HB

397

(11)

HOUSE COMMITTEE REPORT

Date Referred to Committee: February 2, 1996 **FURTHER REFERRALS:**

Date of Committee Action: 2/20/96

The FINANCE Committee considered: **SSHB 397**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 397

FISH LANDING TAX/SEAFOOD MARKETING ASSMT.

"An Act relating to the fisheries resource landing tax and to the seafood marketing assessment; and providing for an effective date."

recommends it be replaced with the following committee substitute CSHB 397 (Fin) [X] the same title [ ] a new title

[ ] additional referral to _____ Committee
[ ] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[X] fiscal note(s) Rev

[ ] zero fiscal note(s) _____

APPROVES PREVIOUS: (Dept/Date)

[X] fiscal note(s) DCED 2/2/96

[ ] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Mulder			✓	
Hanley			X	
Navarre	✓			
Therriault			X	
Kelly			X	
Grussendorf	X			
Rokeberg			X	
J Parnell			X	
Brown			X	

CHAIR'S SIGNATURE Mark Hanley _____

Hanley

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SS for HB 397

Revision Date: January 29, 1996
Department: Commerce and Economic Development
Title: An Act relating to the fisheries resource landing and the seafood marketing assessment;
BRU: Alaska Seafood Marketing Institute
Component: Alaska Seafood Marketing Institute
Sponsor: Austerman
Requestor: House Special Committee on Fisheries
COMPONENT SERIAL NO. 393

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	1,300.0	700.0	700.0	700.0	700.0	700.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	1,300.0	700.0	700.0	700.0	700.0	700.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 General Fund						
1005 GF/Program Receipts	1,300.0	700.0	700.0	700.0	700.0	700.0
1006 GF/MHTIA						
Other						
TOTAL	1,300.0	700.0	700.0	700.0	700.0	700.0

Estimate of any current year (FY 96) cost: $ _____

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS (Attach a separate page if necessary)

SS HB 397 amends AS 16.51.120(a) to include floating processors in the seafood marketing assessment. This assessment will generate up to $700,000 of additional program receipts per year for the Alaska Seafood Marketing Institute to utilize in marketing Alaska seafood products.

Prepared by: Dwayne Peeples
Phone: 465-5571
Division: Alaska Seafood Marketing Institute
Date: January 29, 1996
Approved by Commissi: William L. Hensley for
Date: 1-29-96
Agency: Commerce and Economic Development

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SS HB 397

ANALYSIS: (continued)

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT
Fiscal Note Calculations for SS HB 397

The seafood marketing assessment is a tax levied on the value of seafood products produced in Alaska to be utilized for promoting seafood consumption. The assessment is a voluntary tax which can be terminated by the Commissioner of the Department of Revenue with approval of the eligible processors who together purchase 51 percent of the value of the products, or by a vote of two thirds of the Alaska Seafood Marketing Institute (ASMI) Board of Directors as specified in AS 16.51.130.

The funds generated from this assessment are collected by the Department of Revenue and transferred to ASMI to be use in generic promotion of Alaskan seafood products. In order to comply with the statutory intent for these funds, ASMI is requesting program receipt authority of $1,300,000 in FY 97 to expend those fund collected in 1994 and 1995 as prescribed by Section 28 of SS HB 397. In addition, ASMI is requesting $700,000 authority in the subsequent years for the same purposes.

CONTRACTUAL: Purchase of advertising, and printing services to promote the consumption of Alaskan seafood products.

STATE OF ALASKA
1996 LEGISLATIVE SESSION

FISCAL NOTE

BILL NO: CSSSHB 397

Revision Date: 2/20/96
Dept. Affected: Revenue
Title: Fisheries Resource Landing Tax & ASMI
BRU: Audit Operations
Component: Income and Excise Audit
Sponsor: Rep. Austerman
Requestor: (H) FIN Committee
COMPONENT SERIAL NO. 113

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	-130.0	-130.0	-130.0	-130.0	-130.0	-130.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost $ 0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The statutory amendments requested in CSSSHB 397 have no financial impact on the operating budget of the Department of Revenue. There may be a impact on revenues. Section 21 of the bill amends the Fishery Resource Landing Tax to change the tax rate on developing species from 3% to 1%. This change impacts a very small portion of seafood products taxed and could reduce revenues by less than 2 tenths of 1% (approximately $8,000). Sections 22 and 23 add allow two new tax credits(Education Tax Credit and Winn Brindle Scholarship Fund) to be taken against the landing tax. The estimated loss of revenues from addition of these two credits ranges from $95,000 to $130,000. The total potential loss from the bill is estimated $130,000.

Prepared by: Robert Bartholomew
Phone: 465-2320
Division: Income and Excise Audit
Date: 2/20/96
Approved by Commissioner:
Date: 2/20/96
Agency: Department of Revenue

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LEG.CSSHB397.XLS

Austerman

Alaska State Legislature

House of Representatives
Special Committee on Fisheries

SPONSOR STATEMENT
SSHB 397
FISHERY RESOURCE LANDING TAX & SEAFOOD MARKETING ASSESSMENT

Summary

This legislation is designed to more precisely align the current fisheries resource landing tax (AS 43.77) with the fisheries business tax (AS 43.75) and the ASMI seafood marketing assessment provisions (AS 16.51). This is needed to avoid future legal questions and add a measure of fairness to the tax. Specifically, SSHB 397 clarifies that the landing tax is an occupational tax and equalizes tax rates and credits with the fisheries business tax.

In SSHB 397, the 3.3 percent landing tax which includes .3 percent for ASMI is reestablished to a 3 percent landing tax with a separate .3 percent seafood marketing assessment application. This separates the marketing assessment in the landing tax statutes and equalizes the landing tax with the shore-based fisheries business tax.

