

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of) Appeal No. 95-0143
)
THOMAS L. STEWART,)
Appellant) DECISION
)
_____) September 21, 2000

STATEMENT OF THE CASE

The Appellant Thomas L. Stewart filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Program¹ [RAM] on September 13, 1995. RAM denied Mr. Stewart's application for sablefish Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program because he did not show that he, or that his claimed partnership with Mr. James Miller, owned or leased the F/V ALEUTIAN SPIRIT during the QS qualifying period (1988, 1989, or 1990). RAM awarded all of the QS associated with the vessel to Mr. Miller, the vessel's owner. Mr. Stewart interests are directly and adversely affected by the IAD.

On appeal, Mr. Stewart claims that he and Mr. Miller leased the F/V ALEUTIAN SPIRIT as a partnership during the sablefish fishing seasons of 1987, 1988, and 1989. This was the first time that Mr. Stewart had claimed the F/V ALEUTIAN SPIRIT had been leased.

We examined the record for prima facie evidence of the claimed partnership's lease of the F/V ALEUTIAN SPIRIT. At the very least, we expected to find evidence that Mr. Stewart and Mr. Miller (a) paid a lease fee for the exclusive use, possession, and enjoyment of the vessel; (b) agreed to lease the vessel; and (c) operated the F/V ALEUTIAN SPIRIT as a joint business. We did not find any such evidence. The record did contain a written 1989 Black Cod Agreement between Mr. Miller and Mr. Stewart, but it did not provide terms or terminology consistent with a vessel lease. As a result, we did not order an oral hearing and join Mr. Miller as a party to Mr. Stewart's appeal.

The weight of the evidence in this case shows that Mr. Miller and Mr. Stewart did not lease the F/V ALEUTIAN SPIRIT. At best, the evidence shows that Mr. Miller had a personal services arrangement with Mr. Stewart, like that of a hired skipper or independent contractor. As a result, Mr.

¹The Restricted Access Management Division was renamed Access Management Program, effective September 28, 1997. [NOAA Circular 97-09, 19 Sep 97].

Stewart is not entitled to initial issuance of sablefish QS.

ISSUES

1. Is the written 1989 black cod agreement between Mr. Stewart and Mr. Miller conclusive evidence of the lease of the F/V ALEUTIAN SPIRIT?
2. Did the claimed partnership of Mr. Stewart and Mr. Miller lease the F/V ALEUTIAN SPIRIT from Mr. Miller during 1987, 1988, and 1989?

BACKGROUND

Mr. Stewart and Mr. Miller fished together in 1987, 1988, and 1989, using the same vessel, the F/V ALEUTIAN SPIRIT. Mr. Miller was the owner of the vessel. Together they landed sablefish in 1987, 1988, and 1989, and Pacific halibut in 1988 and 1989. All but one of the sablefish landings were recorded on Mr. Stewart's fishing permit; and, all but one of the Pacific halibut landings were recorded on Mr. Miller's fishing permit.

Mr. Stewart claims that they fished as a partnership, and that their partnership leased the F/V ALEUTIAN SPIRIT from Mr. Miller based on three separate agreements entered into in the fall of 1987, the spring of 1988, and the month of April 1989.² The first two agreements were oral and the third agreement (the black cod agreement of 1989) was written. The three agreements were similar in substance. On appeal, Mr. Stewart asks only for sablefish QS. He does not claim halibut QS.³

To prove that the partnership leased the vessel, Mr. Stewart produced the following documents:

- a written document entitled, "Black Cod Agreement," dated April 14, 1989, signed by Mr. Miller, as the owner of the F/V ALEUTIAN SPIRIT, and by Mr. Stewart, as the permit holder;
- settlement statements prepared by Mary Covington, issued in the name of Mr. Miller for landings of sablefish made the F/V ALEUTIAN SPIRIT during 1987, 1988, and

²See Mr. Stewart's affidavit, dated March 28, 1995.

³RAM issued halibut QS to Mr. Stewart, based on his ownership of another vessel, the F/V LEE SHORE, for landings made from the vessel during 1987 and 1988.

