NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0092
	)	
MICHAEL ETCHER,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
STANLEY D. MALCOM,	)	
Respondent	)	April 12, 1996
_____	)	

Appellant Michael Etcher timely appealed an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] on April 13, 1995. The IAD denied his application for Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program in connection with halibut caught on the F/V MAGIC MAN during 1989 and 1990. The IAD held that Mr. Etcher had failed to establish that a partnership existed between Mr. Etcher and Respondent Stanley D. Malcom, owner of the F/V MAGIC MAN. It further held that Mr. Etcher failed to show that such alleged partnership leased the F/V MAGIC MAN or that Mr. Etcher succeeded to the interests of such alleged partnership. The IAD accordingly awarded the QS at issue to Mr. Malcom.

ISSUES

1. Was there a partnership between the Mr. Malcom and Mr. Etcher?

2. Did such partnership lease the F/V MAGIC MAN during the relevant periods?

3. Has Mr. Etcher shown an ownership interest in a dissolved partnership?

BACKGROUND

Respondent Stanley D. Malcom owns a 26-foot vessel, the F/V MAGIC MAN. Mr. Malcom and Appellant Michael Etcher longlined for halibut from the F/V MAGIC MAN during two halibut openings in 1989 and two in 1990.[1] Although Mr. Malcom had some gear on the vessel, including buoys, buoy

[1]Mr. Etcher initially claimed QS in connection with the September, 1989 opening. However, in his oral testimony he was unsure whether he fished that opening. Mr. Malcom and crew member Jenice Christopher testified in affidavits that Mr. Etcher was not on the vessel for that opening. [Exs. 14 and 14C]. Accordingly, I find that Mr. Etcher did not participate in the September, 1989 opening.

line, anchors, hooks and snaps, most of the longlining gear was supplied by Mr. Etcher. When Mr. Malcom fished the F/V MAGIC MAN with other crew in the years at issue he continued to use Mr. Etcher's gear. In 1991, Mr. Malcom purchased more gear, and his fishing relationship with Mr. Etcher ended.

During the trips at issue, some of the fish were sold on Mr. Malcom's gear card and some were sold from Mr. Etcher's skiff on Mr. Etcher's gear card.[2] Either way, the parties received the same distributions of trip proceeds: Mr. Malcom received a 20 percent boat share and Mr. Etcher received a 10 percent boat share from the trips' gross proceeds. After deduction of the trip expenses, such as bait, fuel, and lost gear, Mr. Etcher and Mr. Malcom divided the net proceeds equally.

Mr. Etcher and Mr. Malcom disagree as to the proper characterization of their relationship. Mr. Etcher contends that it was a partnership. He described the relationship in a sworn affidavit as follows:

> What happened was very simple. Two guys, Stan Malcom and myself got together and said to each other in essence "hey lets go fishing as partners. Neither one of us alone has what it takes to fish, but together as partners we can do it. You have gear and I have a boat. Lets go out there as partners and fish. We will pay me for our use of my boat and we will pay you for our use of your gear, and then we will split the profits 50/50.'[3] What was created by those two individuals was a partnership that leased a boat from one of the partners and lease[d] gear from the other partner. [Ex. 101].

Mr. Malcom, on the other hand, contended in a sworn affidavit, which he repeated in his oral testimony, that there was no partnership and no lease of the vessel. [Ex. 200, at 1-2]. Mr. Malcom testified that the 50 percent of the net proceeds paid to Mr. Etcher constituted Mr. Etcher's crew share.

There are no contemporaneous written documents in the record indicating that Mr. Malcom and Mr. Etcher created or held themselves out as a partnership. Mr. Etcher testified that the parties did not hold themselves out as a partnership for any purpose, other than the fact that they fished together. There are no written documents evidencing a written or oral lease of the F/V MAGIC MAN.

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[2]This was done with the expectation that the halibut fishery might one day be a limited entry fishery. By selling some halibut off Mr. Etcher's skiff using his gear card, the parties anticipated that Mr. Etcher would be entitled to participate in such a limited entry fishery. However, participation in the fishery is instead now based on QS under the IFQ program.

