BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of	)	
	)	
PAUL McMULLIN,	)	OAH No. 07-0213-TAX
	)	

DECISION AND ORDER

I. Introduction

Paul McMullin appeals an informal conference decision of the Department of Revenue upholding an assessment for $1,136.80 in Salmon Enhancement Tax and $568.40 in Salmon Marketing Tax for the year 2002, together with interest. Because Mr. McMullin has failed to show that the assessment was in error, the assessment is affirmed.

II. Tax Assessed

Paul McMullin held a fisheries business license in 2002, and filled out fish tickets reporting that he had acquired 214,609 pounds of salmon from permitted fishermen.[1] Because he did not file a Salmon Enhancement Tax/Salmon Marketing Tax return, the Department of Revenue prepared one for him, showing $1,136.80 in Salmon Enhancement Tax (SET) and $568.40 in Salmon Marketing Tax (SMT), for a total of $1705.20.[2] The SET figure and the underlying fish quantities were entered on lines for "Cook Inlet."[3] A return was also prepared for 2001, but it is not at issue in this appeal.[4] On December 2, 2003, the department issued a Notice of Assessment that, with respect to 2002, assessed $1,705.20 in taxes and $284.17 in interest up to that time, due by January 31, 2004.[5]

As provided by AS 43.05.240, the Notice of Assessment gave Mr. McMullin sixty days to request an informal conference to dispute the amount billed. On the sixtieth day, Mr. McMullin requested an informal conference, placing the portion of the Notice of Assessment relating to 2002 in dispute.

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1 Record (R.) 12-18. Mr. McMullin stated at the September 12, 2007 case planning conference that he does not dispute the fish tickets attributed to him.

2 R. 10, 12.

3 R. 10, 11.

4 R. 8.

5 R. 7.

II. Procedural Posture

At the informal conference level, Mr. McMullin had one contention: that the assessment was for Cook Inlet salmon purchases, whereas all of his 2002 activity was in Prince William Sound.[6] Revenue Appeals Officer Martin Bassett upheld the assessment on the basis that the Cook Inlet designation was simply an error of putting the figure on the wrong line of the tax return; he found that the actual tax owing was correct.[7]

This is an appeal under AS 43.05.241 and 430 from the informal conference decision rendered by Appeals Officer Bassett. In an appeal at this level, the taxpayer has the burden of proof on all factual issues.[8] This means that Mr. McMullin needs to put evidence in the record, or point to evidence already in the record, showing that he does not owe the tax assessed.

At the case planning conference in this case, Mr. McMullin articulated two issues. First, he said the fish in question were delivered whole, not cut, and therefore in his view would not be subject to enhancement tax. Second, he offered to prove that all of his marketing tax was paid in 2002, using documents he would retrieve from storage. By consent of all parties and the administrative law judge as provided in AS 43.05.455(b)(2), arrangements were made for a hearing by correspondence. Mr. McMullin was to begin by, within one month, providing the documents supporting his appeal, including those showing payment of his marketing tax, followed three weeks later by an opening written argument. He provided neither.

After receiving a notice of pending dismissal for failure to prosecute his appeal, Mr. McMullin submitted an e-mail (1) reiterating his uncut fish argument; (2) mentioning (but not documenting) a $1500 tax payment in 2002, apparently in connection with his second contention from the case planning conference; and (3) raising a new argument that he merely transported the fish to Anchorage unprocessed and delivered them to an Anchorage exporter, a role he believes should not make him liable for tax. No new evidence was submitted.

In response to the e-mail, the Office of Administrative Hearings arranged for the

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[6] R. 3.

[7] R. 1-2, 11. The SET rates were the same for Cook Inlet and Prince William Sound, and the SMT rate was the same statewide.

[8] AS 43.05.455(c).

parties to confer further and then to reconvene for a new case planning conference. At that conference, the parties again agreed to handle the case through written submissions alone, with Mr. McMullin making a last submission after the Department of Revenue responded to his prior arguments. Mr. McMullin was reminded orally and in writing that the only evidence in the case was the 18-page agency record that had been submitted up to that time, that he would need to gather and submit any other relevant documents, and that he would need to put any statements he wished to rely on into affidavit form. There was a specific discussion of whether Mr. McMullin was appealing his Fisheries Business Tax for 2002, which had already been paid. Mr. McMullin said that he was not, and his statement was recorded in the Second Scheduling Order.

