NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0141
	)	
S.Y.B. FISHERIES,	)	ORDER GRANTING MOTION TO
Appellant	)	RECONSIDER AND DECISION
	)	ON RECONSIDERATION
	)	
_____	)	August 24, 1998

On April 17, 1998, SYB submitted a timely Motion for Reconsideration of the Decision in this Appeal, which was issued April 7, 1998. The Motion is GRANTED.

ISSUES

1. Was SYB's appeal timely filed?

2. Did the Decision deny Mr. Rockom's right to transfer his partnership interest in quota shares [QS] in violation of the Magnuson-Stevens Act?

3. Were Findings of Fact Nos. 4 and 5 in error?

4. Did the Decision deny Mr. Rockom's and Mr. McMillan's property interest in the partnership in violation of substantive due process?

5. Is Mr. McMillan the "successor-in-interest" to Mr. Rockom?

6. Did Mr. McMillan apply for Mr. Rockom's QS as Rockom's agent?

7. Is NMFS estopped from denying SYB the QS resulting from Mr. Rockom's 1988 landings?

DISCUSSION

1. Was SYB's appeal timely filed?

Citing Tiger, Inc.,[1] we said in the Decision that SYB's 60-day Appeal filing period began running upon the issuance of QS and that, because SYB waited five months before complaining about the amount of

[1]Appeal No. 95-0100, November 17, 1995, *aff'd on reconsideration*, February 26, 1996, *aff'd*, March 4, 1996.

QS issued, they were late in filing their appeal. On reconsideration, we now conclude that SYB's appeal was timely filed. There are two reasons for this conclusion: (1) The Tiger, Inc. decision was not published until March 1996 — more than a year after QS was issued to SYB. Thus, SYB could not have known of the rule established in that decision and, in fairness, cannot be bound by it in this case. (2) SYB did appeal within the 60-day filing period specified in the Initial Administrative Determination [IAD] that RAM issued on September 11, 1995.[2]

We emphasize here, however, that the rule in Tiger, Inc. is still valid: the issuance of QS is itself an appealable IAD. An applicant need not wait for RAM to issue a written document entitled Initial Administrative Determination for appeal rights to arise. Unless otherwise specified by law or regulation, an Applicant may appeal any action that constitutes RAM's determination of the person's application and that explicitly or implicitly rejects all or a portion of an applicant's claim. As we said in Tiger, Inc., however, the contrary claim must have been asserted by the 90-day deadline afforded by RAM for submitting such claims and supporting evidence. In addition, even where an applicant has made a timely claim, once RAM had denied that claim, the applicant does not have an unlimited time to object. The objection must be raised within the appeal period specified by regulation. [*Id,* at 7]

2. Did the Decision deny Mr. Rockom's right to transfer his partnership interest in QS in violation of the Magnuson-Stevens Act?

On reconsideration, SYB argues that our Decision made a "factual conclusion" that the SYB partnership had dissolved upon Mr. Rockom's sale of his partnership interest to Mr. McMillan, and that this "denial of the existence of SYB's partnership" is a *de facto* denial of the right to transfer partnership rights in QS, in violation of the Magnuson-Stevens Act.

In point of fact, our statement (in a footnote) that the SYB partnership was dissolved when Mr. Rockom sold his interest to Mr. McMillan was not part of the findings or conclusions of the Decision. It was mentioned solely in a discussion of RAM's allocation of other qualifying pounds and RAM's

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[2]RAM apparently did not recognize that SYB was actually making a claim contrary to the NMFS Official Record when Mr. McMillan, in his letter of January 3, 1995, stated that "Poundage accrued in 1988 while Jim Rockom was operating the F/V Baltic Sea is not reflected in the [quota share data] summary." Although we believe RAM acted reasonably in not viewing this as a contrary claim, in retrospect we now see that the claim was ambiguous under the circumstances, i.e., neither RAM nor SYB realized that the fish tickets in question had not been turned in to the State of Alaska by the processor and, thus, had not been included in the NMFS Official Record. The result was that RAM issued a written IAD to SYB only after receiving SYB's subsequent letter and fish ticket evidence in May 1995. If RAM had recognized SYB's request as a contrary claim at the time it was originally received, we have no doubt that RAM would have issued an IAD much closer to the date of the issuance of the QS.

issuance of resulting QS that were not at issue in this Appeal, and thus merely dictum. [Decision, at 12]

In the Decision, we found that SYB did not own the F/V BALTIC SEA at the time the landings in question were made, and that the vessel was owned by the four SYB partners as tenants-in-common. [Decision, at 11-12] Thus, SYB's argument is based on a misreading of our Decision and, therefore, is misconceived and without merit.

