

NO. 35396-2-II

**COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

NELSON ALASKA SEAFOODS, INC.,

Appellant

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Nelson Alaska Seafoods, Inc. (“Nelson Alaska”) submits this reply to the Brief of Respondent, State of Washington, Department of Revenue (“Department”). Nelson Alaska requests that the Court reverse the trial court’s Order on Summary Judgment Motions, determine that Nelson Alaska is not liable for the food fish tax pursuant to the version of RCW 82.27.020(1) that was in effect between January 1, 1998 through June 30, 2001, and order the Department to issue to Nelson Alaska a full refund of all food fish tax paid by Nelson Alaska for geoducks purchased from the Washington State Department of Natural Resources (“DNR”) during that time period.

II. ARGUMENT IN REPLY

A. **The Department Mischaracterizes the Sales Contracts Between DNR and Nelson Alaska As Something Other Than Commercial Sales of Goods**

The Department asserts and argues that, “It [the Geoduck Harvesting Agreement and Contract of Sale between DNR and Nelson Alaska] was not a commercial sale of goods from DNR to Nelson Alaska.” Respondent’s Br. at 16. Instead, the Department attempts to classify and characterize those contracts as nothing more than “a sale of harvesting rights”. Respondent’s Br. at 1-2, 12, 14-17. Based on these assertions, the Department concludes that the DNR cannot be the first

commercial possessor of the geoducks that are the subject of these contracts within the meaning of RCW 82.27.020(1), which defines the “taxable event” for the food fish tax as “the first possession in Washington by an owner.” These conclusions ignore both state law and the clear language and purpose of those contracts.

State law itself mandates the sale of geoducks located on state-owned aquatic lands. RCW 79.96.080, the statute in effect during the periods in issue here, provided, “[G]eoducks *shall be sold* as valuable materials under the provisions of chapter 79.90 RCW¹. *After confirmation of the sale*, the department [DNR] may enter into an agreement with the purchaser for the harvesting of geoducks. The department may place terms and conditions in the harvesting agreements as the department deems necessary. [emphasis added]”² This mandate and authorization is reiterated in Clause 1 of each of the contracts between the DNR and Nelson Alaska, which provides, “Chapter 79.90 RCW and RCW 79.96.080 authorize DNR to *sell geoducks from state-owned aquatic lands* and enter into Harvesting Agreements with geoduck purchasers. [emphasis added]” CP 28, 102, 123, 143, 166, 187, 208, 229. Not only did the statute require the DNR to sell geoducks on state-owned

¹ Chapter 79.90 RCW was repealed or recodified in its entirety by 2005 c 155.

² RCW 79.96.080 was recodified as RCW 79.135.210 pursuant to 2005 c 155 § 1010.

aquatic lands as “valuable materials”, it also required the sale of any state-owned geoducks to be “confirmed” *before* the DNR had the statutory authority to enter into any harvesting agreement with the purchaser. RCW 79.90.240³. This Court explained this sale requirement as a prerequisite before the DNR could enter into any harvesting agreement in *Wash. State Geoduck Harvest Ass’n v. Dep’t of Natural Res.*, 124 Wn.App. 441, 445, 101 P.3d 891 (Div. II 2004), stating:

Chapter 79.90 RCW outlines DNR procedures and responsibilities for auctioning valuable materials. Interested parties must present a \$50,000 deposit to bid on a tract of harvestable ocean bed. The highest bidder at the public auction must then prove itself to be a “responsible bidder” as defined by the statute. RCW 79.90.215⁴. If it satisfies the enumerated criteria, then DNR permits the successful bidder to harvest geoducks from the relevant tract.

Each of the contracts between DNR and Nelson Alaska include a provision stating, “The *sale of the geoducks* was confirmed on _____,” with a date inserted by stamp in the blank space as confirmation of the date the DNR sold the geoducks to Nelson Alaska, thereby establishing compliance with the statutory prerequisite for

³ RCW 79.90.240 was recodified as RCW 79.125.680 pursuant to 2005 c 155 § 1008.

⁴ RCW 79.90.215 was recodified as RCW 79.125.650 pursuant to 2005 c 155 § 1008.

entering into any harvesting agreement with the geoduck purchaser. CP 28, 102, 123, 143, 166, 187, 208, 229.