Throughout SSHB 397, the term "purchased" is replaced with "produced" in order to eliminate the loophole of those who do not specifically purchase seafood and thereby avoid the ASMI assessment. Then, in Section 14, the word "produced" is then defined to include "purchase, production, landing, or export of a fisheries resource." The point of valuation at which the product is taxed the ASMI assessment does not change with this legislation.

Also, this legislation specifies that a person subject to the landing tax is liable for the .3 percent seafood marketing assessment and that all persons who produce less than $50,000 in seafood products per calendar year would be exempt from the assessment. This encourages small operator value added processing.

The provisions in SSHB 397 retroactively apply effective January 1, 1994.

Room 434, State Capitol, Juneau, Alaska 99801-1182 (907) 465-4230 or 465-2487

Background

Two years ago the Legislature passed the Fishery Resource Landing Tax which established a tax on offshore fisheries which landed product in Alaska. Prior to January 1, 1994, these fishery resources were not subject to any Alaska state fishery tax.

The landing tax provisions apply to fishery resources that are caught and processed outside Alaska's three mile jurisdiction and thereafter brought into the state and first landed in this state. As currently in statute, the Landing Tax levies a 3.3% tax on the value of the unprocessed resource which is landed in Alaska for shipment to market elsewhere.

The 3.3 percent is the same percentage applied to shore-based fisheries businesses under the Fisheries Business Tax and the ASMI provisions combined. Of the 3.3 percent landing tax, ASMI receives .3 percent of the tax collected. 50 percent of the tax revenues collected (excluding the ASMI portion) are shared with local governments. This mirrors the fisheries business tax municipal sharing.

The fisheries business tax has been around since 1949 and applies to those fishery resources that are either caught or processed in Alaska's waters. The landing tax does not apply to fishery resources subject to the fisheries business tax.

Update

The American Factory Trawler Association filed suit on February 17, 1994 in the State Superior Court claiming the Landing Tax discriminated against interstate commerce. The Superior Court dismissed the case for failure to exhaust administrative remedies. The case is now being tried administratively in the Department of Revenue.

SELECTED MATERIAL FROM COURT DOCUMENTS REGARDING CHALLENGE TO LANDING TAX BY AFTA

AFTA SUPERIOR COURT COMPLAINT

p. 4, Paragraph 9 — AFTA alleges the landing tax is not an occupation tax nor is it a compensating tax, that it imposes a higher tax rate than under the fisheries business tax, that it imposes a higher tax rate on developing species compared to the fisheries business tax, and that it fails to provide credits found in the fisheries business tax.

AFTA REPLY MEMORANDUM

p. 12 and 14 — AFTA argues the landing tax is a tax directly on goods or property rather than an occupation tax as argued by the state.

p. 23-33 — AFTA argues that the landing tax discriminates against interstate commerce in that the landing tax does not complement the fisheries business tax, that the tax rates are higher under the landing tax, that the landing tax levies a higher tax on developing species, and that the landing tax fails to grant tax credits granted to fisheries business taxpayers.

CURRENT STATUS

AFTA members filed suit directly in Superior Court asking the court to rule that AS 43.77 is unconstitutional. On September 26, 1994, the Superior Court concluded that AFTA members must first exhaust administrative remedies with the Department of Revenue before the court will hear the case. The Alaska Supreme Court affirmed the Superior Court decision on May 10, 1995. The AFTA members are currently pursuing administrative remedies within the Department of Revenue with depositions scheduled to begin in February leading to a formal hearing this summer.

h753:DOR 1/17/96

DEPARTMENT OF REVENUE
INCOME & EXCISE AUDIT DIVISION
SECTIONAL ANALYSIS OF SPONSOR SUBSTITUTE FOR HB NO. 397
A BILL FOR AN ACT ENTITLED

"An Act relating to the fishery resource landing tax and to the seafood marketing assessment; and providing for an effective date."

Section 1 provides a statement of the legislative findings, intent, and purpose for the imposition of the landing tax. The proviso confirms those findings made by the Department of Revenue in regulations adopted contemporaneous in time with the enactment of the landing tax legislation. This section will make it clear that the landing tax is a compensatory fisheries occupation tax on in-state activities that is intended to complement the fisheries business tax under AS 43.75. Section 1 will strengthen the state position in litigation since it encompasses findings that are currently being disputed by the trawler industry.

Sections 2 through 6 amend AS 16.51.120 to substitute the word "produce" for "purchase". Currently, the seafood marketing assessment is levied on the value of products purchased in Alaska. A processor pays the assessment on a percentage of the value the processor paid for the seafood products. The levy of the assessment on seafood products purchased based on value paid by the processor arguably might not encompass the custom processor and exporter situations where the purchase is not made by the processor. It also would not fit the landing of fishery resources. The value of seafood products produced is addressed in Section 11 to include all these situations.

Section 7 amends AS 16.51.120 by adding a subsection to exempt from the assessment processors, as defined in Section 13, who produce less than $50,000 in value of seafood products. The tax liability under AS 43 would be unaffected by this exemption. This exemption is consistent with current law.

Sections 8, 9 and 10 are conforming amendments to AS 16.51.130 and AS 16.51.150 to substitute the word "produce" for "purchase".

Section 11 amends AS 16.51.150 by adding new subsections to generally provide that the value of seafood products produced is the sum of the values under AS 43.75.015 (fisheries business tax), AS 43.75.100 (export and custom processor situations under fisheries business tax), and AS 43.77 (landing tax). Thus, the value used for purposes of the ASMI ("ASMI") assessment will be the identical value used for purposes of AS 43.