Seven weeks later, a few minutes before the deadline for his final submission, Mr. McMullin sent in another e-mail. He mentioned some individuals who could "bear witness," but attached no statements from them. He reiterated his contention that he had paid "the tax in question," this time mentioning a figure of $1900. He then articulated what appeared to be a new argument: that the department took in his 2002 payments for SET and SMT, but erroneously applied the money to fishery business tax which, he argued, he did not owe. He attached, without explanation, one document: an invoice from Whittier Small Boat Harbor to himself from the last week of July, 2002.

III. Analysis

Time has run out for this appeal. There have been multiple opportunities to submit evidence, and the time has come to assess whether Mr. McMullin has met his burden of proof. Over the many months of discussion, he has raised five successive arguments. They will be evaluated one at a time below.

A. No Cook Inlet Activity

The department's tax return supporting the assessment contained a data entry error, placing the 2002 salmon quantity (and the resulting SET) on lines for "Cook Inlet." These figures should have been placed one line higher, on the line for "Prince William Sound." The informal conference sorted out this issue. The amount of tax due, and the assessment itself, are unaffected.

B. SMT Already Paid

In May of 2007, Mr. McMullin claimed to have paid the SMT on the salmon at issue and indicated that he would retrieve documents from storage to prove his claim. Six months later, after multiple opportunities, he had presented no evidence at all to show that he had made SMT payments in 2002. He did not submit any stored documents showing payment. He did not obtain documentation of payment from his bank, such as archived check images or old bank statements. He did not file an affidavit from himself or anyone else attesting to payment. There is therefore no evidence in the record of any SMT payments.

C. No Enhancement Tax on Uncut Salmon

Mr. McMullin has sometimes suggested that SET is not payable for unprocessed fish. SET is a tax owed by fishers and ordinarily is either collected by buyers "at the time the salmon is acquired by the buyer" or by whoever owns the fish if and when it leaves the state, if it has not been bought and taxed up to that time.[9] It is levied on the unprocessed market value or price of the fish.[10] It has nothing to do with processing, and nothing in the SET statutes creates an exemption for uncut salmon.

D. McMullin a Mere Transporter

At later stages of the appeal, Mr. McMullin contended that because he merely transported most or all of the salmon at issue to Alaska Seafood Export, rather than taking title to it, processing it, or exporting it himself, he is not responsible for SET or SMT.

As noted previously, SET is a tax owed by fishers and ordinarily must be collected by buyers "at the time the salmon is acquired by the buyer."[11] The buyers must

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[9] AS 43.76.010 – 013. These provisions were in effect in 2002 as they exist today; additional SET provision, not relevant here, were enacted in 2004. AS 43.76.001 – 009.

For salmon that are not bought prior to being taken out of the state or that otherwise have not been taxed prior to export, the owner of the salmon at the time of removal from the state is liable for the tax. AS 43.76.028. Under a provision added in 2004, fishers pay the tax directly if they transfer the fish to unlicensed buyers. AS 43.76.025(d).

[10] AS 43.75.290(7) (for purposes of this case, the 2002 version is used); AS 43.76.010 – 013.

[11] AS 43.76.010 – 013. For salmon that are not bought prior to being taken out of the state or that otherwise have not been taxed prior to export, the owner of the salmon at the time of removal from the state is liable for the tax. AS 43.76.028.

then remit the proceeds to the Department of Revenue.[12] One is a "buyer" if one "acquires possession of salmon from the person who caught the salmon," even if no purchase or sale occurred.[13] There is one exception: *interstate* transporters of goods for hire who acquire the fish for that purpose are not "buyers."[14]

In 2002, SMT was likewise a tax ordinarily collected by buyers, with "buyer" defined in exactly the same way as for SET.[15] The definition of "buyer" contained the same single exception for *interstate* transporters.[16]

Mr. McMullin "acquire[d] possession of salmon from the person who caught the salmon," as evidenced by his fish tickets. He does not fit within the exception. Therefore, he was required to collect and remit both SET and SMT.