Thus, under state law it is clear the contracts between the DNR and Nelson Alaska were not merely sales of harvesting rights, as asserted by the Department, but first and foremost commercial sales of geoducks owned by the State as valuable materials pursuant to its statutory mandate found in RCW 79.96.080. Only *after* confirmation of a geoduck sale to Nelson Alaska could the DNR then enter into a Geoduck Harvesting Agreement and Contract of Sale with Nelson Alaska that included the right to harvest the geoducks purchased by Nelson Alaska from the designated state-owned aquatic lands. Those contracts were commercial sales contracts that included the right to harvest the geoducks purchased.

This is also clearly established by the terms and provisions of the contracts. The title of each contract is “Geoduck Harvesting Agreement *and Contract of Sale*”. *Id.* Nelson Alaska is identified and referenced in each contract as the “Purchaser”. *Id.* Clause 2 of each contract is entitled, “Valuable Materials *Sold*: Harvest Ceiling”, and the first sentence of that section states, “DNR *agrees to sell* to Purchaser, and Purchaser *agrees to purchase and remove* geoducks from the Property described in Clause 3. [emphasis added]” Clause 3 then provides, “The DNR agrees to grant to the Purchaser a nonexclusive right to commercially harvest geoducks from

bedlands *owned by the State of Washington* in the County(ies) listed in Attachment B. [emphasis added]” *Id.*

All these provisions demonstrate that the principal focus and purpose of the contracts is the commercial sale of geoducks owned, controlled, and possessed by the state located on state-owned aquatic lands to purchasers who are also given the right to harvest the geoducks from specified state-owned aquatic lands. The Department’s effort to recharacterize and limit the scope of those contracts and state law to nothing more than a sale of “harvesting rights” finds no support in either the language of the statute providing the DNR the authority to enter into such contracts or in the contractual language itself. The Department’s argument is without merit.

Using its mischaracterization of the contracts between DNR and Nelson Alaska, the Department then concludes that “the DNR was not making a commercial sale of goods governed by the Uniform Commercial Code.” Respondent’s Br. at 15. However, the Department provides no legal authority to support this conclusion. This argument is also without merit.

Section 23 of each of the contracts between the DNR and Nelson Alaska provides, “This contract shall be governed by the laws of the State of Washington.” CP 40, 114, 135, 155, 178, 198, 219, 240. Each contract

also contains provisions relating to breach of the contract by either party and procedures required for initiating a lawsuit for any failure to perform. CP 36-38, 110-112, 130-133, 150-153, 173-176, 194-196, 215-217.

Chapter 62A.2 RCW contains Article 2 of the Uniform Commercial Code relating to sales. RCW 62A.2-102 provides that Article 2 “applies to transactions in goods”. RCW 62A.2-105(1) defines “goods” as:

"Goods" means all things (including specifically manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and *other identified things attached to realty* as described in the section on goods to be severed from realty (RCW 62A.2-107). [emphasis added]

RCW 62A.2-107(2) provides:

A contract for the sale apart from the land of growing crops or *other things attached to realty and capable of severance* without material harm thereto but not described in subsection (1) or of timber to be cut *is a contract for the sale of goods* within this Article *whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting*, and the parties can by identification effect a present sale before severance. [emphasis added]

Since geoducks are “goods” under these UCC provisions of state law and the sales contracts are governed by Washington State law, the provisions of Article 2 of the Washington UCC apply to the sales contracts

between the DNR and Nelson Alaska. There is nothing in Article 2 exempting sales contracts with a state agency from the provisions of the UCC statute applicable to sales of goods. Geoducks are “goods” as defined in RCW 62A.2-105 and 107. The sale of state-owned geoducks to Nelson Alaska are “transactions in goods” contractually bound by the provisions of Washington State law and thus subject to the provisions of Article 2 of the Washington Uniform Commercial Code. Clearly, the geoduck sales contracts between the DNR and Nelson Alaska are commercial sales of goods.