1989;⁴

- a settlement statement prepared by Hammer and Wikan, dated April 25, 1989, which shows Mr. Stewart charged \$1,565.76 on April 14, 1989, to the account of the F/V LEE SHORE for groceries of the F/V ALEUTIAN SPIRIT;
- Mr. Stewart's individual federal income tax returns for 1988 and 1989;
- checks written on Mr. Stewart's bank account for the F/V LEE SHORE, which include one check to Food Mart on April 27, 1989 for the F/V ALEUTIAN SPIRIT;
- court documents filed by Mr. Miller in a lawsuit against Mr. Stewart in 1989;
- federal 1099 miscellaneous income tax forms for 1988 and 1989, issued individually by Mr. Stewart and by Mr. Miller;
- Mr. Stewart's affidavits of March 31, 1995, and November 14, 1995;
- Mr. Stewart's written response to "Request For Written Response And Documentary Evidence," filed February 17, 1998;
- an undated copy of the "Longline Working Agreement of the Petersburg Fishermen's Union and the Petersburg Vessel Owners Association;" and
- an account statement for Mr. Stewart and the F/V ALEUTIAN SPIRIT at Seward Fisheries for 1989.

Mr. Miller did not claim on his RFA for QS that he leased the vessel to anyone during the time period of 1984 through 1991.

PRINCIPLES OF LAW

Under the regulations of the IFQ program, a former partner of a dissolved partnership that would otherwise qualify for QS as a "qualified person," is eligible to receive QS in proportion to his or her interest in the dissolved partnership. 50 C.F.R. § 679.40(a)(2)(iii). To be considered a "qualified

⁴The record on appeal does not contain settlement statements for sablefish landings made from the F/V ALEUTIAN SPIRIT on June 10, 1988, and September 24, 1988. RAM's official record shows that Mr. Stewart made the landings on his fishing permit.

person" for QS, the partnership must have owned or leased a fishing vessel, from which legal landings of sablefish or halibut were made during the QS qualifying period (1988, 1989, or 1990). 50 C.F.R. § 679.40(a)(2).

The IFQ regulations also provide that a written lease agreement or notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years, is conclusive evidence of a lease. 50 C.F.R. § 679.40(a)(3)(iii). To be considered conclusive evidence of a lease, the written agreement or notarized statement must identify the leased vessel, the name of the lease holder, and the time period during which the lease was in effect. *Id.* Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be used to qualify a person for QS. *Id.*

DISCUSSION

1. Is the 1989 written black cod agreement between Mr. Stewart and Mr. Miller conclusive evidence of the lease of the F/V ALEUTIAN SPIRIT?

A written document is conclusive evidence of a vessel lease, if the document on its face shows the parties intended the document as a written vessel lease.⁵ The title and terminology used in a document, and the provisions governing the parties in a document, are relevant evidence that the parties intended the document as a vessel lease.⁶

The title of the 1989 written black cod agreement is clearly not indicative of a vessel lease. The document is simply entitled, "Black Cod Agreement." Nor is the terminology of the black cod agreement indicative of a vessel lease. The words "vessel lease" or "bareboat charter" are not contained in the document. Nor are the parties referred to as a "lessor" or "lessee." The document is absent of language with regard to the "rent" or "charter hire" of the vessel. The document does not state that it is an agreement between a vessel owner and a partnership (or anyone else) for the use of a vessel. Rather, the document states that it is simply an agreement between Mr. Miller, the "owner" of the F/V ALEUTIAN SPIRIT, and Mr. Stewart, the "black cod permit holder," for Mr. Stewart's black cod permit, black cod fishing gear, and fisheries expertise.

In sum, the language of the 1989 written black cod agreement does not indicate that the parties agreed to lease, or that the parties intended to lease, the vessel. The document is more like a personal services agreement between Mr. Miller and Mr. Stewart. Consequently, I conclude that the written black cod

⁵See Treinen v. Scudder, Appeal No. 95-0104, October 11, 1995.

⁶*Id.*

agreement is not conclusive evidence of a vessel lease.

2. Did the claimed partnership of Mr. Stewart and Mr. Miller lease the F/V F/V ALEUTIAN SPIRIT from Mr. Miller during 1987, 1988, and 1989?

Even though the 1989 written black cod agreement is not by itself conclusive evidence of a vessel lease, the evidence in the appeals record, which includes the 1989 written agreement, may still show that the claimed partnership leased the F/V ALEUTIAN SPIRIT.

