CASCADE LUMBER CO. v. SQUIRE
57-2 USTC ¶ 9841; 52 AFTR 1290 (W.D. Wash. 1957).

Editor's Summary

Key Topics

FAIR MARKET VALUE OF TIMBER
• Method of determining

Facts

The taxpayer properly elected the benefits of section 117(k)(1) with respect to timber cut by it in 1949 and 1950. However, on auditing the taxpayer's return for those years, the Internal Revenue Service determined that the timber cut had a substantially lower value than that claimed by the taxpayer on its return, resulting in a smaller capital gain element. The taxpayer, through claims for refund, contended for a value even higher than that claimed on the returns.

District Court

Held: For the taxpayer. Under section 117(k)(1), the taxpayer is entitled to an evaluation for the timber cut in the tax year based on the highest price, as of the first day of the tax year, that an informed and willing buyer would have paid to-an informed and willing seller; neither of them being obliged to buy or sell, and both having reasonable time to negotiate and arrive at a sale. The market value findings of the Commissioner of Internal Revenue are presumptively correct, but in this case, the evidence overwhelmingly supports the taxpayer. Both the weight of expert testimony and the evidence of comparable sales are in favor of the taxpayer and the values assigned by the taxpayer in its claims for refund are sustained.

Case Text
TRANSCRIPT OF COURT'S ORAL DECISION

BOLDT, District Judge: Gentlemen, it is not my business to consider the wisdom or fairness of Section l17(k)(1) of the Internal Revenue Code. My duty is to apply it without bias for or prejudice against the policy of the law. Actually, I have neither.

Presumably, Congress in adopting this provision acted, as it should, on a broad national basis keeping in mind the general public policy and the relative needs and equities of taxpayers owning timber as compared to those of taxpayers owning off and gas and other nature resources as well as securities and properties of that kind. It is not my privilege to be either generous or niggardly to either the taxpayer or the government. The fair market value of specific timber properties as of a given date ultimately and almost wholly is a question of fact, regardless of how difficult it may be to answer the question. Incidentally, it is no more difficult to answer in a tax case than precisely the same question constantly put to juries in condemnation cases. It is not nearly as

difficult to answer as many other questions that courts are required to answer every day.

The market Value findings of the Commissioner of Internal Revenue are presumptively correct. They establish, prima facie, proper valuation for the purposes of Section l17(k)(1). That presumption remains in effect unless and until it be overcome by a preponderance of evidence showing that the Commissioner's valuation finding in fact was not correct. The burden of proving an erroneous valuation by the Commissioner is on the taxpayer claiming it.
Under 28 U. S. C. A. 1346 the court has original jurisdiction of a controversy of this character. From that follows that if and when the Commissioner's finding be shown to be incorrect by a preponderance of the evidence offered to that effect, the office and force Of the presumption then disappears and thereupon it becomes the responsibility of the trier of the fact, in this instance the court, to determine what the fact concerning market value is as of the dates in question by weighing and evaluating the evidence that has been presented to the court on the subject. In other words, I must now decide the fact of market value on the dates in question, basing my finding solely on the evidence in the record and my appraisal thereof.

The law in the ease is welt established and extremely simple. I am to apply the very well known formula that fair market value is the price at which property would change hands in a hypothetical or suppositious transaction as of the dates in question between a willing buyer and a willing seller, neither being under compulsion to buy or sell, and both being reasonably well informed 'as to the relevant facts concerning the properties in question. That is a simple sounding, easy sentence to speak; unfortunately, the application of it often becomes extremely difficult. It is not so difficult, however, if every word, and the implication of every word, in the formula be weighed and considered in the light of the evidence. I have done that in this instance.

The trier of fact, whether judge or jury, is not bound to accept the opinions of market value expressed by any one or more or all of the experts. Such opinions will have weight only to the extent that the trier of fact finds the opinions sound and well taken. The experts may think this somewhat the situation of a fool charging in where angels fear to tread. Nevertheless, the law assumes that the trier of fact can better find the proper answer to disputed questions of fact from all the evidence submitted, including the opinion testimony, than can any or all of the experts even though they have a vastly greater knowledge and experience of the subject matter than judge or jury. Pragmatic considerations undoubtedly underlie that assumption.

