BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
AQUATECH SEAFOOD LLC	)	
	)	OAH No. 19-0598-TAX
Fisheries Business Tax and Seafood Marketing Assessment 2015-2017	)	

DECISION

I. Introduction

This is an appeal of a May 4, 2020 informal conference decision (ICD) in which the Department of Revenue (DOR) ruled against the taxpayer on certain issues relating to its Fisheries Business Tax and Seafood Marketing Assessment liability for three tax years. The case predates that ICD because there had been a prior appeal and remand, with jurisdiction retained.

The 2020 ICD resolved some issues in favor of the taxpayer, and additional issues were worked out prior to the hearing in this appeal. The hearing took place on October 21, 2020, with testimony taken from a single witness. All proposed exhibits were admitted without objection, including exhibits to the Aquatech prehearing brief.

Only two substantive issues remained at the time of hearing. They are resolved in Parts III and IV below.

II. General Factual Background and Issues Presented

Aquatech Seafood LLC is a shore-based, family-run seafood processor located in Anchorage. Although it has a variety of products, its primary business—and the only one relevant to this case—is live crab. It sells the crab both retail and wholesale to local, lower-48, and overseas buyers. Aquatech does not own, lease, or operate any fishing or crabbing vessels.

Alaska Statute 43.75.015(a)(2) imposes a Fisheries Business Tax of three percent on the value of a fisheries resource such as crab that a shore-based fisheries business processes. Alaska Statute 43.75.100(a)(1) and (2) similarly tax the fisheries resource if, having not yet been taxed under § .015, the resource is transported or sold outside Alaska's taxing jurisdiction. If there is tax liability under AS 43.75.015 or 100, a taxpayer such as Aquatech may owe an additional Seafood Marketing Assessment under AS 16.51.120 and 180(5), which is effectively a surtax of a few tenths of a percent.

DOR audited Aquatech's Fisheries Business Tax returns for the 2015 and 2016 tax years. In the course of those audits, Aquatech identified, and sought to correct, certain matters relating to its 2017 return. All three tax years are at issue in this appeal. Earlier proceedings and negotiations have resolved many issues, leaving the following two:

1. Regarding sales in which Aquatech sold live crabs to Korean buyers "FOB Anchorage," should these sales be treated as sales of unprocessed crab within Alaska, reportable of Schedule 7 and not taxable to Aquatech, or should they be treated as sales of crab transported or sold outside the state and therefore taxable under AS 43.75.100?

2. For crab purchased from other processors that is determined to be subject to tax under AS 43.75, what is the correct benchmark to use in valuing the resource for purposes of applying the three-percent tax?

III. The FOB Issue

Aquatech and DOR disagree about the correct treatment of 8,172.3 pounds of crab in 2015 and 4,798.7 pounds of crab in 2016, all of which was sold "FOB Anchorage" to three Korean buyers.[1] This represents about a fifth of the company's potentially taxable pounds sold in those years.

Aquatech sells a significant amount of crab to Korean buyers FOB Incheon.[2] For those customers, Aquatech arranges shipping to Korea and bears the risk of loss in transit, which for crabs is a significant risk.[3]

However, two buyers in 2015 and one buyer in 2016 asked to purchase FOB Anchorage. This allowed those companies to conceal their Alaska source for the crab from downstream purchasers in Korea, whom they feared would use the information to cut them out of the chain and make future purchases directly from Aquatech. Also, a Korean buyer might be able to negotiate a better shipping rate with Korean Air than Aquatech could obtain.[4]

This arrangement had advantages for Aquatech as well. Aquatech avoided the risk of loss of the crabs en route to Korea.[5]

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1 *See* Ex. T12 at DOR 282 (sold to U.S. Millennium Trading and N9 International Trading), DOR 306 (portion sold to Deok Su Coldstorage), DOR 478-479.

2 *E.g.,* Ex. T9. Incheon is the location of the international airport for Seoul.

3 Testimony of Lamar Ballard.

4 *Id.*

5 *Id.*

Aquatech's invoices for the FOB Anchorage transactions with Korean buyers typically showed "CFI" in the "SHIP VIA" box of the invoice.[6] CFI is an Anchorage freight forwarder that receives and arranges onward shipping for seafood.[7] In these sales CFI was acting for, and paid by, the buyer.[8] There is one exceptional invoice, DOR 168, which will be discussed separately at the end of this section.

The ICD noted that, with respect to a fishery resource that has not already been taxed, AS 43.75.100 imposes tax liability on a person who:

> (1) transports the fishery resource to a point outside the taxing jurisdiction of the state for subsequent processing or sale outside the taxing jurisdiction of the state; or
>
> (2) sells the fishery resource outside the taxing jurisdiction of the state; . . . .

The ICD held that Aquatech was liable for tax under each of the quoted subsections.