[3]In his affidavits submitted to the RAM Division, Mr. Etcher claim that the alleged partnership proceeds were split 45 percent to Mr. Etcher and 55 percent to Mr. Malcom. [Ex. 4, at 1; Ex. 8, at 1]. On appeal, he claimed that the partnership profits were split 50/50. [Ex. 101, at 1].

Mr. Etcher requested an oral hearing for the purpose of cross-examining Mr. Malcom under oath as to the existence of a lease of the F/V MAGIC MAN to a partnership comprised of himself and Mr. Malcom. I ordered an oral hearing pursuant to 50 C.F.R. § 676.25(g)(3). At the oral hearing the parties, representing themselves, provided their own testimony and did not call any other witnesses.

DISCUSSION

The IAD correctly holds that, in order for any person other than the owner, Mr. Malcom, to qualify for the QS at issue, there must be evidence of a vessel lease. Only the vessel owner or a lessee can be a "qualified person." 50 C.F.R. § 676.20(a)(1).

If a partnership between Mr. Malcom and Mr. Etcher existed, and if Mr. Malcom leased the F/V MAGIC MAN to such a partnership during the periods at issue, then Mr. Etcher could be entitled to receive an allocation of QS. "A former partner of a dissolved partnership or a former shareholder of a dissolved corporation who would otherwise qualify as a person may apply for QS in proportion to his interest in the dissolved partnership or corporation." 50 C.F.R. § 676.20(a)(1).

1. Did a partnership exist?

The regulations do not define the term "partnership." It is therefore proper to turn to Alaska law to determine whether a partnership existed between these participants in an Alaska-based enterprise. E.g., Basel v. Westward Trawlers, Inc., 869 P.2d 1185, 1190 (Alaska 1994).

Alaska has adopted the Uniform Partnership Act [Act]. Alaska Stat. § 32.05.010 et seq. The Act defines a partnership as follows: A partnership is an association of two or more persons to carry on as co-owners a business for profit. Alaska Stat. § 32.05.010(a).

Commentary and case law interpreting the Act establishes that, because a partnership is a voluntary association, a partnership cannot exist unless the parties intended a partnership. See 1 Alan R. Bromberg & Larry E. Ribstein, PARTNERSHIP § 2:05(a), at 2:28 (1988 ed.) [PARTNERSHIP]. However, the parties' characterization of their relationship as a partnership is not critical. "The only necessary intention . . . is an intent to do those things which constitute a partnership." In re Medallion Realty Trust, 103 B.R. 8, 13 (Bankr. D. Mass. 1989). "Lay people use the word 'partner' very loosely, often not intending the precise legal relationship of partnership." PARTNERSHIP § 2:05(a), at 2:34.20

In addition to its definition of "partnership," the Act provides several rules for determining if a partnership exists. Alaska Stat. § 32.05.020(a). Most pertinent are the following provisions:

(3) the sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived;

(4) the receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but this inference may not be drawn if the profits were received in payment

(A) as a debt by installments or otherwise;

(B) as wages of an employee or rent to a landlord;

(C) as an annuity to a surviving spouse or representative of a deceased partner;

(D) as interest on a loan, though the amount of payment varies with the profits of the business;

(E) as the consideration for the sale of the good will of a business or other property by installments or otherwise.

Mr. Etcher received a share of the profits for the trips he fished with Mr. Malcom on the F/V MAGIC MAN. However, if Mr. Etcher's receipt of 50 percent of the net proceeds of the venture constituted only "wages of an employee," Mr. Etcher would not have prima facie evidence of a partnership based on his receipt of a share of the profits. Alaska Stat. § 32.05.020(a)(4)(B). Thus, it is necessary to properly characterize the 50 percent of net proceeds received by Mr. Etcher.

Mr. Malcom testified that his distribution of the trips' proceeds was similar to the formula used on larger vessels. He submitted an example of a settlement sheet that he used as a model. [Ex. 200, at 3]. He explained his understanding that, normally, the boat owner supplies the boat and gear and receives 30 percent of the gross proceeds as the boat share. Mr. Malcom testified that, because Mr. Etcher supplied some of the gear, he gave Mr. Etcher 10 percent of the gross as a gear share, and kept 20 percent of the gross as the boat share. Then the operating expenses of ice, bait, oil and gas, grub and any gear loss are subtracted. The balance of the proceeds is then shared equally among the crew. For the trips at issue, the crew consisted solely of Mr. Etcher and Mr. Malcom. Hence, each crew share was 50 percent of the net proceeds.

