BARHAM v. UNITED STATES
301 F. Supp. 43; 69-1 USTC ¶9356;
23 AFTR 2d 1347 (D. Ga. 1969).

Editor's Summary

Key Topics

CAPITAL v. EXPENSE
• Cost of clearing unwanted oak trees and brush from around young, but well-established, pine trees is deductible expense

Facts

The taxpayer spent $2,249.00 in clearing unwanted oak trees and brush (with no commercial value) from around young but well established pine trees growing on his tree farm. He deducted this amount as an ordinary and necessary business expense. The government disallowed the deduction on the ground that such "brush control" activities were carried out in order to improve the pines and promote their long-term growth and enhancement. Thus, the government contended, such activities were capital improvements, the cost of which should be added to the basis of the pines (i.e., capitalized) under section 1016 and recovered through depletion when the timber is harvested.

District Court

HELD: FOR THE TAXPAYER. Section 162(a) of the Code allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." On the other hand, Section 263(a) disallows any deduction for amounts paid out "for permanent improvements or betterments made to increase the value of any property or estate." The issue here is which of these two sections is applicable to the expenditures made by the taxpayer. In Revenue Ruling 66-18, 1966-1 C.B. 59 [Reprinted at 3 Timber Tax Journal 100 (1967)], the Revenue Service ruled that in the case of Christmas trees, "expenditures for silvicultural practices such as weeding and noncommercial thinning...incurred after the trees become established...are in the nature of maintenance charges and are deductible as ordinary and necessary trade or business expense." The affidavit of forestry expert Gene Harris, the deposition of Harley Langdale, Jr., and the deposition of the taxpayer establish beyond dispute that expenditures for the eradication of oak trees and bushes and other undergrowth are common and economically beneficial expenditures in the tree farming business. Furthermore, the affidavit of Harris establishes beyond doubt that in the tree farming business the eradication of competing vegetation from around the small pines is a silvicultural maintenance procedure substantially identical with that described in Revenue Ruling 66-18. The fact that pine trees may be harvested as early as 12 years after planting, or as late as 30 years, is no basis for failure to apply Revenue Ruling 66-18 to this case. Consequently, such ruling controls and the taxpayer is entitled to

deduct the costs as ordinary and necessary business expenses. It should be noted, however, that the government has not contended, and it does not appear, that any of the pine trees around which brush control procedures were carried out were not well established and growing. If such were the case, then these expenditures would have to be capitalized as being in the nature of planting expenses under Reg. Section 1.661-3.

Case Text
[Timber Issue Only]

This issue likewise involves the calendar years 1965 and 1966 and arises by virtue of the plaintiff's claim that he is entitled to deduct costs in the total amount of $2249.00 incurred in clearing unwanted oak trees and brush (with no commercial value), from around young but well established pine trees growing on his tree farm. The government contends that such "brush control" activities were carried out in order to improve the pines and promote their long-term growth and enhancement and that such improvements are *permanent* in nature within the meaning of section 263(a) of the Internal Revenue Code of 1954 and are thus capital improvements the cost of which should be added to the basis of the pines (capitalized) under section 1016 and recovered through depletion when the timber is harvested. Both sides have moved for summary judgment on the basis of the affidavits and depositions on file, all of which were supplied by the taxpayer.

This court has determined that plaintiff's motion for summary judgment should be granted.

[Statutory Provisions]

The basic statutory provisions involved are sections 162(a) and 263(a). Section 162(a)allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." [1] Section 263(a) disallows any deduction for amounts paid out "for permanent improvements or betterments made to increase the value of any property or estate."

[Expert Testimony]

The affidavit of forestry expert Gene Harris (paragraphs 6 and 7), the deposition of Harley Langdale, Jr., President of The Langdale Company (pages 7, 8, 9, 11 and 12)and the deposition of the taxpayer, Ed G. Barham, (pages 18, 19 and 21) establish beyond dispute that expenditures for the eradication of oak trees and bushes and other undergrowth are common and economically beneficial expenditures in the tree farming business. There is thus no doubt that the taxpayer is entitled to take the expenditures for brush control or oak eradication into account. The dispute centers around the man-net in which the taxpayer is entitled to take the expenditures into account.

