

Mark Meadows was a long-time seine fisherman in Prince William Sound. In 2003, he and other fishermen found themselves unable to sell fish to their usual buyer, Sea Hawk Seafoods, Inc. in Valdez, because Sea Hawk had lost its processing license.

After cooperation between fishermen, Sea Hawk, and ADF&G, a plan was devised by which Meadows and other fishermen would obtain their own licenses to process their catches.¹ They would deliver their catches to the Sea Hawk plant, where the fish would be roe-stripped under the fishermen's licenses.

Under this arrangement, Meadows caught whole pink salmon in the terminal harvest area and delivered those fish to Sea Hawk. Sea Hawk employees removed the roe and turned it into ikura which was sold by broker Seafoods Sales. The fish carcasses were ground and dumped. Seafoods Sales sold the ikura and took 3% of the proceeds, Sea Hawk then deducted its operating costs and then took half of the remaining proceeds, and Meadows split the remainder equally between himself and two other fishermen involved in a joint venture. In total, Meadows processed 321,698 pounds of roe, for which 4,282,945 pounds of pink salmon carcasses were discarded.

At the end of the year, Meadows submitted tax returns to ADF&G for those fish that he harvested for their roe, as well as fish he had caught throughout the rest of the season. Only the taxes relevant to those fish harvested for their roe are relevant for purposes of this appeal. Meadows calculated the relevant taxes based on the value of the whole round pink salmon. The Department of Revenue (Department) contended he should have calculated his taxes based on

¹ The processor licenses obtained by the fishermen are referred to as “fisheries business licenses.”

the value of the roe alone, which had a greater value than that of the whole fish. It is this dispute that forms the basis for this appeal.

Meadows paid the additional taxes, but also appealed the Department's decision. His case was heard by an informal conference panel within the Department. The panel upheld the Department's assessment based on the value of the roe for all relevant taxes. Meadows appealed that decision and his appeal was heard by an Administrative Law Judge (ALJ) from the Office of Administrative Hearings. The ALJ granted Meadows' appeal in part, and found that two of the four relevant taxes should be based on the value of the whole salmon rather than the roe; and he upheld the Department's determination on the remaining two taxes.

Meadows now appeals the ALJ's decision that the remaining two taxes should be based on the value of the roe. The Department filed a cross appeal based on the ALJ's determination that two taxes should be based on the whole round salmon.

For the reasons set forth below, I affirm the decision of the Office of Tax Appeals in part and reverse in part. I find that all four taxes should be based on the value of the whole round salmon.

II. DISCUSSION

A. Standard of Review

When the superior court acts as an appellate court to review questions of law there are two possible standards of review to apply: the reasonable basis test or the substitution of judgment test.² The reasonable basis test is applied to questions of law involving agency

² See, e.g., *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166 (Alaska 1986).

expertise, and the court substitutes its own judgment for questions of law that do not involve agency expertise.³

Meadows argues that the questions of law presented in this case do not involve agency expertise, and that therefore this Court should substitute its own judgment. When the issues on appeal “revolve around questions of statutory interpretation requiring the application and analysis of various canons of statutory construction” the issues are appropriately decided using the court’s independent judgment because such questions are “regular grist for judicial mills.”⁴ This is because it is within the court’s expertise to determine the legislature’s intent when passing laws.⁵ However, when the legislature adopts statutes that give an agency broad authority to adopt its own rules, then “[t]he scope of review for an agency’s application of its own regulations to the facts [should be] limited to whether the agency’s decision was arbitrary, unreasonable, or an abuse of discretion.”⁶ This is a deferential standard of review which “properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.”⁷

This is not a case in which the legislature gave the agency broad discretion. Instead, this case involves the interpretation of multiple statutes that leave little discretion for the agency to adopt its own implementing regulations. The legal questions in this case largely involve statutory interpretation. Though regulations adopted by the agency are also applicable, those

³ See, *Handley v. State, Dep’t of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

⁴ *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d.896, 903-04 (Alaska 1987).

⁵ *Northern Alaska Environmental Center v. State, Dept. of Natural Resources*, 2 P.3d 629, 634 (Alaska 2000).

⁶ *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960 (Alaska 1998).

⁷ *Handley v. State, Dep’t of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (*quoting Rose v. Commercial Fisheries Entry Comm’n*, 647 P.2d 154, 161 (Alaska 1982)).

regulations merely implemented the statutes adopted by the legislature using almost exactly the same language.

Nor is this a case that involves complex or highly technical issues of law which involve agency expertise, in which the agency's specialized knowledge and experience would be particularly probative as to the meaning of the statute.⁸

For these reasons, this Court will substitute its own judgment with respect to the questions of law in this case.