There can be no dispute that the State is the owner of the aquatic lands from which the geoducks the DNR sold to Nelson Alaska were harvested. The DNR specifically acknowledges this ownership in each of the sales contracts entered into with Nelson Alaska. CP 28, 102, 123, 143, 166, 187, 208, 229. Washington law recognizes that “sedentary shellfish constitute part of the real property and are subject to *ownership and control of the property owner* or lessee. [emphasis added]” *State v. Longshore*, 141 Wn.2d 414, 422, 5 P.3d 1256 (2000); see also, Appellant’s Brief at pp. 27-28.⁵ Since the State through the DNR owns and controls the geoducks through its ownership of the aquatic lands

⁵ The Department recognizes and admits this ownership by the State: “The State through DNR owned the aquatic lands in which the geoducks were embedded . . .” Respondent’s Br. at 7. This is likewise an admission that the State through the DNR controls the geoducks embedded in the state-owned aquatic lands.

where they are located, the State through the DNR is in “possession” of the geoducks within the meaning of RCW 82.27.010(3), which defines possession as “control of the enhanced food fish by the owner.” Accordingly, the *first possession* of the geoducks in Washington is with the State through the DNR within the meaning of RCW 82.27.010(3). Since the State through the DNR sells the geoducks in commercial sales transactions, the State through the DNR is the owner with first commercial possession of the geoducks in Washington. “[F]irst possession in Washington by an owner” is the “taxable event” for the food fish tax under RCW 82.27.020(1) in effect during the years in issue. That statute did not include the “after the food fish have been landed” language contained in the prior and subsequent versions of the food fish tax statute.

Since Nelson Alaska was not the owner that was the *first commercial possessor* in Washington of the geoducks it purchased from the DNR, Nelson Alaska is not the geoduck owner upon which the legal incidence of the food fish tax fell under the version of the statute in effect for the years in issue, regardless of whether the DNR was liable for the tax or was exempt from liability for the tax under the plain meaning of the statute. That is why Nelson Alaska is entitled to a refund of the food fish taxes it paid during those periods.

B. The 1985 Amendments to RCW 82.27.020(1) Shifted the Legal Incidence of the Food Fish Tax

The Department argues that the legislative history of the 1985 amendments to the food fish tax statute discloses “no legislative intent to shift the incidence of the tax on shellfish to the state” and that a principal reason for those amendments stated in the legislative history is to provide an exemption from the tax for fish shipped into the State. *Id.* The essence of the Department’s argument is: although the legislature in 1985 removed from the statutory definition of the “taxable event” the language “after the food fish or shellfish have been landed”, did not explain why it removed that language, and did not insert that landing language back into the statute until 2001, this Court should interpret the statute as if the landing language had never been removed or conclude that its reinsertion into the statute should be made retroactive. This ignores the plain language of the statute, established rules of statutory construction, and would produce an absurd and unfair result.

Nowhere in the 2001 amendments to RCW 82.27.020(1) is there a clearly expressed legislative intent to apply the changes retroactively. “Where a new enactment does not expressly provide for retroactive application, it should not be judicially implied.” *Everett v. State*, 99 Wn.2d 264, 270, 661 P.2d 588 (1983); *Anderson v. Pierce County*, 86

Wn.App. 290, 310, 936 P.2d 432 (Div. II 1997); see also, Appellant's Brief at pp. 39-40. Since the 2001 amendments cannot be found to be retroactive, the Department's argument can only be that the Court should interpret RCW 82.27.020(1) for the years in issue as if the legislature had never removed the landing language in 1985, thus rendering that legislative change, as well as the 2001 amendment adding the landing language back into the statute, meaningless and superfluous. There is no legal basis for ignoring that statutory change.

“In interpreting other statutes, this court has universally followed the rule that a material alteration of the wording generally changes the meaning of the law.” *Alexander v. Highfill*, 18 Wn.2d 733, 745, 140 P.2d 277 (1943). It is not appropriate for this Court to ignore the statutory change and treat the statute as if the landing language had never been removed. “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002); *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); see also, Appellant's Brief at pp. 16-19. The amended statute contains common language that is plain, clear, and unambiguous. Therefore, “only a plain language analysis of a statute is appropriate.” *Id.* “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered

meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999); *Stone v. Chelan County Sheriffs Dep’t*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Bauer v. Employment Sec. Dep’t*, 126 Wn.App. 468, 474, 108 P.2d 1240 (Div. III 2005). This Court has recognized in applying these rules of statutory construction that an unambiguous statute is not subject to construction, and language cannot be added to a clear statute even when the legislature failed to adequately express its intentions or the language used has unintended consequences. *Adams v. Dep’t of Social & Health Services*, 38 Wn.App. 13, 16, 683 P.2d 1133 (Div. II 1984).