Section 12 amends AS 16.51.160 to correspond with the change from purchase

to produce. In addition, a technical correction is made to move the return due date from April 1 to March 31 to correspond to the due dates for fisheries business and landing tax returns.

Section 13 repeals and reenacts AS 16.51.180(3) to define a processor as a person who processes, custom processes, or exports fishery resources and is liable for the fisheries business tax under AS 43.75, or who is liable for the landing tax under AS 43.77.

Section 14 amends AS 16.51.180 by adding a new paragraph to define "produce" as an activity upon which a fisheries business or landing tax liability is imposed. In conjunction with taxpayers other than those subject to the tax under AS 43.75.015 being made subject to AS 16.51, an eligible processor is defined as a person liable for the assessment levied under AS 16.51.120. This gives equal voting and other rights under AS 16.51 to all persons liable for the ASMI assessment.

Sections 15 through 20 make technical amendments to the education credit provisions throughout AS 43 to include the landing tax education credit in the combined $150,000 limitation.

Section 21 amends AS 43.77.010 by using language similar to that found in AS 43.75 to articulate that the tax applies to a person who engages or attempts to engage in a fisheries business in the state. This provision corroborates the Department of Revenue position that the tax is a business occupation tax, as opposed to a property tax on the resource as argued by the trawler industry.

This section also reduces the tax rate from 3.3% to 3% to coincide with the fisheries business shore based tax rate under AS 43.75. As originally enacted, the 3.3% tax rate was composed of a 3% tax and a .3% Alaska Seafood Marketing Institute levy. The trawler industry attacked the 3.3% as imposing a higher rate under AS 43.77 than is imposed under AS 43.75. This amendment extinguishes that argument by removing the ASMI levy from AS 43.77 to achieve equal tax rates under both AS 43.77 and AS 43.75.

The tax rate for a developing commercial fish species is established at 1% of the value of the fishery resource. Developing fish species are those species designated by Fish and Game under AS 16.05.050. These developing species are eligible for a 1% tax rate under the fisheries business tax provisions. The trawler industry argued that AS 43.77 imposed an unconstitutionally higher tax burden than was imposed under AS 43.75 for these species. The amendment addresses that argument and corrects an unintended consequence of the original legislation.

Section 22 amends AS 43.77 by adding a new provision to provide an education credit identical to that contained in AS 43.75 and other state tax provisions. The trawler industry argued that the failure to provide equal credits in AS 43.77 was unconstitutional. The amendment addresses that argument and corrects an unintended consequence of the original legislation.

Sections 23 and 26 amend the revenue sharing provision in AS 43.77.050 to repeal the ASMI allocation under AS 43.77 consistent with the amendments in Section 21. All tax revenue will continue to be deposited into the general fund with Community Development Quota tax credits paid from revenue otherwise shared with municipalities.

Section 26 would also repeal, in conformity with value under Section 11, the present definition of value in AS 16.51.180(6).

Section 24 amends AS 43.77.200 to define "engages or attempts to engage in a floating fisheries business in the state" as any part of the comprehensive occupation of harvesting or taking, processing, transportation, or delivery of a fishery resource.

Section 25 provides that the ASMI portion of the current landing tax is to be applied by the Department as a credit against the ASMI assessment that is retroactively imposed under Sec. 27. In practice, the retroactive imposition of the ASMI assessment under AS 16 will only amount to a reallocation of monies paid under AS 43.77 to AS 16.51.

Section 27 provides that the act is retroactive to January 1, 1994. This retroactive application does not create an additional tax liability on any person and effectively averts some of the constitutional arguments advanced by the trawler industry.

Section 28 provides that the act takes effect immediately.

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FIRST DISTRICT
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

AMERICAN FACTORY TRAWLER ASSOCIATION,

Plaintiff,

v.

STATE OF ALASKA, WALTER J. HICKEL Governor of the State of Alaska, DARREL J. REXWINKEL, Commissioner of Revenue of the State of Alaska,

Defendants.

Case No. 1-JU-94-177 Civil

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff American Factory Trawler Association (hereinafter "AFTA") is a non-profit corporation organized under the laws of the State of Washington for the purpose of promoting the growth of markets and the superior quality of seafoods that are processed aboard vessels at sea and of promoting the common business interests of those engaged in the North Pacific at-sea processing industry. AFTA's members are owners or operators of vessels that are engaged in the catching and processing of fisheries resources on the high seas. All of AFTA's members have principal offices in the State of Washington. The members of AFTA are Alaska Ocean Seafood, Inc.; American Seafoods Company; Arctic King Fisheries; Arctic Storm, Inc.; Arica Fishing Co.; Cape Horn Fisheries L.P.;

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Emerald Resource Management, Inc.; Glacier Fish Company, Ltd.; Golden Age Fisheries; Golden Alaska Seafoods; Morning Star Fisheries; M/V Savage, Inc.; Oceantrawl Inc.; and Premier Pacific Seafoods, Inc.

2. Defendant State of Alaska is a sovereign State of the United States; defendant Hickel is Governor of the State of Alaska and is responsible, under Article III, sec. 16, of the Alaska Constitution, for the faithful execution of the laws of the State; defendant Rexwinkel is the Commissioner of Revenue of the State of Alaska and under AS 44.25.020 has the specific duty of enforcing the tax laws of the State.

3. Fish are caught and processed by AFTA's members in the Gulf of Alaska and Bering Sea off the coast of Alaska but outside of the territorial waters of the State of Alaska in what is designated as the Exclusive Economic Zone of the United States. After the fish are caught, they receive primary processing on board the vessels owned or operated by AFTA's members. The fish are cleaned, headed and gutted, and then processed into a variety of product forms such as surimi, fillets, blocks and related by-products before being frozen on board the vessels. The frozen product is then stored on the vessels in refrigerated holds.