The IFQ regulations do not define what constitutes a vessel lease. Consequently, this Office has identified seven factors that an Appeals Officer should consider in making a case-by-case determination of whether a business relationship should be recognized as a vessel lease.⁷ The factors include, but are not limited to:

- (1) how the parties characterized their business arrangement at the relevant times;
- (2) whether and to what extent the claimed lessee had possession and command of the vessel and control of the navigation of the vessel;
- (3) whether the claimed lessee directed the fishing operations of the vessel;
- (4) whether the claimed lessee had the right to hire, fire, and pay the crew;
- (5) whether the claimed lessee was responsible for the operating expenses of the vessel;
- (6) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her business for federal tax purposes and other purposes; and
- (7) whether the claimed lease had a set or guaranteed term.

As a guideline in weighing the factors, we stated in O'Rourke v. Riddle⁸ that the North Pacific Fishery Management Council intended to award QS to persons who had supplied the means to harvest the fish,

⁷See, e.g., F/V Determined Partnership v. Big Blue, Inc., Appeal No. 95-0049, October 22, 1996, *aff'd* November 5, 1996; Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, August 20, 1996, *aff'd* Smee v. N.M.F.S., C96-1512 WD (W.D. Wash., June 9, 1997); Kristovich v. Dell, Appeal No. 95-0010, March 20, 1996, *aff'd* March 27, 1996.

⁸Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

suffered the financial and liability risks to do so, and directed the fishing operations. In short, the Council intended QS for persons who, as lessees, had acted like entrepreneurs,⁹ in the exercise of their right of the exclusive use, possession, control, and command of a fishing vessel.

I shall now consider the factors to determine whether the evidence in the record shows that Mr. Stewart and Mr. Miller leased the F/V ALEUTIAN SPIRIT.

1. How the parties characterized their business arrangement at the relevant times.

Mr. Stewart states on appeal that he and Mr. Miller leased the F/V ALEUTIAN SPIRIT, but the documents provided for the appeals record do not show that he or Mr. Miller ever characterized their business arrangement as a lease at relevant times or that they ever agreed to lease the vessel when they discussed their business arrangement.

Mr. Stewart's affidavits

Mr. Stewart states¹⁰ in relevant part:

5. In the Fall of 1987, I entered into an agreement with Jim Miller, owner of the Aleutian Spirit, ADF&G#40128, for fishing black cod. Our agreement was that Jim would provide the vessel, and I would provide my state black cod permits, fishing gear, fisheries expertise, and service as skipper. I was responsible for the operation of the vessel, directing the crew, and setting the gear. For this I received a regular crew share and a 15% interest in the "boat share" ...

7. In the Spring of 1988 I again agreed with Jim Miller to fish black cod, under the same terms that we had agreed to the previous Fall. ...

8. In April 1989, I again made an agreement with Jim Miller. This agreement was in writing (prepared by Jim Miller) and has already been submitted to the RAM Division. The substance of the 1989 agreement was the same as the ones we made in 1987 and 1988. I again provided my permits, fishing gear, expertise, and service as skipper of the vessel. Again I received a crew share and 15% of the boat share. ...

⁹According to WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988), an "entrepreneur" is one who organizes, manages, and assumes the risks of a business venture in the expectation of gaining the profit.

¹⁰See Mr. Stewart's affidavit, filed March 31, 1995.

10. I view the operation that Jim Miller and I had in 1987, 1988, and 1989 as a partnership. He provided the vessel, I provided my services as skipper, my fishing gear, and my permits. He and I (and no one else) share the boat share profits. ...

Mr. Stewart writes in another document,¹¹ in relevant part:

Jim and I formed a partnership in 1987 to fish black cod in the Gulf of Alaska. Jim Miller did not have any gear or experience in fishing black cod in outside waters. As a result, he entered [into] an agreement with me where I would supply the permits, gear, expertise, and crew. In exchange, I was to receive a percentage for the use of my gear, permit, permits, and the skipper's share. ...

Mr. Stewart does not use the word "lease" to characterize his business arrangement with Mr. Miller. Nor does he state that he and Mr. Miller ever agreed to the lease of the F/V ALEUTIAN SPIRIT. He fails to mention language that one would normally find in a vessel lease arrangement. He does not state that Mr. Miller would be paid a lease fee or that he and Miller would have the right of exclusive use and possession of the F/V ALEUTIAN SPIRIT. In his own words, Mr. Stewart simply viewed the parties' arrangement as a "partnership."