B. The Fisheries Business Tax and Seafood Marketing Assessment.

The Fisheries Business Tax (FBT) and the Seafood Marketing Assessment (SMA) are both imposed on anyone engaged in a fisheries business who first processes a fisheries resource. The taxes are assessed based on the value of that fisheries resource. Meadows argues that the fisheries resource being processed was whole round salmon, and therefore the tax should be assessed on the value of salmon at 4 cents per pound. The Department argues that the fisheries resource processed by Meadows was roe, and therefore the taxes should be assessed based on the value of the roe, which is undisputedly \$2/pound. The ALJ upheld the Department's assessment of these taxes based on the value of the roe. For the reasons stated below, I find that the fisheries resource is the whole round salmon.

It is not in dispute that Meadows is liable for these taxes because he first processed the fisheries resource. The issue is whether he must pay the tax based on the value of the salmon or the roe. "Value" in this case is based on the "prevailing price paid to fishermen for the

⁸ To the extent that this case involves technical issues, they are issues relating to fisheries practices and fisheries markets. The Department of Revenue gives no reason to believe that it has specialized expertise in these areas. The tax statutes and regulations at issue are not particularly complex.

unprocessed fishery resource of the same kind and quality” by similar fisheries businesses in the same market area where the fishery resource was taken.⁹

The issue under this statute is whether the “unprocessed fishery resource” consists of whole salmon, or the roe removed from that salmon.

“Processing” is any activity that “modifies the physical condition of a fisheries resource,” *except* for activities done “solely for the purpose of maintaining the quality of the fresh resource.”¹⁰ This exception would appear to be for relatively minor activities that are done as soon as the resource is taken from the ocean—activities that must be done to preserve that resource while the fisherman transports the resource to the processor. This would apply to things like gutting and cleaning the fish.

Meadows did nothing to the fish before delivering it to the Sea Hawk plant as whole fish. At the plant, the roe was extracted, and the carcasses were ground into tiny pieces so that they could legally be discarded back into the ocean. This is more than gutting or icing and cannot reasonably fit within the exception to activities defined as processing.

According to the State’s argument, the “fisheries resource” should be valued partway through this process – after the roe was removed from the carcasses, but before the roe was processed into ikura. The State would view these as separate processes. First the roe is stripped, and then the roe was processed into ikura.

Some fisherman, perhaps, may separate these tasks. They may strip the roe on the boat, and then deliver roe to a processing plant. Meadows did not. He delivered whole, round fish to the Sea Hawk plant.

⁹ AS 43.75.290(7).

¹⁰ 15 AAC 75.300(4).

I see no meaningful way to distinguish Meadows from a hypothetical processor who purchased whole salmon from a fisherman for 4 cents a pound and processed them. That processor would be taxed on the purchase price.

The fact that Meadows was both the fisherman and the processor does not change the fact that the unprocessed fisheries resource that he took off his boat and delivered for processing was not roe, it was whole fish. The statute requires value to be determined based on a product of “like kind and quality.” I find that the relevant product is whole fish.

Accordingly, as to the Fisheries Business Tax and the Seafood Marketing Assessment, I conclude that the value for tax purposes should have been 4 cents, the market value of whole, round fish.¹¹

C. The Salmon Enhancement Tax and Seafood Marketing Tax.

Commercial salmon fishermen and women in Alaska are required to pay the Salmon Enhancement Tax (SET) and the Seafood Marketing Tax (SMT) when salmon are either transferred to a buyer or exported out of the state. The Department calculated these taxes based on the value of the salmon roe. The ALJ reversed this determination and found that the taxes should have been assessed on the value of the whole fish.

In its cross appeal, the Department argues that Meadows never transferred the salmon to a buyer, and therefore the SET should have been assessed as of the time the roe was removed from the state under AS 43.76.028.¹²

¹¹ The State suggested that the value should have been determined to be 8 cents a pound. This argument was not briefed by the State and it is, therefore, deemed waived. *See, e.g., Kellis v. Crites*, 20 P.3d 1112, 1115 (Alaska 2001).

The Department also argues that the flesh of the pink salmon caught under the roe stripping regulation was necessarily unmarketable under the emergency roe-stripping regulations. The emergency regulation that allowed Meadows to catch fish near the hatchery solely for the purpose of roe stripping, which would normally be illegal under AS 16.05.831, applied only to “pink salmon...that have matured to the point that their flesh can not be marketed or...cannot be put to other lawful use or be given away free of charge to food banks or members of the general public.”¹³

This cannot be true. Even though the salmon had value only for its roe and not for the rest of the salmon, it had some value. Because these salmon were nearly rotten and no longer worth eating, their market value was four cents per pound rather than the eight cents that commercial fishers’ were getting for fresher salmon in the same region.¹⁴