Settlement sheets submitted by Mr. Etcher for the trips at issue are consistent with Mr. Malcom's explanation. Those sheets generally designate 20 percent of the gross as "Stan Boat share" and 10 percent of the gross as "Mike Gear share." [Ex. 4C]. On the first 1989 settlement sheet, the net proceeds that were divided 50/50 between the parties are specifically designated "crew."

I find that the 50 percent share of the net proceeds received by Mr. Etcher constituted his crew share. This is the equivalent of wages received for his labors on the F/V MAGIC MAN. Accordingly, I find that Mr. Etcher has not made out a prima facie case of a partnership based on his receipt of a share of the profits of trips at issue.

Indeed, if receipt of a crew share could be the basis for finding a partnership, virtually every crew member in the longlining fisheries could claim QS as a former partner in a dissolved partnership. However, the North Pacific Fishery Management Council chose to make the initial allocation of QS to owners and lessees. 50 C.F.R. § 676.20(a)(1). The Council chose not to allocate QS to crew members who, in this industry, generally receive percentages of the net trip proceeds as compensation for their labors.

There is no other evidence in the record supporting Mr. Etcher's claim that the parties entered into a partnership agreement. Instead, the evidence established:

- The parties did not co-own a "business," but had only an interest in their respective shares of the proceeds from discrete fishing trips;

- The parties did not hold themselves out as a partnership;

- The association was for only four halibut openings; Mr. Malcom fished with other crew during the two years at issue and Mr. Etcher received no proceeds from such trips;.

- The parties did not file partnership tax returns;

- There are no contemporaneous documents suggesting the existence of a partnership.

I conclude that Mr. Etcher and Mr. Malcom were not partners in a partnership during the times at issue.

2. Was there a lease of the vessel?

If, for the sake of argument, there had existed a partnership between Mr. Etcher and Mr. Malcom, Mr. Etcher would have to show that such partnership leased the F/V MAGIC MAN from Mr. Malcom. If not, Mr. Malcom, as owner, is entitled to all QS associated with fish caught on board the vessel. The owner of a vessel will receive QS in connection with relevant landings of halibut and sablefish unless there was a lease of the vessel. 50 C.F.R. § 676.20(a)(1).

The regulations do not define "lease," but discuss the evidence that will establish the existence of a lease:

> Conclusive evidence of a vessel lease will include a written vessel lease agreement or a 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. Conclusive evidence of a vessel lease must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect. Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.

50 C.F.R. § 676.20(a)(1)(iii) (Emphasis supplied).

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. Mr. Etcher's appeal depends on there being sufficient "other evidence" of an oral lease to establish that the alleged partnership was the lessee of the F/V MAGIC MAN during the relevant periods. However, Mr. Etcher has failed to identify any such evidence in the record.

The Office of Administrative Appeals in O'Rourke v. Riddle[4] stated:

In deciding whether a vessel lease existed between the parties, an Appeals Officer should . . . consider a variety of factors. These include, but are not limited to:

(1) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;

(2) whether the claimed lessee directed fishing operations of the vessel;

(3) whether the claimed lessee had the right to hire, fire, and pay the crew;

(4) whether the claimed lessee was responsible for the operating expenses of the vessel; and

(5) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes.

In Kristovich v. Dell,[5] we added a sixth factor:

(6) whether the claimed lease had a set or guaranteed term.

Mr. Etcher does not deny that Mr. Malcom was at all times present on board the F/V MAGIC MAN

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[4]Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

[5]Appeal No. 95-0010, March 20, 1996, at 10, *aff'd* March 27, 1996.

and that Mr. Malcom was the captain who ultimately made all decisions, such as where to fish. Mr. Malcom presented evidence that he paid the operating expenses. The evidence establishes that Mr. Malcom asserted full possession and command of the F/V MAGIC MAN at all times. Furthermore, Mr. Malcom testified without contradiction that the relationship with Mr. Etcher could have terminated at any time.