4. From time to time during the course of a fishing season, some of the vessels owned or operated by AFTA's members and carrying processed fish enter Alaskan territorial waters

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for the purpose of transferring the processed fish to other vessels for continued transportation of the products to foreign or domestic destinations. In some instances, the fish is simply transferred from one vessel to another while the vessels are at sea but inside territorial waters; in other instances, the ships may dock at Alaska ports for the purpose of transfer. After being transferred, all of the previously processed fish is promptly transported out of Alaska.

5. Approximately 75 percent of the total fisheries resources taken and processed by AFTA's members on the high seas is sold to foreign purchasers and transported by ship to foreign countries, primarily Japan and Korea. The remaining 25 percent is transported by ship and motor transportation to various final destinations within the United States for sale or further processing. In the course of transportation, the fisheries products enter the jurisdictions of various states and foreign countries outside of Alaska, where the products are either transferred from one form of transportation to another and then moved to new jurisdictions or unloaded for additional processing or sale.

6. In 1993, the Alaska legislature adopted Ch. 67, SLA 1993, "An Act levying and providing for the collection of and disposition of the proceeds of a fishery resource landing tax." The Act is set out in AS 43.77.010 -- AS 43.77.200. AS 43.77.010 imposes a tax of 3.3 percent on the entire

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unprocessed value of any fishery resource "that is brought into the jurisdiction of, and first landed in," the State of Alaska. "Landing" a fishery resource in the State is defined in AS 43.77.200 to mean "the act of unloading or transferring a fishery resource" in the State.

7. Ch. 67, SLA 1993 became effective on January 1, 1994, and AFTA's members are required, under the terms of the Act, to file returns and taxes on April 1 of each year, beginning in 1995, on the unprocessed value of any fish "landed" in Alaska during the previous calendar year. The tax applies to fish that were caught and processed outside of Alaska by AFTA's members.

8. AS 43.77.010 provides that persons who pay tax under AS 43.75 are exempt from payment of the landing tax. AS 43.75 imposes a tax on persons engaged in "a fisheries business," inside of the State of Alaska. A "fisheries business" is defined in AS 43.75.200 as "processing fisheries resources for sale by freezing, cooking, salting, or other method and includes but is not limited to canneries, cold storages, freezer ships, and processing plants."

9. The landing tax under AS 43.77 and the processing tax under AS 43.75 dc not impose equal tax burdens. For example, the tax rate imposed under the processing tax (AS 43.75.015) on persons who land raw fish in the state and process them on shore in Alaska is 3 percent of the unprocessed value of the

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fisheries resources; the tax rate imposed under the landing tax (43.77) on persons who merely unload or transfer processed fisheries products in Alaska and do not catch or process them at all in Alaska is 3.3 percent of the unprocessed value of the harvested fish. The processing tax (43.75) provides for tax credits for certain contributions that may be applied against 100 percent of the taxes owing under the processing tax on the value of 100 percent of the fisheries resources processed by in-state processors; tax credits under the landing tax for similar contributions may be applied against only 45.45 percent of the taxes owing on the value of only those fish taken under a community development quota. The processing tax (AS 43.75.015) provides for a tax rate of 1 percent on shore based processors for fisheries resources that have been designated by the Commissioner of Fish and Game as "developing species"; "developing species" that are taken and processed outside of Alaska but unloaded or transferred in Alaska are taxed under the landing tax at the rate of 3.3 percent of the unprocessed value of the fish.

10. The landing tax under AS 43.77, imposed on fish caught and processed outside of Alaska's jurisdiction, but not imposed on a fisheries business conducted within the State, provides an economic advantage to those persons who conduct fisheries businesses within the State. The advantage stems both from the fact that an in-state fisheries business need not

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pay the landing tax at all, and from the fact that an in-state fisheries business pays a lower total tax for unloading, transferring and processing fish in Alaska than an out-of-state processor pays for merely unloading or transferring previously processed fisheries resources within Alaska.

11. An unapportioned tax imposed on the full value of fisheries resources, landed in Alaska solely for the purpose of subsequent shipment through and landing in a variety of other states and foreign jurisdictions, unfairly subjects the fisheries resources to the risk of multiple taxation in all jurisdictions in or through which the fish is landed or transported, and constitutes a deterrence to the free movement of goods in interstate and foreign commerce.

12. Article I, Sec. 8, of the Constitution of the United States provides that Congress has the authority to "regulate commerce with foreign nations, and among the several states . . ." Pursuant to this allocation of governmental responsibility, individual states are prohibited from imposing taxes that place a heavier burden on businesses involved in interstate or foreign commerce than imposed upon businesses carrying on similar business activities purely within the boundaries of the State. Taxes imposed on interstate and foreign business activities must be non-discriminatory and must be fairly allocated dependent upon the proportion of the total interstate business activity that takes place within the State.

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13. AS 43.77 unlawfully discriminates against interstate commerce in violation of Article I, Sec. 8, of the United States Constitution in that:

(a) the activity taxed has an insufficient nexus with the State of Alaska to justify imposition of any tax;

(b) the tax discriminates against interstate and foreign commerce in favor of purely local activities;

(c) the tax is not fairly apportioned;

(d) the tax is not fairly related to services provided by the State of Alaska.

