227 § 2, part; 1935 c 180 § 5, part; Rem. Supp. 1949 § 8370-5, part.]

NO. 35396-2

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

NELSON ALASKA SEAFOODS, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

**DECLARATION OF
MAILING**

07 JUL 23 PM 1:25
STATE OF WASHINGTON
BY [Signature] DEPUTY

COURT OF APPEALS
DIVISION II

I, KRISTIN D. JENSEN, state and declare as follows:

I am a citizen of the United States of America and over 18 years of age and not a party to this action. On this date, I provided a true and correct copy of BRIEF OF RESPONDENT and this DECLARATION OF SERVICE to be served via U.S. mail (through Consolidated Mail Services), with proper postage affixed to:

Larry N. Johnson
Attorney at Law
14242 Ambaum Blvd SW Ste 6
Seattle, WA 98166-1443

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 23rd day of July, 2007, in Olympia, Washington.

Kristin D Jensen
KRISTIN D. JENSEN, Legal Assistant

ORIGINAL