The tax returns in the record do not establish that a lease arrangement existed. On the occasions the fish were sold on Mr. Etcher's fish card, the fish processor made the payment to Mr. Etcher. Accordingly, he claimed the income on his tax return, deducting as expenses the payments to Mr. Malcom for his boat and crew share, as well as the trip expenses. [Exs. 102; 103]. However, the evidence suggests that Mr. Malcom claimed on his tax returns the income and expenses when the fish were sold on his gear card.[6] When, as here, the tax returns reflect only the party who receives payment from the fish processors, they are not helpful in determining whose business the fishing enterprise was or whether there was a lease. Moreover, the parties did not file a partnership tax return. Thus, the tax returns do not reflect that the fishing enterprise was conducted by a partnership that leased the vessel from Mr. Malcom.

Mr. Malcom received a 20 percent boat share. However, no contemporaneous documents identify this as a lease fee. Mr. Malcom testified (and I take notice that this is standard in the industry) that the owner who is present on the longlining vessel normally takes a boat share from the gross proceeds. It would be absurd to characterize the owner's boat share as a lease fee when the owner never relinquishes possession of the vessel to another. It would also be absurd to characterize Mr. Malcom's command of his vessel to be solely in the role of an agent of the partnership. Although it is possible for a partnership to delegate management to one of its partners, see, e.g., Chocknok v. State, Commercial Fisheries Entry Comm'n, 696 P.2d 669, 673 (Alaska 1985), Mr. Etcher has not suggested that this delegation occurred here. Accordingly, I reject Mr. Etcher's characterization of the 20 percent boat share as a lease fee.

I find that, at all times in question, Mr. Malcom had possession and control of the F/V MAGIC MAN. I conclude that there was no lease of the F/V MAGIC MAN.

3. Has Mr. Etcher shown an ownership interest in a dissolved partnership?

Even if Mr. Etcher could overcome the hurdles of establishing the existence of a partnership and establishing that such partnership leased the F/V MAGIC MAN during the periods at issue, he would

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[6]Mr. Malcom's tax returns are not of record. However, the amounts claimed as income on Schedule C of Mr. Etcher's federal income tax returns are less than the income of the trips at issue. Furthermore, Mr. Etcher testified that the tax returns indicate when the fish were sold on his card and when they were sold on Mr. Malcom's card.

have the burden of establishing his ownership interest in such dissolved partnership.

The IFQ regulations provide (in relevant part):

> Evidence of ownership interest in a dissolved partnership or corporation shall be limited to corporate documents . . . or notarized statements signed by each former partner . . ..

50 C.F.R. § 676.20(a)(1)(iv).

Mr. Etcher was unable to submit a notarized statement from Mr. Malcom as to his ownership interest in the alleged partnership. Indeed, Mr. Etcher himself changed his testimony as to his alleged ownership interest. Accordingly, Mr. Etcher is unable to meet this final barrier to his claim for QS.

FINDINGS OF FACT

Upon de novo review of the administrative record, I find that, during the time periods at issue, the preponderance of the evidence establishes that:

1. The 50 percent share of the net proceeds received by Mr. Etcher constituted his crew share.

2. Mr. Etcher has not made out a prima facie case of a partnership based on his receipt of a share of the profits of trips at issue.

3. At all times in question, Mr. Malcom had possession and control of the F/V MAGIC MAN.

4. Mr. Etcher has not established that he has an interest in a dissolved partnership between himself and Mr. Malcom.

CONCLUSIONS OF LAW

1. There was no partnership between Michael Etcher and Stanley Malcom during the time periods at issue.

2. There was no lease of the F/V MAGIC MAN during the periods at issue.

DISPOSITION AND ORDER

The RAM Division's Initial Administrative Determination awarding the QS at issue to Stanley Malcom is hereby AFFIRMED. This decision takes effect on May 13, 1996, unless by that date the Regional Director orders review of the decision.

Rebekah R. Ross
Appeals Officer

I concur in the factual findings of this decision and I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1996 fishing season, I recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date. Any party, however, [including the Division] may submit a motion to reconsider, but it must be received at this office not later than April 22, 1996.

Edward H. Hein
Chief Appeals Officer