14. AS 43.77 unlawfully discriminates against foreign commerce in violation of Article I, Sec. 8, of the United States Constitution for the reasons outlined in Paragraph 13 of this complaint and for the additional reasons that:

(a) the tax, even if were fairly apportioned (which it is not) creates a substantial risk of international multiple taxation; and

(b) the tax prevents the federal government from speaking with one voice when conducting commercial relations with foreign governments.

15. AS 43.77, to the extent that it taxes the value of fisheries resources that are brought into Alaska for the sole purpose of transferring them to vessels for export to foreign nations, imposes a tax on exports in violation of Article I, Section 10, Clause 2, of the United States Constitution.

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16. AS 43.77 is in direct conflict with economic and resource management policies and purposes of the United States government as set forth in 16 U.S.C. sections 1801 et seq. (the Magnuson Act), and therefore void as in violation of Article VI of the United States Constitution (the Supremacy Clause).

17. AS 43.77 violates the equal protection clauses of Article I, sec. 1, of the Alaska Constitution and Amendment XIV, sec. 1, of the United States Constitution.

WHEREFORE, AFTA requests that this court issue a judgment:

(a) declaring AS 43.77 invalid and unconstitutional;

(b) permanently enjoining each and every defendant and their agents from taking any action to enforce collection of the tax;

(c) awarding AFTA its costs and attorneys fees;

(d) for such other relief as the court deems appropriate in the circumstances.

DATED this 17th day of February, 1994 at Juneau, Alaska.

GROSS & BURKE

Avrum M. Gross

Susan A. Burke

COUNSEL FOR AMERICAN FACTORY TRAWLER ASSOCIATION

THIS MATTER IS FORMALLY ASSIGNED TO LARRY R. WEEKS SUPERIOR COURT JUDGE

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

AMERICAN FACTORY TRAWLER ASSOCIATION,	)
Plaintiff,	)
v.	)
STATE OF ALASKA, WALTER J. HICKEL Governor of the State of Alaska, DARREL J. REXWINKEL, Commissioner of Revenue of the State of Alaska,	)
Defendants.	)

Case No. 1-JU-94-177 Civil

REPLY MEMORANDUM AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Most of the arguments raised in the State's Memorandum have already been extensively discussed in our opening memorandum. There is no need to repeat that discussion here. This reply will first address the procedural arguments raised by the State -- standing and exhaustion of administrative remedies. We will then review the substantive constitutional issues, focusing on only a few aspects of the State's arguments -- those that we believe demonstrate in and by themselves the complete lack of merit to the State's position.

I. AFTA HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF AS 43.77 AND NEED NOT FIRST PURSUE ADMINISTRATIVE REMEDIES.

The State initially claims, as a procedural matter, that AFTA has no standing to raise the constitutional issues and

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Instead, the State argues that the Landing Tax is not a tax on goods or property at all; it is a tax on an "occupation." (State's Memorandum at 16.) The State goes on to claim that, "A trawler that only moves property through the jurisdiction is not subject to the landing tax." (Id.)

At the outset, one might ask just what "occupation" is being taxed here. The Landing Tax is imposed upon the owner of fisheries products that are being "landed" in the state; there is no provision of AS 43.77 that even refers to an "occupation," much less imposes a tax on one. The owner of the fish "landed" need not have caught them or processed them himself; so long as the fish are owned by him when they come into the State, he must pay a tax on them if he transfers them for further transportation, whether his "occupation" is fisherman, processor, fish broker, or what have you. The reason the statute does not seek to tax an "occupation" and specifically, the occupation of plaintiff's members is, of course obvious; all of the crucial elements of that occupation -- the catching of fish, the processing of fish and the sale of fish take place outside of Alaska. The state cannot tax an occupation that occurs outside of its borders and AS 43.77, on its face at least, makes no effort to do so.

A comparison with Alaska v. Arctic Maid, 366 U.S. 199 (1961), cited as support for the State's argument, is instructive. The tax in Arctic Maid was specifically placed by statute on those "prosecuting or attempting to prosecute . . . lines of business in connection with Alaska's commercial

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eastern markets." 8/ Yet the State, nonetheless, claims that the Landing Tax "does not tax property moving through the State." It is hard even to understand this position. If, for instance, a catcher/processor vessel comes in from the high seas, anchors in the "protected waters of Southeast Alaska" for a few days and continues with its cargo to Seattle, the State would apparently recognize that the taxpayer is "only moving property through the jurisdiction" and is "not subject to tax." If the same vessel, however, anchors in the same protected waters and unloads its cargo to a tramp steamer through stevedoring (which is uniformly recognized as an integral part of the shipment of goods in interstate commerce) 9/ that activity apparently makes some kind of difference and confers power on the State to tax an entire "occupation" which, of course, is not defined in the act and which the State makes no real effort to define even in its memorandum.

The Landing Tax is clearly not an occupation tax. It is not defined as one and it could not reach the occupation of offshore harvesting and processing even if it purported to do so. It is, plainly and simply, a tax on property being

8/ (State's Memorandum at p.1.) Actually, as noted in our opening memorandum and supporting affidavit, the fisheries products are either loaded on tramp steamers or delivered to a common carrier. In either case, the transportation to interstate and foreign destinations continues and the fisheries products are immediately removed from the State.

9/ Puget Sound Stevedoring Co. v. State Tax Commission, 302 U.S. 90, 82 L.Ed.. 68 (1937); Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 442, 91 L.Ed. 992 (1947); Washington Revenue Department v. Association of Washington Stevedoring Cos., 435 U.S. 734, 55 L.Ed.2d 682 (1978).

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transported by a series of vessels through the state to other states and foreign countries. 10/ The State itself recognizes that goods purely in transit were never meant to be subject to the Landing Tax. We emphasize here that the immunity of such goods from taxation is not simply a matter of legislative choice; it is a matter of constitutional necessity.