The Longline Working Agreement

Mr. Stewart states in a different affidavit¹² that the parties "informally looked to a form agreement [during 1987 and 1988], the Longline Working Agreement of the Petersburg Fishermen's Union and the Petersburg Vessel Owners Association, to set out the rights and duties of each partner." But longline vessel owner-union agreements traditionally govern arrangements between vessel owners and independent contractors or hired skippers, not vessel owners and vessel lessees.

RFA

Neither Mr. Stewart, nor Mr. Miller, claimed in their RFAs or in their applications for QS¹³ that they,

¹¹See Mr. Stewart's "Responses to Request For Written Response and Documentary Evidence," filed February 17, 1998.

¹²See Mr. Stewart's affidavit, November 14, 1995, at 2.

¹³The record does not show that Mr. Stewart ever filed an application for QS with RAM. Therefore, I shall assume that he never returned his application for QS to RAM, and that he never claimed anything contrary to what he claimed on his RFA.

individually, or through a partnership, leased the F/V ALEUTIAN SPIRIT during the relevant period. Mr. Stewart did not claim that a lease existed for the vessel until he filed his appeal.

Federal Tax Returns

Mr. Stewart did not claim on his federal tax returns for 1988 and 1989 that he leased the F/V ALEUTIAN SPIRIT. (He did not submit a copy of his tax return for 1987). Mr. Stewart admits that he and Mr. Miller did not file a partnership tax return during any of those years.

Settlement Statements

The settlement statements for the F/V ALEUTIAN SPIRIT do not distinguish between Mr. Miller as owner and Mr. Miller as partner in the distribution of the vessel's profits. Mr. Miller is referred to as the owner of the F/V ALEUTIAN SPIRIT and Mr. Stewart is referred to as a skipper, a permit holder, and a crew member.

The 1989 Black Cod Agreement

As previously discussed, the written 1989 black cod agreement does not contain language indicative of a vessel lease. The words "lease," "lessor," or "lessee" do not appear in the document. Mr. Miller is characterized as a "boat owner," and Mr. Stewart is characterized as a "skipper" and a "permit holder."

Under the black cod agreement, Mr. Miller is required to provide a seaworthy vessel, hull and liability insurance, and repairs for the normal wear and tear of the vessel. Mr. Stewart is required to provide fishing gear, fishing expertise, and sablefish fishing permits. The document does not mention a partnership (or anyone else) having exclusive use and possession of the vessel. Nor does the document distinguish between the proceeds paid to Mr. Miller for the use of the vessel, and the proceeds paid to him as a partner in the operations of the vessel. The document provides only for Mr. Miller to receive a percentage of boat share, as boat owner, and for Mr. Stewart to receive a percentage of boat share, as a permit holder.

Court Documents

Mr. Stewart submitted court documents that Mr. Miller filed in a lawsuit against him in 1989. Mr. Miller sued Mr. Stewart to prevent him from fishing aboard another fishing vessel other than the F/V ALEUTIAN SPIRIT. In the lawsuit, Mr. Miller alleged that Mr. Stewart breached "a contract to

render special unique or extraordinary personal services."¹⁴ The court documents do not mention the existence of a "partnership" or a vessel "lease."

Insurance

The record is absent of documents that show the partnership of Mr. Miller and Mr. Stewart was insured for the operations of the F/V ALEUTIAN SPIRIT.

In sum, Mr. Stewart does not claim in his affidavits that he and Mr. Miller characterized their arrangement as a lease when they discussed their arrangement. Nor is there evidence that Mr. Stewart or Mr. Miller ever characterized their business arrangement as a lease at any other relevant time. Mr. Stewart simply claims on appeal that he now believes the claimed partnership leased the vessel.

The weight of evidence clearly shows that the parties did not characterize their business arrangement as a lease at relevant times. The weight of the parties' characterizations is more indicative of a partnership or a personal services arrangement than a vessel lease.

2. Whether and to what extent the partnership had possession and command of the vessel and control of the navigation of the vessel.