[Rev. Rul. 66-18]

In *Revenue Ruling* 66-18, C.B. 1966-1, 59 advice was requested concerning tax treatment of expenditures incurred in the cultivation of Christmas trees as a trade or business. The trees were

never harvested until they were more than 6 years old. Among the expenses considered in that ruling are "weeding" expenses described therein at page 60 as follows:

> "Weeding, or cleaning, is a silvicultural operation employed in young established stands to free small trees from weeds, vines, etc., and to provide better growing conditions by liberating crop trees from other trees of a similar age but of less desirable species. It is sometimes done, especially in plantations, by cultivating between the rows or sometimes by spraying with selective herbicides. Noncommercial thinning is the removal of excess trees in immature stands to give the remaining trees room to grow."

In discussing the proper tax treatment of these expenditures the Internal Revenue Service at page 61, said:

> "The expenditures for silvicultural practices such as weeding and noncommercial thinning are incurred after the trees become established and before they are ready to be cut. Such expenditures are in the nature of maintenance charges and are deductible as ordinary and necessary trade or business expenses."

In the present case the pine trees may be harvested as early as 12 years after planting, or they may not be harvested until 30 years after planting depending upon rate of growth and whether they are cut for pulpwood or saw logs This fact is no basis for failure to apply *Revenue Ruling* 66-18 to this case. The uncontradicted affidavit of the taxpayer's forestry expert, Gene Harris, establishes beyond doubt that in the tree farming business the eradication of competing vegetation from around the small pines is a silvicultural maintenance procedure substantially identical with that found in *Revenue Ruling* 66-18. That affidavit reads in part:

7.

This [Timber Stand Improvement] work is regarded in forestry circles as customary annual expense to tree farmers, and is both an ordinary as well as a necessary expense in tree farming. In forestry, this is virtually a necessary expense for the management, *maintenance* and conservation of a stand of pine trees.

8.

In conclusion, I can best illustrate what I have attempted to set forth in this affidavit by comparing this [Timber Stand Improvement] work which Mr. Barham has done as 'weeding trees' just like a row-crop farmer weeds his cotton, corn or peanuts. Some foresters call this 'brush control'" (emphasis added).

Revenue Ruling 66-18 therefore controls the disposition of the expense issue in this case.

[Capital Expenditures v. Expense]

The result reached here is indirectly supported by *Estate of Richard R. Wilbur* [CCH Dec.

27,080], 43 T.C, 322 (1964), which involved an election under Reg. 1.162-12 to treat as capital outlays certain farm expenditures made prior to reaching the productive state *where such expenditures would otherwise be considered as deductible expenses (Thompson and Folger Company v. Commissioner* [CCH Dec. 18,598], 17 T.C. 722 (1951)). The court at 323-24 noted that expenditures subsequent to the original planting of orchards for irrigation, *cultivation,* pruning, fertilizing, spraying, and *other care of the trees* are known as cultural practices expenditures which, although they bear a similarity to capital outlay, are normally deductible as ordinary and necessary expenses. See 4A Mertens, Law of Federal Income Taxation section 25.124 at 515. The uncontradicted affidavit of the taxpayer's forestry expert establishes beyond doubt that in the business of tree farming the eradication of scrub oaks, etc., is a cultural practice within the class of those practices enumerated in *Wilbur.*

The government contends that the brush control expenditures involved in the case at bar are not annual in nature and that the benefits flowing from these expenditures will thus extend several years into the future to be finally reaped when the trees are cut at ages varying from 12 to 30 years. However, the same may be said of some of the expenditures allowed by the Commissioner as deductions in *Revenue Ruling* 66-18. The government's argument merely points out the capital characteristics of these brush removal expenditures which in varying degrees are common to many cultural practices. It is for this reason that Reg. 1,162-12 provides for an option to capitalize the cultural practice expenditures. See *Estate of Wilbur, supra.*

In addition to the supporting authorities cited herein, see *Ransburg v. United States[67-2* USTC ¶9672], 281 F. Supp. 324 (S.D. Ind. 1967) which goes so far as to disagree with that portion of *Revenue Ruling* 66-18 (not discussed above) which held that pruning and shearing expenses should be capitalized.

It should also be noted that it has not been contended by the government and it does not appear that any of the pine trees around which brush control procedures were carried out were not well established and growing. If such were the case, then these expenditures would have to be capitalized as being in the nature of planting expenses under Reg. 1.661-3. See *Revenue Ruling* 66-18, C.B**.** 1966-1, 59, 61.

Since the pleadings, depositions and affidavit on file show that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment on the tree farm expense issue as a matter of law, plaintiff's motion for summary judgment on this issue is granted.

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1 if the taxpayer were not in the trade or business of tree farming but merely held the property for the production of income, then these same items of expense could be deducted under section 212.