3. Were Findings of Fact Nos. 4 and 5 in error?

On reconsideration, SYB argues that our Findings of Fact Nos. 4 and 5 are in error. Finding No. 4 states: "The U.S. Coast Guard abstract of title for the F/V BALTIC SEA is ambiguous concerning the vessel's ownership during the period in question in this Appeal." [Decision, at 13] SYB asserts that the abstract of title is not ambiguous and clearly shows that the vessel was owned by the same *individuals* who comprised SYB Fisheries partnership. [Motion, at 1] The assertion that the abstract of title was not ambiguous is a matter of opinion with which we disagree. Our reasons for finding ambiguity were explained in the Decision, and SYB has not submitted any evidence that persuades us otherwise.

Finding of Fact No. 5 states: "During the entire period in question in this Appeal, the F/V BALTIC SEA was owned by four individuals as tenants-in-common, and not by the S.Y.B. Fisheries partnership." [Decision, at 13] SYB asserts that it owned and operated the F/V BALTIC SEA during the entire period of time in question in this Appeal, and that Mr. Rockom transferred all of his interest in the partnership, including fishing rights, to Mr. James McMillan. [Motion, at 1-2] We disagree. First, SYB does not provide any evidence in support of its contention that SYB owned the vessel at the time of the four landings in question in this Reconsideration. And, oddly, SYB's assertion concerning Finding No. 4 (discussed above) appears to acknowledge that the vessel was owned by the individual partners, not by the partnership itself. Second, SYB's argument appears to be based solely on its view that Mr. Rockom transferred his interest in QS when he sold his interest in the vessel.[3] We have previously decided that the IFQ regulations do not provide for private assignments of initial QS eligibility.[4]

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[3]If SYB is attempting to argue that the sale of Mr. Rockom's interest in the partnership to Mr. McMillan transferred Mr. Rockom's interest in QS, our response is that Mr. Rockom had no interest in QS *as a partner*. Mr. Rockom's interest in QS was only *as an individual.*

[4]*See,* Nettie H, Inc., v. Keith T. Suguira and Alan L. Melling, Appeal No. 96-0075, January 16, 1997, *aff'd* February 18, 1997; Prowler Partnership v. Samuelson, Appeal No. 95-0084, Decision on Reconsideration (Part I), March 12, 1996, *aff'd* March 14, 1996; Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, *aff'd* January 18, 1996; Alwert Fisheries, Inc. v. Oregon Seafood

Having found that SYB did not own the vessel, and lacking any claim or evidence that SYB leased the vessel, we must conclude that SYB was not a "qualified person" on the basis of any landings made from the F/V BALTIC SEA. [*See*, 50 C.F.R. § 679.40(a)(2)] Therefore, we must further conclude that SYB did not have any interest in QS resulting from these landings. Thus, there was no "partnership interest in QS" for Mr. Rockom (or any of the other partners) to transfer. Mr. Rockom's interest in QS was as an individual. Therefore, we find no basis for changing our Findings of Fact 4 and 5 in the Decision.

It is true that if SYB had owned or leased the F/V BALTIC SEA, it would have had an interest in any qualifying landings made from the vessel and any resulting QS. But under our prior decisions,[5] we would nonetheless have to conclude that SYB was dissolved (for IFQ purposes) when Mr. Rockom sold his interest in the partnership. Under IFQ regulations [50 C.F.R. § 679.40(a)(2)(B)(iii)], the appropriate applicants for QS earned by a dissolved partnership would be each of the former partners, and such QS would be issued to the individual former partners in proportion to their interests in the partnership. That is not the basis for our Decision in this case, however. Therefore, arguments on this point are not relevant to this Reconsideration.

4. Did the Decision deny Mr. Rockom's and Mr. McMillan's property interest in the partnership in violation of substantive due process?

SYB's argument that the Decision in this Appeal somehow violated the Due Process Clause of the Fifth Amendment of the United States Constitution is unintelligible. SYB appears to be arguing that the Decision was arbitrary, irrational, and not related to a legitimate end of government. [Points and Authorities, at 11] But the argument lacks any particulars, and it does not specify or demonstrate how the Decision violated the Due Process Clause. We find it impossible to evaluate or respond to such an argument.