Mr. Stewart admits that Mr. Miller was on board the vessel during the fishing for sablefish,¹⁵ but states that Mr. Miller served only as a "simple deck hand."¹⁶ The settlement statements confirm Mr. Miller's presence aboard the vessel. The settlement statements show that Mr. Miller received a skipper share in 1987 and crew shares in 1987, 1988, and 1989.¹⁷ The settlement statements also show that Mr. Stewart received a permit and gear share in 1987, a skipper's share in 1988 and 1989, and crew shares in 1987, 1988, and 1989. RAM's official record also shows that Mr. Miller landed halibut and sablefish from the F/V ALEUTIAN SPIRIT on his fishing permit during the relevant period.¹⁸

¹⁴See the complaint filed by Mr. Miller, and Mr. Miller's Memorandum in support of [his] Motion for Temporary Restraining Order.

¹⁵See Mr. Stewart's affidavit of November 14, 1995, at 1.

¹⁶See Mr. Stewart's written response, filed February 17, 1998, at 3.

¹⁷The settlement statement for trip dates between April 15, 1989 and May 12, 1989 does not show that Mr. Miller was paid a crew share for that time period.

¹⁸Mr. Miller made halibut landings from the F/V ALEUTIAN SPIRIT on May 24, 1988, June 21, 1988, May 17, 1989, and June 14, 1989. He made sablefish landings from the vessel on April 24, 1988.

The 1989 written black cod agreement, which Mr. Stewart claims also reflects the parties' arrangement in 1987 and 1988, does not specify the party (or entity) to be in charge of the vessel during the relevant period. Nor is there evidence that Mr. Miller relinquished possession, control, or command of the F/V ALEUTIAN to a partnership (or anyone else).

I find the weight of evidence does not show that the alleged partnership of Mr. Miller and Mr. Stewart had complete and exclusive right of possession, control, and command of the F/V ALEUTIAN SPIRIT during the relevant period. But even if it did, it would not be determinative that the partnership leased the F/V ALEUTIAN SPIRIT

3. Whether the partnership directed the fishing operations of the vessel.

RAM's official record shows that Mr. Stewart made all but one of the sablefish landings from the F/V ALEUTIAN SPIRIT, and that Mr. Miller made all but one of the halibut landings from the vessel, during the relevant period (1987, 1988, and 1989).¹⁹ Mr. Miller made the other sablefish landing on April 24, 1988. Mr. Stewart landed sablefish, and Mr. Miller landed halibut, from the F/V ALEUTIAN SPIRIT on the same day, May 17, 1989.

The settlement statements show that Mr. Stewart was paid a permit and gear share for sablefish fishing in 1987. The 1989 black cod agreement, and the court documents filed in the lawsuit between Mr. Miller and Mr. Stewart, also state that Mr. Stewart was responsible for the fishing gear, the fishing permit, and the expertise for the fishing of sablefish in 1989.

Mr. Stewart was primarily in charge of sablefish fishing and Mr. Miller was primarily in charge of halibut fishing. But it is unclear whether they acted jointly as partners or as an employer and a hired skipper or independent contractor. Consequently, the evidence is inconclusive as to whether the alleged partnership directed the fishing operations of the vessel. But even if it did, it would not be determinative that the partnership leased the F/V ALEUTIAN SPIRIT.

4. Whether the partnership had the right to hire, fire, and pay the crew.

The appeals record is absent of documents that show a "partnership" had the right to hire, fire, and pay the crew of the F/V ALEUTIAN SPIRIT. There are no 1099's, receipts, copies of checks, tax returns, or crew affidavits in the appeals record.

¹⁹The sablefish landings were made on September 24, 1987, April 24, 1988, May 3, 1988, June 10, 1988, September 24, 1988, April 24, 1989, May 11, 1989, May 17, 1989, and May 27, 1989. The halibut landings were made on May 24, 1988, June 21, 1988, May 17, 1989, and June 14, 1989.