B. Nexus.

The State spends much of its argument on nexus seeking to demonstrate that the AFTA members' vessels that enter Alaskan waters for a few days a year cause sufficient impact to create adequate nexus for the State to impose the Landing Tax on them. As we noted in our opening memorandum, if the State believes that through occasional contacts, various vessels have established some sort of nexus with Alaska, it can seek to

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10/ This is exactly the kind of tax that the Supreme Court distinguished in Arctic Maid from the local occupation tax imposed there. As opposed to a tax on a local business, the court noted, "[a] tax on an integral part of an interstate movement might be imposed by other states, with the net effect of unduly burdening commerce". . . . The "integral part of interstate movement" referred to in Arctic Maid was stevedoring. And while subsequent decisions have recognized stevedoring as a local business that may be taxed as such, no court has ever held that a state may tax goods that are merely transferred during the course of their interstate shipment. This is because the mere act of transferring goods from one mode of transportation to another in the course of interstate shipment is not a purely local event. It can be repeated again and again during the course of interstate shipment. It is important to keep in mind here that unlike the business tax imposed on stevedoring companies in Association of Washington Stevedores (whose local business was unloading for hire), the Landing Tax is not imposed on the person doing the unloading or transferring -- it is imposed on the owner of the fisheries products, who may never even touch the products while they are being transferred within Alaska and may continue to own them as they are shipped through and "landed" in many states.

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Pp. 16-22 of "Reply & Opposition to Cross-Motion for Summary Judgment" were missing from the original file. Continuation of document after p. 33 was also absent.

equal right that is the source of concern over multiple taxation. Whatever tax the state imposes (which, incidentally, must be imposed on intra-state commerce as well) must be apportioned to reflect the portion of business activity attributable to the State. No effort was made to do that here.

D. The Landing Tax Discriminates Against Interstate Commerce.

The State's claim that the Landing Tax does not discriminate against interstate commerce is based on a series of arguments. First, the State argues that its "unified tax scheme" (comprised in the State's view of the Landing Tax and the fisheries business tax imposed under AS 43.75) provides no economic advantage to local processors; second, the State argues that the Landing Tax validly compensates for the fisheries business tax imposed under AS 43.75; third, the State claims that the tax rates under both taxes are actually identical; finally, the State argues that the State's failure to have provided Landing Tax taxpayers with tax rate reductions for developing species (available to AS 43.75 taxpayers) and the State's failure to have provided Landing Tax taxpayers with tax credits of comparable magnitude to those available under AS 43.75 is of no constitutional significance. None of these arguments has merit.

The State initially attempts to justify the clear discrimination here by arguing that the Landing Tax and the fisheries business tax under AS 43.75 are nothing more than parts of a single "unified tax scheme" -- one that imposes

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essentially the same tax on any entity that "conducts a substantial fishery business in Alaska, subsequent to the actual catching of the fish." In the State's view, the legislature could just as well have expanded the definition of "fisheries business" under AS 43.75 to include the mere activity of offloading or transferring fish caught and processed outside the state. In that case, under the State's view, there would be no discrimination at all since all "fisheries businesses" would be taxed at exactly the same rate. The flaw in this argument is that the activities that are conducted within Alaska by AFTA's members are of a vastly different nature and vastly different magnitude from those conducted by local processors subject to taxation under AS 43.75 and cannot rationally be stretched to cover an entire "fisheries business" conducted within the state. The State cites Alaska v. Arctic Maid, 366 U.S. 199, 6 L.Ed.2d 227 (1961), as being dispositive of this issue. But as noted earlier in this memorandum, the critical fact in that case was that the fish caught by the processors who were challenging the tax were all caught in Alaska waters, and the Court made it crystal clear that Alaska could not impose a "fisheries business" tax on persons who neither catch nor process fish within the state. Id., 366 U.S. at 203.

It is unquestionably for this reason, rather than an arbitrary choice on the legislature's part (or as the State suggests at p. 28 of its memorandum some "historical anomaly"), that the Landing Tax was enacted as a separate and distinct tax

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and not included within the fisheries business tax. What we are left with, then, is a clearly discriminatory landing tax imposed on persons who catch and process fish outside Alaska and from which local processors are exempt. Moreover, there is a distinct and very real element of protectionism at play here, for as the State itself argues, the Landing Tax is intended to compensate for the 3 percent fisheries business tax and the 0.3 percent ASMI assessment that local processors pay -- a way of attempting to ensure that local businesses are not placed at a competitive disadvantage to interstate commerce.

This leads, of course, to the State's argument concerning compensating taxes. While it may be a legitimate goal for a State to insure that its local businesses are not disadvantaged by lower taxes paid by interstate competitors, there are three tests that must be met before such a compensating tax will be held valid. There must be an identifiable local burden for which the State has an interest in compensating; the local tax and the alleged compensating tax must be on "substantially equivalent" activities; and the tax rates on interstate commerce may not exceed those imposed on local business. Oregon Waste Systems, Inc. v. Oregon, Department of Environmental Quality, 62 U.S.L.W. 4209 (April 4, 1994). The Landing Tax meets none of these tests.