With respect to subsection (1)—transporting the resource out of the jurisdiction—the ICD found that Aquatech arranged the shipment abroad, declaring that "Aquatech's procedure . . . is identical whether the resources are shipped FOB source or FOB destination."[9] While this may have been a reasonable surmise at the time of the informal conference, further exploration at the hearing showed that it is mistaken as a matter of fact. Aquatech did not arrange shipping for the FOB Anchorage sales (other than DOR 168) and did not transport the product out of state.

With respect to subsection (2)—selling the resource outside the jurisdiction—the issue is more nuanced. The question is where the "sale" occurred, which in this context (as DOR's counsel acknowledged in closing argument) is essentially a question of where the goods are when title passes from seller to buyer.[10] DOR takes the position that an FOB term governs nothing more than risk of loss, not passage of title.

DOR has erred in dismissing the FOB clause as an irrelevance. To be sure, FOB does determine who has the responsibility to transport and insure goods, with the seller responsible

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6 *E.g.,* Ex. T12 at DOR 285, 439.

7 Ballard testimony.

8 *Id.*

9 Ex. T12 at DOR 110.

10 *See, e.g., Pan American Eutectic Welding Alloys v. C.I.R.* 36 T.C. 284, 289-291 (U.S.T.C. 1961) (where title passed when goods were outside the U.S., location of sale and sales income was outside the U.S.); *C.I.R. v. Hammond Organ Western Export Corp*., 327 F.2d 964, 966 ("It is well established by many court decisions that the place of sale is where the title and risk of loss passed from the seller to the buyer.").

before the FOB location and the buyer responsible afterward.[11] Historically, however, that change of responsibility was thought to occur *because* something more fundamental occurred at the FOB location: the passage of title.[12] If a buyer purchased goods FOB the seller's loading dock, the buyer owned the goods once they crossed that dock and had to arrange, and bear the risk of, whatever happened to them after that, including the truck that took them away and in any downstream transport. If a buyer purchased goods FOB the buyer's receiving dock, it was the seller who owned the goods during transport and until they crossed that dock.

Over time, it has become not wholly uncommon for parties to negotiate a passage of title at a point different from the FOB location. Nonetheless, FOB clauses retain an important tie to the question of title. As the U.S. Tax Court has noted, "[t]he use of the term 'F.O.B.' raises the presumption that title passes to the buyer on the seller's delivery of goods to the indicated place."[13] To put it another way, FOB location remains the place for title to pass, absent evidence to the contrary. Thus, in a recent tax decision entitled *Powerex Corp. v. Department of Revenue,*[14] the Oregon Supreme Court noted that "title to the goods passes at the f.o.b. point." And in *VisionStream, Inc. v. Director of Revenue,*[15] the Missouri Supreme Court recently found title to transfer at a manufacturer's place of business where the only evidence regarding place of transfer was a delivery term providing "[d]elivery will be F.O.B. manufacturer."

In the transactions at issue this case, the only evidence or contractual term bearing on transfer of title is the FOB term. There is no basis to conclude that Aquatech retained any interest in the crabs after they left the Aquatech facility and passed into the hands of the freight forwarder engaged by the Korean buyers. Indeed, DOR has, in other contexts, accepted that sales "FOB Anchorage" to out-of-state buyers like Trident Seafoods, with shipping handled by that buyer's freight forwarder, are sales within Alaska.[16]

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[11] *See, e.g.,* U.C.C. § 2-319(1). DOR points to a common source of definitions of terms for international transactions (though one not incorporated in the sales contracts in this case), the *Incoterms* (International Rules for the Interpretation of Trade Terms) developed by the International Chamber of Commerce. The *Incoterms* likewise provide that FOB terms have the effect described in the text, though using the term only in the context of exports and imports by sea. The *Incoterms* and U.C.C. do not address the concept of title.

[12] *See, e.g., North American Phillips Corp. v. American Vending Sales, Inc.,* 35 F.3d 1576, 1578 n.2 (Fed. Cir. 1994) (citing Black's Law Dictionary); *Vogt v. Shienebeck*, 100 N.W. 820, 822 (Wis. 1904).

[13] *Liggett Group, Inc. v. Commissioner*, 58 T.C.M. 1167 (1990).

[14] 357 Or. 40 (Oregon 2015).

[15] 465 S.W.3d 45, 46-47 (Mo. 2015).

[16] Ballard testimony; Ex. T12 at DOR 292, 527.

The department's unease may stem from the fact that the buyers here are overseas corporations. If Aquatech is not liable for tax on these crabs, the liability falls on the Korean corporations who shipped them abroad, and it may be difficult—under the current regulatory scheme—to be sure it is paid. The tax law in this case is not ambiguous, however, and the issue does not involve contested interpretation of that law. Instead, the case turns wholly on issues of fact coupled with concepts of general property and contract law. Thus, there is no scope to bring public policy or ease of administration into the analysis. In any event, one can imagine regulatory steps that could be taken to ensure collection of tax on exported live crabs.