In applying these established rules of statutory construction, the conclusion is inescapable that, when the legislature explicitly redlined out and removed the “after the food fish have been landed” language from the definition of the taxable event for imposition of the food fish tax in 1985, it intended to change the law. CP 265. Any review of the plain language of the statute as amended demonstrates that the change in the statutory definition of the taxable event for the food fish tax changed the legal incidence of the tax from a buyer to the seller.

Obviously, the scope of RCW 82.27.020(1) is broader than merely sales contracts between a state agency and a private individual or entity, such as the geoduck sales contracts involved in this case. It also applies to

commercial possession of food fish in Washington by all “owners”, whether private or public. Thus, contracts for the commercial sale of food fish in Washington, such as geoducks or other shellfish, between two private parties, and not involving a public or state agency, also trigger the taxable event defined in the statute and imposition of the food fish tax on one of the contracting parties, i.e., the party that was the first commercial possessor in Washington of the geoducks or shellfish that are the subject of the sales contract.

Early in this State’s history it was established that the state had the power to sell and transfer ownership of public tidelands to private individuals:

At this stage of our state’s history it seems unnecessary to pursue any extended discussion as to the power of the state to invest private persons with the ownership of tide lands. The state asserted its original ownership when its constitution was framed. Const., art. 17, § 1. As early as 1891 this court, after careful consideration, held that title to such lands is beyond controversy in the state, and that the state has full power to dispose of the same, subject to no restrictions save those imposed upon the legislature by the constitution of the state and the constitution of the United States. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539, 12 L.R.A. 632.

Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 132-133, 94 P. 922 (1908). It is also established under Washington law that “sedentary shellfish constitute part of the real property and are subject to ownership

and control of the property owner or lessee.” *State v. Longshore*, *supra* at 422-423; see also, *McKee v. Gratz*, 260 U.S. 127, 43 S.Ct. 16, 67 L.Ed. 167 (1922) [possession of mussels via ownership of the real property entitled the owner to damages for conversion by a trespasser]; see also, Appellant’s Brief at pp. 27-28.

If Nelson Alaska had entered into a contract for the purchase of geoducks (or other shellfish) located on tidelands owned by a private individual or entity with a contractual right to harvest the geoducks from those privately-owned tidelands similar to the sales contracts with the DNR involved in this case, there can be no doubt that the incidence of the food fish tax would have fallen on the seller of the geoducks under the version of RCW 82.27.020(1) in effect from 1985 to 2001. Under such a private contract, it is the seller who would be the first commercial possessor of the geoducks in Washington within the meaning of the “taxable event” as defined in the statute. Such a seller is an “owner” of the geoducks through ownership of the tidelands. The seller is in “possession” of the geoducks because it controls them through ownership of the tidelands, whether that possession is actual or constructive possession within the meaning of RCW 82.27.010(3). *State v. Longshore*, *supra* at 422-423. By selling the geoducks located on tidelands owned by the seller, the private seller is in “commercial” possession of the geoducks

within the meaning of RCW 82.27.010(2). As first commercial possessor of the geoducks in Washington, the seller under such a private sales contract becomes obligated to pay the food fish tax.

Under such a private contract, Nelson Alaska as the buyer of the geoducks would not become liable for the tax because it would not have been the “first” commercial possessor of the geoducks in Washington under the 1985 amended version of RCW 82.27.020(1). This is because that version of the statute did not include in the definition of the “taxable event” the “after the food fish have been landed” language included in the prior and subsequent versions of RCW 82.27.020(1). Had that language not been removed from the statutory definition of taxable event for the food fish tax, Nelson Alaska as the buyer in such a private contract would have become liable for the tax as the first commercial possessor of the geoducks in Washington after they had been landed.

Therefore, the 1985 amendments removing the landing language from the definition of the taxable event resulted in shifting the legal incidence of the tax from a geoduck or shellfish buyer to the seller as the owner of the tidelands where the geoducks or shellfish are located, and therefore the owner in control of and possessing the geoducks or shellfish located on those tidelands, at least when the sales contract was with a private tidelands owner. The legal incidence of the fish tax was not

shifted back to the buyer under such contracts until the statute was amended again in 2001 adding the landing language back into the definition of the taxable event. The same conclusion is required even when a geoduck or shellfish sales contract is with the DNR.

