

Belcher v. Patterson
305 F.2d 557, 62-2 USTC ¶ 9585,
10 AFTR2d 5067 (5th Cir. 1962) (denying reh'g)

[1954 Code Sec. 1221 and similar 1954 Code Sec. 117(a)(1)]

Capital gains sale of timber: Property held primarily for sale to customers. The gain from the sale of timber held by a partnership was not entitled to capital gain treatment since the partnership's principal activity was the sale of real estate and timber. The gain was ordinary income from the sale of property in the ordinary course of business Back reference: ¶ 4717.6972.

[1954 Code Sec. 7422]

Suit for refund: Determination of issue: Year of taxability on gain from realty transaction: The District Court's refusal to determine the year of taxability on gain realized from a foreclosure sale after determining that such was a taxable event was error. Taxpayers in another action pending before the Tax Court for the year 1953 are maintaining the transaction is taxable in 1954 or 1955 while the Commissioner has determined it is taxable in 1953. Determination of the year of taxability is necessary in order to determine the amount of refund claim due the taxpayers for the years 1954 and 1955, which were in issue before the District Court. If the gain is taxable in 1953 the Commissioner has no right of set-off for the years 1954 and 1955. If it is a taxable event in 1954 or 1955 the taxpayers are not entitled to as much of a refund as they claim. Back reference: ¶ 5781.344.

W. L. Longshore, United States Attorney, Birmingham, Ala., Louis F. Oberdorfer, & Assistant Attorney General, Lee A. Jackson, Sharon L. King, Department of Justice, Washington 25, D. C., for the District Director. Erie Pettus, Jr., Massey Bldg., Birmingham, Ala., for taxpayers.

Before Rives and Wisdom, Circuit Judges, and Carswell. District Judge.

Per Curiam: We have considered carefully all grounds asserted and find no cause for rehearing although, the petition does call attention to certain sentences of the Courts' opinion which require amendment for clarification and correction textually without impairment to its rationale or its holding.

On page 7 of the opinion [first full paragraph in the second column on page 84,237] the Court stated:

"By agreement of the parties only a few of the many factual issues presented were submitted to the jury, all others being left to the trial court for determination. Since the court found that the sales were not made of property held primarily for sale to customers in the ordinary course of trade or business, the subsequent interrogatories submitted to the jury distinguishing long

term gains from short term gains (sic) necessarily followed. We hold that the issue was properly raised and adjudicated below and is, therefore, properly before this Court."

The language of this paragraph is to read as follows:

"By agreement of the parties only a few of the factual issues presented were submitted to the jury, all others being left to the trial court for determination. Submitted to the jury were interrogatories requiring the jury to determine, for the various years in question, the fair market value of certain timber held for more than six months, and less than six months. The jury made no determination that the taxpayer held the timber primarily for sale to customers in the ordinary course of trade or business. The jury only made such findings relating to the Allendale and Crawford tracts and such findings are not relevant to the particular issue here. The jury was not asked to make such a finding with respect to the other timber. It was either assumed by the parties that the timber was not held primarily for sale to customers in the ordinary course of trade or business, or either or both of the parties completely failed to bring this issue to the Court's attention *at the time that the interrogatories were submitted to the jury*. In any event, we find that such a determination is indispensable to a final adjudication of this cause. Since the District Court later found that the timber was not held primarily for sale to customers in the ordinary course of trade or business, the findings of the jury with respect to fair market value have efficacy. Had the court found, even after the jury's verdict, that the timber was held primarily for sale to customers in the ordinary course of trade or business irrespective of the jury verdicts the taxpayers would not be entitled to capital gain. What the District Court here did was, in effect, submit the question of damages to the jury prior to determining or having determined itself the question of liability.

"We hold, therefore, that the issue was properly raised in the court below and that the District Court made a finding of fact on this very point at issue."

Secondly, the paragraph of the Courts' opinion on page 12 [third full paragraph in the second column on page 84,239] reading:

"The second question raised in the Director's appeal is whether the District Court erred in refusing to make a determination of the specific year in which the Allendale tract of !and became a taxable event to the partnership."

should read as follows:

"The second question raised in the Director's appeal is whether the District Court erred in refusing to make a determination of the specific year in which the Allendale mortgage foreclosure became a taxable event to the partnership."

The language of the latter paragraph is substituted for the former language of the opinion.

Of the other matters urged in the petition for rehearing we conclude that these are repetitious of the grounds previously submitted, considered and determined. The petition /or rehearing is, therefore, denied.