However, the evidence does show that both Mr. Miller and Mr. Stewart assumed those responsibilities at one time or another during the relevant period. The settlement statements show that Mr. Stewart was paid a skipper's share in 1988 and 1989 and that Mr. Miller was paid a skipper's share in 1987. The 1989 black cod agreement required Mr. Stewart to train the crew for sablefish fishing. Mr. Stewart acknowledges that it was Mr. Miller's responsibility to issue 1099 federal tax forms to crew members.²⁰ Mr. Stewart's bank checks and his account statement at Seward Fisheries show that he made crew payments on May 12, 1989, May 18, 1989, May 27, 1989, and June 7, 1989. Mr. Miller and Mr. Stewart were both aboard the vessel during the fishing of the vessel. But even if both parties did the hiring, firing, and payment of the crew, the evidence is unclear as to whether they acted jointly as partners, or individually as an owner and a hired skipper or independent contractor, during the relevant period..

As in factor 3, the weight of the evidence is inconclusive as to whether the partnership of Mr. Stewart and Mr. Miller was responsible for the hire, fire, and payment of the crew during the relevant period. It is just as likely that Mr. Stewart handled those responsibilities, as part of a personal services arrangement with Mr. Miller. But even if the partnership was responsible for those activities, it would not be determinative that the partnership leased the vessel.

5. Whether the partnership was responsible for the operating expenses of the vessel.

The "operating expenses of the vessel" are those expenses that are attributable to the fishing operations in question. These would include trip expenses (fuel, ice, bait, and groceries) as well as other expenses necessitated by the fishing operations (fishing gear, vessel repairs, insurance).

A party's investment in the fishing enterprise is certainly a significant in determining whether the party was the type of person the North Pacific Fishery Management Council believed would qualify as a lessee. In Alliance Against IFQs v. Brown,²¹ the Ninth Circuit believed that the Council grouped owners and lessees of boats as being those participants in the industry who had a "capital investment in the vessel and gear that continues as a cost after crew and vessel shares are paid from a fishing trip." Id.

The Council apparently concluded that vessel leases, like vessel owners, take some financial risk and have some financial control over the level of capitalization of the fisheries. That, the Council indicated, is what distinguishes vessel owners and lessees as a group from hired skippers and other crew members. Yet the Council did not require that a person must have made a certain level of capitalization

²⁰Id., at 3.

²¹84 F. 3d 343 (9th Cir. 1996).

to be considered a lessee under the IFQ program. When there is a written lease, for example, a lessee need not show any capital investment. Only a valid, executed lease document identifying the leased vessel, the lease holder and the period of time during which the lease was in effect must be produced.²²

As with other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether they represent a capital investment in the vessel, operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show that there was a lease. "Operating expenses of the vessel" are those expenses that are attributable to, and necessitated by, the fishing operations in question. Smee, at 12-14.

Fishing Gear

Mr. Stewart claims²³ that he provided the fishing gear, and that he paid for lost or worn fishing gear, of the F/V ALEUTIAN SPIRIT in 1987, 1988, and 1989. The 1989 black cod agreement required Mr. Stewart to provide the fishing gear, to instruct the crew, to set the fishing gear, of the F/V ALEUTIAN SPIRIT.

Checks and receipts submitted by Mr. Stewart show that he purchased fishing gear in 1988 and 1989. The settlement statements show that Mr. Stewart paid for lost or worn fishing gear in 1989 and that Mr. Miller paid for lost or worn fishing gear in 1987, 1988, and 1989. The settlement statements further show that the vessel's revenues were used to pay various businesses ("H & W" and "T.U.") for charges to replace fishing gear in 1987, 1988, and 1989. It is unclear whose credit was used to guarantee the charges.

The weight of the evidence shows that both parties paid for the fishing gear of the F/V ALEUTIAN SPIRIT. It is unclear whether the purchases were made in the name of a partnership.

Baiting of Fishing Gear

²²50 C.F.R. § 679.40(a).

²³See Mr. Stewart's "Responses to Request For Written Response And Documentary Evidence," at 1 and 2.

Mr. Stewart does not claim that he advanced funds or paid for the baiting of the fishing gear for the operation of the F/V ALEUTIAN SPIRIT during the relevant period.

The settlement statements show that Mr. Miller advanced funds to pay for the baiting of fishing gear in 1987 and 1988. The settlement statements do not show that anyone incurred expenses for baiting in 1989.

The weight of the evidence shows that Mr. Miller advanced funds to pay for the baiting of fishing gear of the F/V ALEUTIAN SPIRIT during the relevant period. The evidence in the record does not show that a partnership purchased or advanced funds for baiting.