The Department is unable to point to anything in the statute or otherwise that demonstrates a legislative intent to impose the food fish tax on the seller when the geoducks sold are located on privately-owned tidelands, but on the buyer when the seller is the DNR or other public agency and the geoducks are harvested from publicly-owned tidelands. The definition of the taxable event for imposition of the food fish tax found in RCW 82.27.020(1) makes no distinction whatsoever between “owners” in “commercial possession” of geoducks or other shellfish in Washington that depends on whether the geoducks are located on privately-owned or publicly-owned tidelands. However, that is exactly what the Department is asking this Court to do – interpret the statute so there is such a difference in the legal incidence of the tax depending on ownership of the tidelands where no such distinction exists in the plain language of the statute.

Such an interpretation of the statute by this Court would be contrary to established rules of statutory construction and would produce an absurd and unfair result. See, Appellant’s Brief at pp. 16-19. Under

the Department's interpretation of the statute, a buyer of publicly-owned shellfish would be placed at a competitive disadvantage to one buying from a private owner because of the obligation to pay the food fish tax. There is absolutely nothing in the statute or otherwise to suggest or imply that the legislature intended such a dichotomy and competitive disadvantage to exist in the application of the food fish tax statute as amended in 1985.

A plain language analysis of RCW 82.27.020(1) requires the conclusion that, for the periods in issue, Nelson Alaska was not the owner with first commercial possession of the geoducks in Washington and, therefore, was not the owner liable for the food fish tax during those periods.

C. The Department, Like the Trial Court, Has Focused On the Wrong Issue

The Department continues the mistake made by the trial court in its ruling and order by focusing its argument on why the DNR cannot be liable for the food fish tax.⁶ Respondent's Br. at 13-20; see also,

⁶ The Department mistakenly asserts that Nelson Alaska has argued that the DNR is liable for the food fish tax. Respondent's Br. at 7, 13-14, 19. That is not and has not been an argument of Nelson Alaska. See, Appellant's Brief. Nelson Alaska's argument is that under the plain meaning of "taxable event" in statute as amended in 1985, Nelson Alaska was not the first commercial possessor in Washington of the geoducks it purchased from the DNR and, therefore, was not an "owner" liable for the tax under that statute and should be refunded the tax it erroneously paid. Whether or not the DNR is liable for the tax is not relevant to resolution of the issue in this case and need not be decided by the Court.

Appellant's Br. at 34-36. The issue is not whether the DNR is liable for the food fish tax under the 1985 amendments to RCW 82.27.020(1). The only issue is whether Nelson Alaska should be granted a refund of the food fish tax it paid on its purchases of geoducks from the DNR under the sales contracts executed during the period when the taxing statute did not include the "after the food fish have been landed" language. The issue is whether the amended statute placed the legal incidence of the tax on Nelson Alaska when Nelson Alaska was not the first to own and possess the geoducks in Washington for commercial purposes.

If the amended statute changed the incidence of the tax such that Nelson Alaska is not liable for the tax for its geoduck purchases from the DNR, it does not necessarily follow from that conclusion that the DNR is liable for the tax. It also does not necessarily follow from a conclusion that the DNR is not liable for the tax that then Nelson Alaska is or must be liable. The Department's arguments that one conclusion must follow the other are fundamentally flawed. See, Appellant's Br. at 34-36.

While the 1985 amendments shifted the incidence of the tax generally from buyers who first came into possession of the geoducks after they were landed to sellers who first possessed the geoducks regardless of when they were landed (see Section B above), it is certainly possible that the DNR was exempted from payment of the tax when

liability fell on the DNR as the first commercial possessor of the geoducks in Washington. That is what the Department argues in Section C.4. of its brief, asserting that “DNR was not a ‘taxpayer’ liable for the food fish tax.” Respondent’s Br. at 20-22. However, even if the DNR was exempt from payment of the food fish tax under the amended statute, it does not follow from that conclusion that Nelson Alaska is a taxpayer liable for the food fish tax when the statute did not include the “after the food fish have been landed” language. Regardless of whether the DNR is liable or exempt from the tax, it is not an issue the Court must decide in this appeal.