The State identifies as the "local burden" the fisheries business tax imposed on local processors under AS 43.75. While the State attempts to characterize AS 43.75 as simply a tax on one who "utilizes Alaska resources and infrastructure," there

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is in fact no real question that the fisheries business tax is an occupation tax imposed on those who actually conduct a fisheries business within Alaska -- catching and processing fish within Alaska. 20/ Since AFTA's members neither catch nor process any fish within Alaska, it is difficult to understand why they should be required to compensate for the burden placed on local processors who do engage in that activity within Alaska and whose operations are heavily dependent on significant state and local resources and infrastructure. Just as Oregon could not, in Oregon Waste Systems, justify differential rates on out of state businesses that used Oregon's waste disposal sites on the basis that local waste disposal businesses paid income taxes to Oregon, Alaska cannot justify a landing tax imposed only on out of state processors simply because its local processors pay a state processing tax. And just as Louisiana "had no interest" in offshore gas such that a discriminatory tax on in-state uses of that gas could be justified as compensating for state severance taxes on locally produced gas, Alaska has no interest in either the resources that are taken from the high seas or in the processing activities that take place there. Maryland v. Louisiana, 451 U.S. 725, 68 L.Ed.2d 576 (1981).

As we noted in our opening memorandum, the Landing Tax rates are higher both nominally and effectively than those imposed under the fisheries business tax. The Landing Tax, of

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20/ See, Alaska v. Arctic Maid, 366 U.S. at 202.

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course, is imposed at a rate of 3.3 percent, while the fisheries business tax is imposed at the rate of 3 percent. The State contends that the nominal tax rates imposed on AFTA members and local processors are actually identical, since AFTA failed to take into account the fact that local Alaska processors pay a 0.3 percent assessment levied to finance the Alaska Seafood Marketing Institute ("ASMI"). (State's memorandum at 24.) AFTA is perfectly aware of the 0.3 percent ASMI assessment imposed under AS 16.51.120 on Alaska processors who purchase and process fish within Alaska. AFTA is also aware of the fact that this is a self-imposed assessment -- one that is imposed at all only if a majority of Alaska processors vote to impose it on themselves. See, AS 16.51.120 (a). AFTA members do not serve on the ASMI Board and have no say over how ASMI funds are spent. Similarly, AFTA members are not eligible to vote in elections to determine whether the assessment will be terminated or the rate of the assessment increased or decreased. See, AS 16.51.120. Although the State claims on page 10 of its memorandum that the fisheries products produced by AFTA members are "extensively marketed as '"Alaska Seafood,'" the State has not offered one whit of evidence to support that claim. AFTA members do not catch "Alaska fish" and reap little, if any, benefits from ASMI's promotions, the

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vast majority of which feature salmon. 21/ Equally important, the ASMI assessment is not part of the State's fisheries business occupation tax, but a special assessment for a specific and limited purpose -- providing reimbursement from Alaska processors to the State for state expenditures on ASMI to promote the marketing of their products. 22/ Forcing AFTA members to contribute to ASMI is tantamount to requiring Juneau property owners to pay additional property taxes to help Anchorage retire its municipal bonded indebtedness. Even under the State's expansive and totally unjustified characterization of the "substantial fisheries activities" that AFTA members conduct in Alaska, the proper comparison of tax rates is between the Landing Tax at 3.3 percent and the fisheries business tax under AS 43.75 at 3 percent. There is no justification for imposing a Landing Tax that is 0.3 percent higher than the tax imposed under the fisheries business tax in

21/ See, 1993 ASMI annual report, attached to the State's memorandum. AFTA members may, of course, derive some indirect benefit from ASMI's promotions to the extent that they promote the general consumption of fish products; but that benefit is no different from that received by any processor of fish anywhere in the world that ASMI conducts Alaska seafood promotions.

22/ The legislative findings adopted as part of the enactment establishing ASMI expressly articulate this purpose. See, secs. 1 and 2, Ch. 106, SLA 1981.

Moreover, the ASMI assessment is as close to creating a dedicated fund as Article IX, sec. 7, would permit. While the money collected from the assessments is subject to annual appropriation and technically could be used for any state purpose, there is no question that if the legislature appropriated the money received from those assessments for purposes other than to fund ASMI, there would be a quick and decisive vote by the processors to terminate the assessments.

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AS 43.75, and the State's argument concerning the ASMI assessment provides none.

The State's memorandum does not really even address the argument in our opening memorandum that the tax rates under the Landing Tax are effectively even more than 0.3 percent higher than the AS 43.75 tax rate because of the vastly reduced credits allowable under the Landing Tax. The State merely argues that it does not matter in "economic terms" whether a taxpayer contributes $10,000, for instance, to an educational institution or pays the same amount to the Department of Revenue in taxes. However, the State confuses "monetary terms" with "economic terms." A taxpayer is likely to view a contribution to an educational institution as a form of business investment for training future employees or for advancing technical or scientific knowledge that will benefit the industry. A taxpayer is not likely to view payment of tax to the state as any kind of investment. But more important, the State totally ignores the major thrust of our argument -- that even the educational credits under the Landing Tax are allowed only for those taxpayers who enter into joint ventures with local Alaska communities in the federal Community Development Quota program. This limitation not only involves a clear and flagrant discrimination against interstate commerce (as we pointed out at p. 57 of our opening memorandum); it results in a vast reduction in the total amount of available contribution tax credits under the Landing Tax as compared to similar credits under AS 43.75. Such a vast reduction in

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allowable credits of necessity increases the effective tax rate under the Landing Tax. 23/

Similarly, the State's memorandum never really comes to terms with the obvious discrimination against the offshore catcher/processor fleet found in the legislature's failure to provide in the Landing Tax for the same reduction in tax rates for developing species as is provided under AS 43.75. 24/ The State's only argument is that the legislature legitimately did not afford offshore catcher/processors a rate reduction for developing species because they catch and process too much of those species to be considered "developing." The basis for this argument is to compare the 84,000 metric tons of developing species caught last year by AFTA members with

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23/ The restriction of the Landing Tax educational and infrastructure credits to fisheries products produced under a Community Development Quota results in precisely the kind of economic protectionism that the Court in Maryland v. Louisiana found so discriminatory. Landing Tax taxpayers can obtain a credit only if they participate with a local Alaska community and only if they invest in training and infrastructure that will benefit Alaska based processors. This credit system clearly discriminates against the majority of the offshore catcher/processor fleet who do not participate in the Community Development Quota program by subsidizing the operations of those who do through tax credits for employee training and capital improvements in shore based facilities.