Trip Expenses

Mr. Stewart claims that he paid for bait (\$882) in 1987; that he paid for ice and bait (\$2,976), fuel (\$1,112), and groceries (\$613) in 1988; and that he paid for ice and bait (\$6,032), and groceries (\$1,565) in 1989. But the settlement statements submitted by Mr. Stewart do not support his claims. The settlement statements show that Mr. Miller and various businesses advanced the funds for the vessel's trip expenses and that the trip expenses were paid for by the crew during the relevant period. The settlement statements do not indicate that Mr. Stewart advanced funds or bore financial risk for the vessel's trip expenses.

The weight of the evidence shows that Mr. Miller bore financial risk for the trip expenses of the F/V ALEUTIAN SPIRIT during the relevant period.

Insurance

Mr. Stewart acknowledges²⁴ that Mr. Miller provided the hull and liability insurance of the F/V ALEUTIAN SPIRIT. There is no evidence in the record that the partnership of Mr. Miller and Mr. Stewart paid for insurance, or that the partnership was insured. At best, the arrangement for the insurance of the vessel is no different than that between a vessel owner and a hired skipper or an independent contractor.

In sum, both parties bore financial risk with regard to the fishing operations of the F/V ALEUTIAN SPIRIT. But the weight of evidence does not show that any of the vessel's financial expenses or risks were jointly borne by a partnership or that both parties were wholly and severally at risk for the vessel's operating expenses. On its face, the financial arrangement between the parties is similar to that

²⁴See Mr. Stewart's affidavit, dated November 14, 1995, and the 1989 written black cod agreement.

between a vessel owner and a hired shipper or an independent contractor..

6. Whether the parties treated the fishing operations in which the vessel was used as the partnership's business for federal tax purposes and other purposes.

Mr. Stewart's Federal Tax Returns

The federal income tax returns do not show that Mr. Miller and Mr. Stewart filed as a partnership during the relevant period. Mr. Stewart produced only his *individual* federal tax returns for 1988 and 1989. In one of his affidavits,²⁵ Mr. Stewart states that a "significant portion" of the tax deductions were related to the F/V ALEUTIAN SPIRIT. However, in a later written response,²⁶ he denies that the deductions were related to the vessel.

The 1099s

The 1099s show that Mr. Stewart paid Mr. Miller "fishing boat proceeds" of \$188,388.90 in 1988 and \$129,889.05 in 1989. The 1099s also show that Mr. Miller paid Mr. Stewart "fishing boat proceeds" of \$46,072 in 1988 and \$18,039 during those respective years. Mr. Stewart writes²⁷ that he paid Mr. Miller the gross revenues he received from sablefish fishing. Alaska law²⁸ required the cannery to pay Mr. Stewart directly for the delivery of the fish, as the holder of the permit for harvest of sablefish from the F/V ALEUTIAN SPIRIT.

The 1099s do not show that the claimed partnership of Mr. Miller and Mr. Stewart paid either of the individuals.

The settlement statements

²⁵See Mr. Stewart's affidavit, dated November 14, 1995, at 2 and 3.

²⁶See note 30.

²⁷See Mr. Stewart's Responses To Request For Written Response and Documentary Evidence, at 3.

²⁸See AS 16.05.680, which provides, in relevant part: "It is unlawful for a person, or an agent of a representative of the person, ... (2) to purchase fish from a fisherman who neither is the holder of a limited entry, interim-use, or landing permit issued under AS 16.43, nor is exempt under AS 16.05.660."

Mr. Stewart writes²⁹ that the settlement payments represented the “total gross” of sablefish proceeds from the F/V ALEUTIAN SPIRIT. The settlement statements do not mention the existence of a partnership. The settlement statements are in the name of Mr. Miller, as the owner of the vessel.

Mr. Stewart’s Account Statement at Seward Fisheries for 1989

Mr. Stewart’s account statement at Seward Fisheries in 1989 shows that he (and not the partnership of Mr. Miller and Mr. Stewart) was paid for sablefish landings made from the F/V ALEUTIAN SPIRIT during the relevant period.

Insurance

Mr. Stewart did not claim that the partnership purchased insurance for the vessel or the partnership. He acknowledges³⁰ that Mr. Miller was responsible for providing the hull and liability insurance of the F/V ALEUTIAN SPIRIT.