The correct issue, and the focus of the Court’s attention, must be on whether, under the definition of the “taxable event” in RCW 82.27.020(1), Nelson Alaska’s ownership of the geoducks it purchased from DNR was the first commercial possession in Washington by an owner of those geoducks, thus making Nelson Alaska liable for the food fish tax. If it was not the first commercial possessor, then Nelson Alaska was not liable for the food fish tax regardless of who else or whether anyone else was potentially liable for the tax as a result of the purchases from the DNR. Nelson Alaska was not the owner in first commercial possession in Washington of the geoducks it purchased from the DNR. The DNR was the first commercial possessor of the geoducks, regardless

of whether the statute requires payment of the tax by the DNR or exempts the DNR from such liability.

D. The Food Fish Tax Is Levied On an “Owner” and the Statutory Meaning of “Owner” Under RCW 82.27.020(1) Includes the State As Owner of the Geoducks It Sold To Nelson Alaska

The Department argues that the DNR cannot be responsible for the food fish tax because the DNR cannot be considered a “person” under RCW 82.04.030. Respondent’s Brief at 17-20. However, the statute does not levy the tax upon a “person”. The fish tax statute levies the tax on the first commercial “owner” of the food fish: “The tax is levied upon and shall be collected from the *owner* of the enhanced food fish whose possession constitutes the taxable event. [emphasis added]” RCW 82.27.020(1). The “taxable event” for the food fish tax is defined as “the first commercial possession by an *owner*. [emphasis added]” *Id.* “Possession” for purposes of the food fish tax means “control of the enhanced food fish by the *owner*.” [emphasis added]

The Department’s focus and reliance on the definition of “person” found in the business and occupation tax statute, Chapter 82.04 RCW, is therefore misplaced. RCW 82.27.050 made the meaning of words and phrases found in the B & O tax statute relevant to the food fish tax statute only “insofar as applicable”. When the operative phrase in defining the

“taxable event” is a commonly used and understood word -- owner -- which is not specifically defined in the statute, the plain and ordinary meaning of that term is what is applicable, not the meaning given to another word found in another statute. See, Appellant’s Br. at 36-39. The definition of “person” found in the B & O tax statute, therefore, is not applicable to the determination of who is an “owner” and first commercial possessor in Washington under RCW 82.27.020(1).

The State through the DNR, as seller of the geoducks in commercial sales transactions, was the commercial owner of the geoducks immediately prior to their sale to Nelson Alaska and the first commercial owner and possessor of the geoducks within the meaning of the provisions of the food fish tax statute in effect during the years in issue.

Furthermore, even if relevant to the issues in this case, the definition of “person” provided in RCW 82.04.030 does not exclude an agency of the state such as the DNR:

“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. [emphasis added]

It is reasonable to interpret a “person” to include the DNR under this broad definition as either a “political subdivision of the state of Washington” or “any group of individuals acting as a unit . . . or otherwise”. Therefore, even if an “owner” under the food fish tax must be a “person” within the meaning of RCW 82.04.030, the DNR is included within any reasonable interpretation of that statutory definition.

E. Any Doubt As To The Meaning of This Taxation Statute Must Be Construed Most Strongly Against the Department’s Interpretation and In Favor of the Taxpayer

The Department seeks to bolster its position by arguing it has consistently interpreted the 1985 amendment removing the landing language from the definition of the taxable event in the fish tax statute as being imposed on harvestors, not the DNR. Because this case concerns the construction of a statute, this Court’s review is *de novo* and the error of law standard applies. See, Appellant’s Br. at 16. “Under this standard, this court may substitute its interpretation of the law for the agency’s.” *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Therefore, the Department’s consistent interpretation of the statute, if erroneous as a matter of law as Nelson Alaska has established it is, should be given no weight by this Court in applying

established rules of statutory construction to determine the meaning of the amended fish tax statute.