5. Is Mr. McMillan the "successor-in-interest" to Mr. Rockom?

SYB claims that Mr. McMillan is the successor-in-interest to Mr. Rockom by virtue of having purchased Mr. Rockom's interest in the SYB partnership and in the F/V BALTIC SEA. SYB argues that, as the successor-in-interest, it was entitled to apply for QS in Mr. Rockom's place. [50 C.F.R. § 679.40(a)(2) — a "qualified person" means a "person" as defined in § 679.2, which includes the person's successor-in-interest.] As previously stated, however, Mr. Rockom had no interest in QS *as*

Producers and Dorothy L. Painter, Appeal No. 95-0073, March 21, 1996, aff'd March 27, 1996; and Silver Ice Fisheries Partnership v. Arctic Select Seafoods, Inc., Appeal No. 95-0114, October 30, 1996.

[5]*See, e.g.*, Silver Ice Fisheries Partnership v. Arctic Select Seafoods, Inc., Appeal No. 95-0014, decided October 30, 1996, *aff'd*, November 12, 1996.

a partner, but only as an individual. Nothing in the "Vessel and Joint Venture Sale Agreement" between Mr. Rockom and Mr. McMillan indicates or suggests that Mr. Rockom intended to transfer his individual interest in an initial issuance of QS to Mr. McMillan.

As we stated in Cadden,[6] the IFQ regulations allow the successor-in-interest to an *individual* "qualified person" to apply for QS in order to assure that eligibility for the initial issuance of QS would not necessarily expire if the individual died. In other words, for purposes of the initial issuance of QS, the successor-in-interest to an individual "qualified person" can only be the person's estate or heirs.[7] Therefore, Mr. McMillan is not the successor-in-interest to Mr. Rockom for the purpose of applying for the initial issuance of QS.

6. Did Mr. McMillan apply for Mr. Rockom's QS as Rockom's agent?

SYB claims that Mr. Rockom authorized Mr. McMillan to apply for QS on Mr. Rockom's behalf. In support of this claim, SYB points to the Waiver of Confidentiality form that Mr. Rockom signed on November 21, 1994 [Exhibit D, accompanying Points and Authorities]. This form, however, does not represent the creation of an agency relationship between Mr. Rockom and Mr. McMillan. The waiver merely authorizes NMFS to use Mr. Rockom's confidential catch and landings (fish ticket) information for the purpose of properly allocating QS. Because of Alaska confidentiality laws, RAM needed Mr. Rockom's permission to release this information to QS applicants who owned or leased any vessels from which landings were made on Mr. Rockom's fishing permit. The waiver did not authorize SYB to apply for QS on Mr. Rockom's behalf.

In support of its agency argument, SYB also relies on three other documents: an unsigned letter, apparently from Mr. McMillan to NMFS, and an "Affidavit" signed by Mr. McMillan and Mr. Hutchens [Exhibit B]; and a RAM internal form entitled "Staff Request for Authority to Change NMFS Official IFQ Record." None of these documents mention that Mr. Rockom was authorizing Mr. McMillan to apply for QS on his behalf or to act as his agent. We find that these documents provide no support for SYB's claim of agency or authorization by Mr. Rockom.

Even if, as SYB argues, NMFS knew that Mr. McMillan was claiming Mr. Rockom's QS, the evidence in the record shows that Mr. McMillan was applying for QS *on behalf of SYB*, as its

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[6]Cadden v. Levenhagen and Pugh, Appeal No. 95-0013, January 17, 1996, at 6, *aff'd* January 18, 1996.

[7]RAM allows individual applicants who qualify for QS to have their certificates issued in the name of a partnership or corporation, if the individual is actively involved in the entity and if the entity existed at the time of application. But in such cases, the entity is not the individual's successor-in-interest for purposes of application; the individual is the only appropriate applicant for QS.

managing partner, and not on behalf of Mr. Rockom. The Request for Application for Quota Shares [RFA] that was filed by Mr. McMillan was for SYB, not Mr. Rockom.[8]

We find that neither SYB nor Mr. McMillan were Mr. Rockom's agent for the purpose of applying for QS.

7. Is NMFS estopped from denying SYB the QS resulting from Mr. Rockom's 1988 landings?

On reconsideration, SYB argues that NMFS failed to comply with regulations in that it had full knowledge that SYB was claiming Mr. Rockom's QS, "yet it did not notify SYB that such claims as made on the application were 'improper' or 'incomplete,' permitting SYB to amend its application and thereby qualify for Mr. Rockom's shares." [Points and Authorities, at 14]

Because SYB was neither Rockom's agent nor his successor-in-interest, SYB has no legitimate claim to Mr. Rockom's QS. Therefore, SYB does not have standing to challenge any denial of QS to Mr. Rockom or any failure of NMFS to notify Mr. Rockom of his need to apply for QS as an individual. That right belongs only to Mr. Rockom. He has not applied for QS, nor is he a party to this Appeal or Reconsideration.