Meadows argues that, acting as the processor, he effectively bought the salmon from himself acting as the fisherman, and therefore he was a buyer for purposes of the SET and SMT. The term “buyer” for purposes of the SET and SMT is defined in both statute and regulation. The legislature defined buyer in AS 43.76.040 as “a person who acquires possession of salmon from the person who caught the salmon regardless of whether there is an actual sale. . . .”¹⁵ The Department’s regulatory definition is only slightly different: “buyer’ means a person who purchases or otherwise acquires salmon from a limited entry permit

¹² AS 43.76.028 (a) (“The owner of salmon removed from the state is liable for payment of a salmon enhancement tax imposed under AS 43.76.001--43.76.013 if, at the time the salmon are removed from the state, the tax payable on the salmon has not been collected by a buyer.”).

¹³ 5 AAC 93.925(b).

¹⁴ The Department mentions in its brief that it is appealing the ALJ’s decision about the value of the salmon, but this issue was not briefed and is deemed waived. *See* note 11, *supra*.

¹⁵ AS 43.76.040 [emphasis added].

holder, and includes a person required to obtain a license under AS 43.75.011, but does not include a person acquiring salmon for personal consumption or a tender acquiring salmon on behalf of a person required to obtain a license under AS 43.75.011. . .”¹⁶ There is no material difference in these definitions for purposes of this case.

In 2003 Meadows held two roles. He held a limited entry permit to fish, and as authorized by ADF&G, he held a fisheries business license so that he could process salmon as well. If he did not hold the fisheries business license and instead sold salmon to Sea Hawk as in years past, the SET and SMT would clearly be based on the value of the salmon that he sold to Sea Hawk. It could not possibly be based on the value of the roe, which would be undeterminable at that time.

The State argues that there was a “sham” transaction, which implies some sort of fraud or collusion. Use of this term is unwarranted. The arrangement entered into between Meadows and Sea Hawk was approved by ADF&G. As noted above, the statute does not require there to be an “actual sale” for there to be a buyer.¹⁷ Rather, in cases in which fish is transferred between related entities, it is taxed based upon its market value.

I agree with the ALJ’s conclusion that it would be unfair to require that Meadows’ “fishing activities be taxed at a higher rate because he is also in the business of processing, for which he is taxed separately.”¹⁸ It is not a sham, as the state argues, to apply the SET and SMT at the point when Meadows issued fish tickets to himself and calculated the value of the salmon at four cents per pound. Rather, this is the only common sense interpretation of the

¹⁶ 15 AAC 76.290(1).

¹⁷ AS 43.76.040.

¹⁸ Order Granting Partial Summary Adjudication at 7.

statute. He transferred salmon to himself as processor and owed the tax “at the rate of two percent of the value of salmon, as defined in AS 43.75.290”¹⁹ at the time he issued fish tickets to himself.

The definition of value for the SET and SMT is the same as that discussed *infra* in relation to the FBT and SMA. Therefore, the SET and SMT should also be based on the value of the whole round salmon, four cents per pound.

D. Remaining issues.

Meadows also argues that the Department improperly imposed additional tax, interest, and penalties; and that it inconsistently applied the taxes in violation of Meadows’ constitutional rights.²⁰ Meanwhile, the Department also made an alternative argument on cross appeal that the ALJ was incorrect in determining that the market value of the whole round salmon should be 4 cents per pound rather than 8 cents per pound.²¹ Because these issues were not briefed, each of these claims is denied.²²

Meadows also argues that the Department’s interpretation is arbitrary and capricious. In light of the conclusions reached above, it is not necessary to reach this argument.

¹⁹ AS 43.76.011(a).

²⁰ Appellant’s Designation of Points on Appeal.

²¹ Cross brief of appellee at 11.

²² *Sherer v. Mundt*, 36 P.3d 1196, 1199 (Alaska 2001) (issues not briefed or only cursorily briefed are considered waived). *See also, Nenana City School Dist. v. Coghill*, 898 P.2d 929, 934 (Alaska 1995) (“In agency review, an issue may be abandoned on appeal to the superior court, either by failing to include it in the points on appeal or by inadequate briefing.”).

III. CONCLUSION

For the reasons set forth above, the decision of the Office of Tax Appeals is REVERSED as applied to the FBT and SMA; and AFFIRMED as applied to the SET and SMT.

Entered at Juneau, Alaska this 20th day of December, 2011.

Signed _____
Philip M. Pallenberg
Superior Court Judge

CERTIFICATION OF SERVICE

I certify that I served the following parties on the 20th day of December, 2011.

Dan Branch, AAG <input type="checkbox"/>	Markos Scheer <input type="checkbox"/>
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Signed _____
David Bogda
Regional Appeals Clerk

[This document has been modified to conform to the technical standards for publication.]