This Court faced an issue of statutory construction very similar to the issue involved in this case in *Adams v. Dep't of Social & Health Services, supra*. The issue in *Adams* was the meaning of the term “back pay” as used in RCW 41.06.220(2). The Department of Social and Health Services (DSHS) interpreted the meaning to include a “net loss concept” so that any money earned during the period the employee was wrongfully suspended is deducted in computing “back pay” due upon reinstatement. DSHS supported its interpretation looking beyond the language of the statute using common law principals. The employee argued the statute was unambiguous and did not provide for any such setoff. Applying established rules of statutory construction, this Court rejected the agency’s interpretation and looked only at the language of the statute itself in agreeing with the employee’s position, stating:

An unambiguous statute is not subject to construction, and the court may not add language to a clear statute even if it believes the legislature intended something else but failed to express it adequately. *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978). Ambiguous means uncertain or susceptible to more than one meaning. *Harding v. Warren*, 30 Wn.App. 848, 639 P.2d 750 (1982). If a statute is unambiguous, there is no need to look to administrative action as an aid to interpretation. *Municipality of Metro Seattle v. Department of Labor & Indus.*, 88 Wn.2d 925, 568 P.2d 775 (1977). It is for the

court to determine the purpose and meaning of statutes even when the court's interpretation is contrary to the agency charged with carrying out the law. ***Overton v. Economic Assistance Auth.***, 96 Wn.2d 552, 637 P.2d 652 (1981).

“Back pay” in RCW 41.06.220(2) is clear and unambiguous. In order to reach the result urged by the Department, we would have to read into the statute language which is not there. This we cannot do.

Adams v. Dep't of Social & Health Services, supra.

The same rules of construction must be applied and the same conclusion must be reached in this case regardless of the interpretation the Department has applied to the amended food fish tax statute. The Department is asking the Court to read back into the amended fish tax statute the landing language the legislature had explicitly removed from the definition of the “taxable event”. The Court does not need to and should not look further than the plain language of the amended statute to resolve the issue in this case, just as it did in ***Adams***.

However, even if the Court believes there is any doubt as to the meaning of the amended fish tax statute as applied to the geoduck sales contracts between Nelson Alaska and the DNR, those doubts must be resolved in favor of Nelson Alaska. “If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer.” ***Ski Acres, Inc. v. Kittitas***

County, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992); see also, Appellant's Br. at 18-19.

The Department itself has certainly raised serious doubts about the legitimacy of its own interpretation of the amended statute by publishing its concerns in one of its determinations available to the public, Det. No. 87-147, 3 WTD 111 (1987). CP 86-94; see also, Appellant's Br. at 30. The Department attempts to downplay the significance of its review of the "landing" language that had been included and then removed from the definition of the taxable event for the fish tax. Yet, this is exactly the statutory language that is the subject of this appeal. Although its discussion was not required to decide the issue in Det. No. 87-147, the Department chose to make its observations about the statute available to the public:

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".

Det. No. 87-147, *supra*. The Department then observes that "if one interpreted the new amended language *literally*" the tax would fall on the sellers of food fish rather than on the buyers as the Department has applied the amended statute. The Department then concludes that to avoid this result required by the plain meaning of the amended statute, "one is forced

to strain, grope and scramble to avoid the most likely consequence of this inartfully drafted replacement legislation.” *Id.*

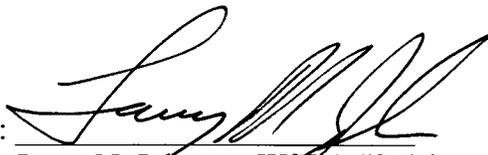
There are no doubts as to the meaning of RCW 82.27.020(1) as amended by the legislature in 1985 removing the “after the food fish have been landed” language from the statute’s definition of the taxable event. A plain language analysis of the statute requires the result sought by Nelson Alaska in this appeal. Yet, even if the Court finds any doubt in this taxing statute’s meaning based on the language used and removed by the legislature, those doubts must be resolved most strongly in favor of the taxpayer, Nelson Alaska, and against the taxing authority, the Department.

III. CONCLUSION

The Court should reverse the trial court’s September 8, 2006 Order On Summary Judgment Motions granting the summary judgment motion of the Department of Revenue and denying the summary judgment motion of Nelson Alaska.

Respectfully submitted this 4th day of October 2007.

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PROOF OF SERVICE

I hereby certify that I mailed a copy of the foregoing Reply Brief of Appellant Nelson Alaska Seafoods, Inc. by depositing it with the United States Postal Service with postage prepaid and addressed to:

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BY [Signature] [Signature]