The conclusion with respect to virtually all of the crab at issue is that Aquatech is not liable for tax under AS 43.75.100. This is because all of the available evidence indicates that Aquatech neither shipped the crab out of the jurisdiction nor sold the crab outside the jurisdiction.

DOR 168, the exceptional invoice, requires a brief separate discussion.[17] It was a sale of just 14.6 pounds of live crab (a tiny sale in the context of these large commercial transactions) to a large Korean buyer. This small group of crabs was shipped, not to Korea, but instead to California by FedEx. Although the invoice says "FOB Anchorage," the Korean customer was charged for shipping on the invoice, and shipping was arranged by Aquatech. The transaction was a favor to the Korean buyer, shipped as a gift to the buyer's friend. Aquatech admitted at hearing that the transaction is taxable. On remand, DOR may exclude these 14.6 pounds from the 2015 Schedule 7.

IV. The Valuation Issue

As noted in the previous sections, AS 43.75.015 and 100 impose a three-percent tax on the "value" of at least some of the crab handled by Aquatech. The second issue in this case concerns the base value to which that three percent is applied.

A portion of Aquatech's crab is purchased directly from fishers. The parties agree that that such crab should be taxed at three percent of the price paid to the fisher. However, a portion of Aquatech's crab is purchased unprocessed from other processors who have, in turn, purchased it from fishers. In that circumstance, Aquatech does not know the price paid to the fisher, but

[17] *See* Ex. T12 at DOR 168.

Aquatech can reasonably surmise that the price it paid the other processor has been marked up from the ex-vessel price, both to cover a variety of costs and to provide a profit.[18]

For the crab purchased through other processors, Aquatech has calculated the tax base by using the COAR (Commercial Operator's Annual Reports), which provides average prices paid to fishermen by processors as reported to the state by the processors.[19] DOR contends that Aquatech should have used the actual price it paid to purchase the crab from the middleman processor. For tax years 2015-2017, DOR's method yields a value (and a tax liability) approximately sixty percent higher that Aquatech's method.[20]

The starting point for choosing between these competing methods is AS 43.75.290(7). That provision sets out to define the word "value" in AS 43.75—"value" being the figure against which the three percent tax rate is to be multiplied. Section .290(7) defines value three ways for three contexts.

First, in subpart (A), it addresses "value" in the context of fishery resources taken by a person who holds a direct marketing fisheries business license and who sells to a buyer who does not hold a fishery business license. In this situation, the benchmark value is the "market value" as determined by the "prevailing price paid to fishermen . . . in the same region." But the parties agree that subpart (A) does not apply to Aquatech, which does not hold a direct marketing license and does hold a fisheries business license.

Second, in subpart (B), it addresses "value" in the context of resources taken in company-owned, -operated, or -leased vessels. For this situation, "market value" is the benchmark. Again, the parties agree that Aquatech does not fall under this subpart, since it has no fishing boats.

Third, in subpart (C), "value is defined for all situations other than those described in (A) and (B). Here, "value" is defined as **"the actual price paid for the fishery resource by the fisheries business to the fisherman."** This is the provision that, in the view of both parties, governs Aquatech's tax liability.

The trouble with subpart (C) is that the value it describes, if read literally, does not exist for the middleman transactions at issue here. "[T]he fisheries business" in the definition is the

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[18] Ballard testimony.

[19] *See* Aquatech Prehearing Brief Ex. 2. Ex. T12 at DOR 399 provides a partial description of the COAR system.

[20] *See* Aquatech Prehearing Brief Ex. 4, p. 1; Ballard testimony.

taxpayer (we can tell that from the parallel language in AS 43.75.015). The taxpayer is Aquatech. Aquatech, however, has not in any conventional sense paid any price at all "to the fisherman."[21] It has paid a price to someone else.

Aquatech proposes that the answer to this conundrum is to value the crab in accordance with an approximation of the price that *was* paid (by someone else) "to the fisherman." It believes this approach is the most faithful to the statutory intent.