24/ The State's argument that this claim is not ripe because no taxpayer has actually been denied such a reduction is meritless. The discrimination is clear on the face of the two statutes. Any Landing Tax taxpayer who has harvested species on the list of "developing species" is clearly harmed by the obvious discrimination. The State does not dispute the fact presented in the Affidavit of Joseph R. Blum that AFTA taxpayers indeed harvest species that are on the list that applies during 1994 -- the current Landing Tax tax year. And the State cannot seriously dispute the fact that the Department of Revenue would have absolutely no statutory authority to grant the rate reduction even if an AFTA member applied for it.

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"minimal" amount of revenue the Department received from in-state processors for developing species. However, as the 1993 Revenue Report cited by the State indicates at p. 12, the State received last year $200,628 in tax revenues from shore based processors for developing species. Since those fish are taxed at only 1 percent of value, it means that in-state processors processed developing species having an unprocessed value of $20,062,800 -- hardly a "minimal amount."

The State makes two other claims with respect to the clearly discriminatory tax credits. The first is that there is no discrimination because taxpayers under the Landing Tax will never pay more than the 3 percent reduced tax for developing species paid by floating processors. This argument was addressed in our opening memorandum in a slightly different context, but it applies with equal force to the State's argument here. 25/ The higher tax rate imposed on in-state floating processors is justified only as a means of encouraging floating processors to move their operations on shore. See, State v. Reefer King, 559 P.2d 56, 66 (Alaska 1977). While a state may have differential tax rates to encourage local businesses to conduct their businesses in certain ways that inure to that state's overall economic well being, it may not do so with respect to interstate businesses. 26/ The State here may not, therefore, justify the higher tax rates under the

25/ See, AFTA's opening memorandum at 54 n. 37.

26/ See, Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 72, 10 L.Ed.2d 202 (1963).

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Landing Tax for developing species on the basis that the Landing Tax, without the reduced rate for developing species, will never exceed the lowest possible tax rate imposed on floating processors. 27/

The most serious flaw in the State's argument that the Landing Tax is a valid compensating tax for the fisheries business tax is its claim that the two taxes are imposed on "substantially equivalent" events. The sole argument that the State makes is that the "substantially equivalent" event taxed under both the Landing Tax and the fisheries business tax is utilizing "Alaska's infrastructure to conduct a fisheries business." The State's argument never comes to grips with the palpably obvious differences between the two taxable events or with the fact that it cannot impose a tax on conducting a

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27/ The State also argues that even if the failure to provide a reduced rate for developing species under the Landing Tax is held discriminatory, the court need not declare the entire act unconstitutional because the State can "cure" the defect. The only case cited for this remarkable proposition is McKesson Corporation v. Division of Alcoholic Beverages, Department of Business Regulation of Florida, 496 U.S. 18, 110 L.Ed.. 2d. 17 (1990), and the case in no way supports the State's argument. The only issue before the United States Supreme Court was whether the taxpayer was entitled to relief retroactively for taxes already paid under a tax that the state court had invalidated. At issue before the state court was a reduced tax rate under Florida's alcoholic beverage tax for alcoholic beverages made from products grown in Florida. The state court allowed the overall beverage tax to stand, and apparently severed the offending rate reduction section. That sort of "surgery" is not possible here since the court is faced with two wholly separate taxes imposed on two entirely different activities -- one that grants the reduction and one that does not. In any event, there is no possible way that the court could simply instruct the Department of Revenue to "cure" the discrimination. The Department may have the authority to interpret tax laws, but it does not have the authority to amend them. Only the legislature has that authority.

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"fisheries business" that does not take place in Alaska. 28/ The fisheries business tax under AS 43.75 is an occupation tax on conducting a fisheries business in the state -- that is, processing fish. The Landing Tax is imposed on the mere act of transferring fisheries products that have been caught and processed elsewhere, not necessarily by the same person who "owns" the fish products brought through Alaska and "landed" there. The activity of processing fish is no more equivalent to the activity of transferring already processed fisheries products than manufacturing is to wholesaling. 29/

In summary, the State has offered no justification for the obvious and clear discriminatory treatment that the Landing Tax imposes on interstate commerce.

E. The Rate of Taxation Under the Landing Tax is Not Fairly Related to the Services Provided by the State.

The State claims that on page 16 of our opening memorandum, AFTA "concedes that they cannot prevail on the

28/ As noted earlier, the State cannot, under Arctic Maid, impose a fisheries business tax on persons who neither catch nor process fish in Alaska.

29/ The weakness in the State's attempt to characterize transferring fisheries products as "utilizing Alaska's infrastructure to conduct a fisheries business" is best demonstrated by the State's admission on pages 15 and 16 of its memorandum that the Landing Tax is not imposed on an offshore catcher/processor who merely transports its products through Alaska without unloading or transferring them here -- even though that same vessel may, during the course of transporting its products to some interstate or foreign destination, enter an Alaska port, take on fuel, make emergency repairs, and transfer crew members prior to continuing its transportation of the products. Under the State's analysis, then, so long as the fisheries products remain in the vessel's hold, the vessel is not conducting a "fisheries business" in Alaska.

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