SYB's reliance on 50 C.F.R. § 679.4(a)(1)(ii) is misplaced. That section was not in effect at the time SYB's Application for QS was being processed.[9] And SYB's assertion that NMFS violated 50 C.F.R. § 679.40(a)(6)(iii) is incorrect. That section states: "An incomplete application will be returned to the applicant with specific kinds of information identified that are necessary to make it complete."

There is no evidence in the record from which we can find that SYB's Application for QS was "incomplete." A Quota Share Data Summary in the record indicates that RAM received an Application for QS from SYB on or about May 19, 1994, but the application is not in the record. Because no one in this Office has ever seen SYB's application, we cannot determine whether it was incomplete in any way. RAM's practice has been not to return any applications to applicants. Rather, if there is some deficiency in the application, RAM notifies the applicant and gives them an opportunity to correct the problem. RAM did inform SYB that it needed to submit additional documents to support its claim to QS. [*See*, Exhibit B, accompanying Points and Authorities] Thus, it appears that RAM did substantially comply with the regulatory requirements of 50 C.F.R. § 679.40(a)(6)(iii).

More to the point, however, RAM's denial of SYB's claim to credit for the additional landings in

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[8]*See*, Form B and Form D of SYB's RFA, which is signed by Mr. McMillan, on behalf of SYB.

[9]50 C.F.R. § 679.4(a)(1)(ii) took effect July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996).

question in this Reconsideration did not result from any "incompleteness" in SYB's application. The IAD clearly stated that the claim for the additional qualifying pounds was denied because of a lack of sufficient and timely evidence in support of its claim, which is governed by 50 C.F.R. § 679.40(a)(7). SYB was given the required 90 days to submit the evidence. Having reviewed the entire record, we do not find any evidence that SYB failed to qualify for Mr. Rockom's QS as a result of any lack of notice from NMFS or from a lack of opportunity to amend its application. SYB does not get credit for Mr. Rockom's landings because it has not established that it owned or leased the F/V BALTIC SEA at the time of those landings.

SYB further argues that, as a matter of equity, NMFS should be estopped from denying SYB credit for Mr. Rockom's landings simply because Mr. Rockom did not apply as an individual. Our response is two-fold: First, even if Mr. Rockom had applied as an individual, SYB would not be entitled to receive his QS. Second, to the extent that Mr. Rockom may have a claim that he was unfairly kept from applying for or receiving QS, that is his claim, not SYB's. SYB has no standing to assert Mr. Rockom's individual rights.

FINDINGS OF FACT

1. SYB's appeal was filed within the 60-day appeal filing period specified in the IAD.

2. The rule in Tiger, Inc. does not apply in this case.

3. There is no basis for changing our Findings of Fact 4 and 5 in the Decision.

4. Neither SYB nor Mr. McMillan were Mr. Rockom's agent for the purpose of applying for QS.

5. RAM's denial of SYB's claim to credit for the additional landings in question in this Reconsideration did not result from any "incompleteness" in SYB's application.

6. SYB does not get credit for Mr. Rockom's landings because it has not established that it owned or leased the F/V BALTIC SEA at the time of those landings.

CONCLUSIONS OF LAW

1. SYB's appeal was timely filed.

2. The Decision did not deny Mr. Rockom's right to transfer his partnership interest in QS in violation of the Magnuson-Stevens Act.

3. Mr. McMillan is not the successor-in-interest to Mr. Rockom for the purpose of applying for the

initial issuance of QS.

4. SYB has no standing to assert Mr. Rockom's individual rights.

DISPOSITION AND ORDER

Conclusion of Law No. 1 of the Decision in this Appeal is REVERSED. That portion of the IAD that relates to SYB's claim for Jim Rockom's 1988 landings is VACATED. RAM is ORDERED to allocate 75 percent of the qualifying pounds of sablefish from fish tickets G86-000572 and G86-000512 to Floyd J. Hutchens, Jr., Thomas A. Copeland, and Erling J. Carlson, allocating one-third of those pounds to each individual. Any resulting QS may be issued in the name of SYB Fisheries if RAM is so directed by the individuals.

This Decision on Reconsideration takes effect on September 23, 1998, unless by that date the Regional Administrator orders review of the Decision on Reconsideration.

Edward H. Hein
Chief Appeals Officer

Randall J. Moen
Appeals Officer