Disappointingly, the ICD addressed this issue by simply pretending the "to the fisherman" language did not exist. "The value of the fisheries resources," it declared without elaboration, "is . . . the actual price paid for the fishery resource by the fisheries business."[22] But in interpreting a statute, we are required to read all of its words, not just some of them, and try to give them all effect.[23]

Interestingly, the Department of Revenue has encountered this problem before. In 1998, it addressed a purchase of 5,057 pounds of live crab by Yamaya Seafoods. Exactly as has occurred here, Yamaya purchased the crab from another processor, Prime Alaska Seafoods. The purchased came to DOR's attention because Yamaya subsequently processed the crab but failed to pay Fisheries Business Tax on its value. Although DOR could undoubtedly have learned from Yamaya the price it paid to Prime, DOR instead assessed Yamaya based on "value" determined via "the average price reported to the state for sales of red king crab in Dutch Harbor in 1997"—essentially, the equivalent of a COAR value.[24] In other words, DOR used the approach Aquatech is proposing here. DOR contends that the Yamaya approach was merely the nonbinding solution chosen by a mere auditor, but this undersells its significance; it seems to have been applied as well at the informal conference level, thus making it a considered departmental position.[25]

DOR's Yamaya approach fits with the statutory scheme. As DOR's Revenue Audit Supervisor observed in testimony to the legislature in 2019:

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[21] Insofar as we have any evidence in this case, the middleman processors from whom Aquatech purchased the crab do not own fishing vessels. Ballard testimony. DOR asserts (albeit without evidence) that these middlemen do own and operate fishing vessels in other fisheries. But even if that is true, it is irrelevant, because those vessels in other fisheries did not catch the crabs whose value is being taxed here. The middlemen are, in no sense, the "fishermen" in the context of this case.

[22] Ex. T12 at DOR 111.

[23] *E.g., In re Adoption of Missy M.,* 133 P.3d 645, 650 (Alaska 2006).

[24] *In re Yamaya Seafoods,* Case No. 25-OTA-99 (Alaska Office of Tax Appeals 1999) (published at aws.state.ak.us/OAH/Decision/Display?rec=4811).

[25] *See id.* DOR is correct that the use of this approach is neither endorsed nor rejected in the *Yamaya* decision itself; thus, it did not rise to the level of a holding by the predecessor tribunal to OAH.

> It's simply a longstanding policy that we tax based on price paid to the fisherman, a term that's nearly the same as ex-vessel value. And that's simply the policy that's in statute.[26]

In each of the three definitions of "value" in AS 43.75.290(7), the value described is a value paid to, or earned by, the initial taker of the resource, not someone downstream of that in the chain of commerce. In the present case and in the Yamaya transaction, we are tasked with interpreting the statute in an interstitial situation, a circumstance that falls through a crack within one of the three elements of what was doubtless intended to be a comprehensive definition of value. In filling that gap, it makes sense to honor the overall concept in the rest of the definition.[27]

There is, moreover, a sense in which the Yamaya approach directly and fully applies all the words of the statute. In a middleman transaction, the closest thing to the price paid by the taxpayer to the fisherman is the portion of the price paid to the middleman that was, in effect, passed through to the fisherman. Thus, in approximating what the fisherman actually received, the Yamaya approach generates an "actual price" paid "by the fisheries business" "to the fisherman," albeit paid indirectly.

In departing from the approach it took in the Yamaya transaction, DOR has articulated no principled basis for its departure. Instead, it has read "to the fisherman" out of the statute. One can accord no deference to such an unexplained departure from a prior interpretation.[28]

Aquatech was correct to value the crab it purchased from other processors using the best evidence available of the price paid to the fisherman.[29]

V. Interest and Penalties

Aquatech stipulated at hearing that interest and penalties are at issue in this case only insofar as they are driven by the principle amount due. Because that amount will change based

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[26] Remarks of Elizabeth Nudelman, House Resources Committee (April 24, 2019).

[27] *Cf. Roberts v. Sea-Land Services, Inc.,* 566 U.S. 93, 101 (2012) ("'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting prior authority).

[28] *See In re Renaissance Umiat, LLC*, OAH No. 10-0268-TAX (OAH 2011) (published at https://aws.state.ak.us/OAH/Decision/Display?rec=4862), Decision at 7 (even with regard to an agency's regulation—which would normally command more deference that interpretation of a statute—there is no deference when what the agency has done is ignore part of the regulation).

[29] In other contexts, it is possible that the best evidence of this value would come from a source other than the COAR.

Using the COAR presents a slight logistical problem, since the COAR values for the prior year are published after the Fisheries Business Tax return is due. Aquatech apparently handled this by putting estimated values in its return and then amending with actual COAR figures. Ballard statement at closing.

on the rulings above, DOR will need to recalculate interest and penalties on remand. Some interest and penalties may still be owed due to the issues resolved prior to hearing.

VI. Order

This matter is remanded to the Department of Revenue to recalculate Aquatech's tax liability in accord with the holdings above. Jurisdiction is not retained.

DATED April 22, 2021.

By: *Signed*
Name: Christopher Kennedy
Title: 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.[30]

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.[31] 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.[32]

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.[33]

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

30 AS 43.05.465(f)(1).
31 AS 43.05.470.
32 AS 43.05.470(b).
33 AS 43.05.465 sets out the timelines for when this decision will become final.