In sum, the weight of the evidence does not show that Mr. Stewart and Mr. Miller treated the operations of the F/V ALEUTIAN SPIRIT as a partnership or joint business for tax, accounting, settlement, or insurance purposes during the relevant years.

7. Whether the claimed lease (by the partnership) had a set term.

Mr. Stewart claims that he and Mr. Miller entered into three separate partnership arrangements for the lease of the F/V ALEUTIAN SPIRIT: in the fall of 1987, in the spring of 1988, and in April 1989. While the first two arrangements were oral, the third arrangement, known as the 1989 black cod agreement, was written.³¹

Even assuming that the separate arrangements had set or guaranteed terms, the weight of the evidence does not show that the arrangements were for the alleged partnership’s exclusive use of the F/V ALEUTIAN SPIRIT. The 1989 black cod agreement, which Mr. Stewart acknowledges as essentially

²⁹Id., at 2 and 3.

³⁰See, Mr. Stewart’s affidavit, dated November 14, 1995, and the Black Cod Agreement.

³¹Mr. Stewart ended the 1989 written agreement before the expiration of its term (June 21, 1989) because of a dispute over the seaworthiness of the vessel. See, Mr. Stewart’s written response, at 4; Mr. Stewart’s supplemental affidavit, at 3; and Mr. Dan Bruce’s letter to Randall Moen, dated December 22, 1997, at 6.

the same agreement as the two oral arrangements, is solely between two individuals: Mr. Miller, as vessel owner, and Mr. Stewart, as permit holder. The agreement can only be reasonably read as an agreement for Mr. Stewart's services (as far as supplying the crew, the fishing permit, the fishing gear, and the fishing expertise), and not for the alleged partnership's exclusive use of the vessel. After considering the above, I do not give much weight to this factor.

Summary.

Mr. Stewart and Mr. Miller fished together, and shared (at least in some measure) the expenses and risks associated with the fishing operations aboard the F/V ALEUTIAN SPIRIT. But that is not enough to conclude they leased the F/V ALEUTIAN SPIRIT as a partnership during the relevant period. The evidence in the record does not show that the parties (1) paid a lease fee for the use of the vessel; (2) bore joint financial risk for the vessel's operating expenses; (3) treated the operations of the vessel as a joint business; (4) agreed to lease the vessel, or claimed they had ever done so, at relevant times. Therefore, I conclude the alleged partnership did not lease the F/V ALEUTIAN SPIRIT. The weight of the evidence is more indicative of a personal services arrangement between the parties.

In light of all of the above, I conclude that Mr. Stewart is ineligible for sablefish QS as a result of the sablefish landings made from the F/V ALEUTIAN SPIRIT during the relevant period.

FINDING OF FACTS

1. The 1989 written black cod agreement does not contain provisions and terminology indicative of a vessel lease.
2. The parties did not at relevant times agree to lease the F/V ALEUTIAN SPIRIT from Mr. Miller, nor did they characterize their business arrangement as a lease.
3. Mr. Miller and Mr. Stewart did not treat the operations of the F/V ALEUTIAN SPIRIT as a partnership for tax, accounting, settlement, or insurance purposes during the relevant years.
4. Mr. Stewart and Mr. Miller did not pay Mr. Miller a lease fee for the F/V ALEUTIAN SPIRIT.
5. Mr. Stewart and Mr. Miller did not jointly pay or incur financial risk with regard to the vessel's operating expenses.

CONCLUSIONS OF LAW

1. The 1989 written black cod agreement is not conclusive evidence of a vessel lease.

2. Mr. Stewart and Mr. Miller did not lease the F/V ALEUTIAN SPIRIT as a partnership during 1987, 1988, or 1989.
3. Mr. Stewart is ineligible for the initial issuance of QS, based on the sablefish landings made from the F/V ALEUTIAN SPIRIT during 1987, 1988, or 1989.

DISPOSITION

The IAD, denying Mr. Stewart's claim to qualifying pounds landed from the F/V ALEUTIAN SPIRIT for the years 1987-1989, is **AFFIRMED**. This decision takes effect October 23, 2000, unless by that date the Regional Administrator orders review of the Decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, October 2, 2000. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

Randall J. Moen
Appeals Officer