E. Payment Applied to Wrong Tax

Mr. McMullin's final theory seems to rest on the undisputed fact that he did make payments of $1,946.58 against 2002 tax liability of some kind. The payments consisted of a $99.00 prepayment, a $337.60 credit from a prior year, and $1,509.98 in payments of some other kind.[17] The department applied these payments against a Fisheries Business Tax (FBT) liability that it calculated for Mr. McMullin of $1,996.06; the payments fell just short of satisfying that liability.[18]

Mr. McMullin's theory is that one pays FBT only on fish that one processes,[19] and he did not process the salmon at issue in this case. This theory has two flaws.

First, Mr. McMullin's FBT was paid years ago. He explicitly stated in the September 12 case planning conference that he was not appealing that tax, and on that basis the department did not address FBT issues in its briefing or evidence submissions. Further, it would be outside the scope of this appeal to take old FBT payments and reallocate them to other taxes based on a determination that no FBT was owed. The 2002 FBT was not part of the informal conference decision appealed to this office, and it is

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12 AS 43.76.025.
13 AS 43.76.040.
14 *Id.*
15 Former AS 43.76.110 – 130 (repealed 2004).
16 Former AS 43.76.130 (repealed 2004).
17 R. 19. R. 19 – 24 were added to the Record with the Department's Closing Brief.
18 *Id.*
19 *See* AS 43.75.015.

therefore beyond the jurisdiction of this office to revisit the 2002 FBT.[20]

Second, to the extent that there is a record relating to Mr. McMullin's 2002 FBT, it does not fully support his argument. The FBT was collected not only for 214,609 pounds of salmon but also for significant quantities of ling cod and other non-salmon species.[21] Beyond that, Mr. McMullin has suggested that the amount of salmon he transported unprocessed to Alaska Seafood Export was about 172,000 pounds,[22] which would leave 42,000 pounds that he apparently did process and for which he would have owed FBT in any case. Thus, even under his theory a significant portion[23] of the $1,946.58 he remitted in 2002 would have to be applied to FBT, leaving him with a substantial unpaid SET and SMT liability.[24]

IV. Conclusion

No basis has been demonstrated to disturb the assessment challenged in this case.

V. Order

The Department of Revenue's Informal Conference Decision in this case of March 19, 2007 is AFFIRMED.

DATED this 11th day of February, 2008.

By:
Christopher Kennedy
Administrative Law Judge

NOTICE

This is the hearing decision of the Administrative Law Judge under Alaska Statute 43.05.465(a). Unless reconsideration is ordered, this decision will become the final administrative decision 60 days from the date of service of this decision.[25]

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20 *See* AS 43.05.405.

21 R. 22.

22 McMullin e-mail, August 9, 2007.

23 One can very roughly estimate from the FBT return that the overall portion, encompassing non-salmon and processed salmon, could be as low as about 20% or could exceed 50%, depending on the species of the 42,000 pounds of salmon that were apparently processed. *See* R. 22.

24 If there was an error in applying too large a portion of the 2002 payments to FBT (something that cannot be determined on the present record), the error may be the result of Mr. McMullin's failure to file his own FBT return for 2002, leaving it to the department to prepare a return for him.

25 Alaska Statute 43.05.465(f)(1).

A party may request reconsideration in accordance with Alaska Statute 43.05.465(b) within 30 days of the date of service of this decision.

When the decision becomes final, the decision and the record in this appeal become public records unless the Administrative Law Judge has issued a protective order requiring that specified parts of the record be kept confidential.[26] A party may file a motion for a protective order, showing good cause why specific information in the record should remain confidential, within 30 days of the date of service of this decision.[27]

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Statute 43.05.480 within 30 days of the date this decision becomes final.[28]

Certificate of Service: The undersigned certifies that on the 11th day of February, 2008, a true and correct copy of this document was mailed to the following: Paul McMullin; Chris Poag, counsel for the Department of Revenue; Hollie Kovach, Chief of Appeals, Tax Division.

By: _____
Linda Schwass/Kim DeMoss

[26] Alaska Statute 43.05.470.
[27] Alaska Statute 43.05.470(b).
[28] Alaska Statute 43.05.465 sets out the timelines for when this decision will become final.