In this particular case we have had seven well qualified experts express opinions of market value of the same properties on the same dates and come up with almost shocking variances in opinion. The average of the opinion figures given by plaintiff's experts is almost exactly twice the average of the per-thousand market value figures of defendant's experts. Well we might be mystified at this great variance of opinion between qualified experts if we had not heard the evidence as to how they reached their conclusions.

Without discussing the matter at great length, it is perfectly apparent on the fact of it that the government's witnesses have taken the Washington state timber and a few other sales and have assumed that the average of the [prices] on those sales was the market price, giving little, if any, consideration to the Indian Service sales. On the other hand, the plaintiff's experts have

disregarded the Washington state sales, or, at least, have given little, if any, weight to them, and have predicated their opinions almost exclusively on the several Indian Service sales. In effect, the question for me to decide is, which of those viewpoints is the more proper approach in finding the price that would have been arrived at in the hypothetical sales on January 1, 1949, and on January 1, 1950.

It is my opinion that under l17(k)(1) and the market value formula, prescribed thereby, that the taxpayer is entitled to an evaluation for the timber cut in the tax year based on the highest price as of the first day of the tax year that an informed and willing buyer would have paid to an informed and willing seller, neither of them being obliged to buy or sell and both having a reasonable time to negotiate and arrive at a sale. This implies that the hypothetical seller would have offered the property for sale either as a whole or in parcels and in other particulars on a basis most advantageous to the seller, limited only by acceptability of such basis to the hypothetical buyer. If the evidence be viewed in that light and ail of the evidence be taken into account, considering all sales and eliminating none, but evaluating each and looking into its background and circumstances, that is, giving weight to the state sales as well as the others, but applying the market value formula fully and fairly in the manner indicated, it is abundantly clear that the market value findings of the Commissioner are erroneous.

In my opinion the evidence overwhelmingly preponderates in favor of the plaintiff's contentions that the timber properties in question were worth in fair market value $16 per thousand average unit price for 1949 and $17 for 1950.

The matter has been considered from a variety of points of view. If approached simply on the weight of the testimony of the experts, without in any manner reflecting on or indicating any criticism of the government's experts, in my judgment the preponderance clearly lies in the evidence given by plaintiff's experts. To my mind that evidence has substantially more convincing power. On the other hand, if each of the sales offered in evidence as a comparable sale by either party be analyzed and weighed according to its circumstances, the same ultimate conclusion is reached.

I am fully convinced the whole evidence preponderates to show that if the Cascade Lumber Company had undertaken to negotiate a sale of this 35 million odd feet of timber on the first day of each of these years with a buyer that was willing and able, but not obliged, to buy, that the company could and would have sold the properties on those dates either by parcels or as a whole for figures not less than $16 a thousand in 1949 and $17 per thousand in 1950.

Accordingly, from any point of view, I feel obliged to grant judgment for the plaintiff in amounts to be computed on the basis indicated.

It is so ordered.

The above entitled action came duly and regularly on for trial before the undersigned Judge of the above entitled Court, sitting without a jury, on June 5, 1957, upon the plaintiff's complaint. Plaintiff appeared by its attorneys, Bryant R. Dunn and Ben J. Gantt, Jr. of Graham, Green &

Dunn of Seattle, Washington. Defendants appeared by Charles P. Moriarty, United States Attorney, Charles W. Billinghurst, Assistant United States Attorney, and Allen A. Bowden, Attorney, Department of Justice. Evidence on behalf of plaintiff and defendants was introduced. The Court, having considered all of the evidence, the brief fried by the plaintiff and the arguments of counsel, rendered its oral decision on June 7, 1957 finding that the plaintiff was entitled to a judgment against the defendants; and the Court being fully advised in the premises, hereby makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I. The Court has jurisdiction of the subject matter of this civil action under and by virtue of the Internal Revenue Laws of the United States, Title 28, U. S. Code, Section 1340. The plaintiff, Cascade Lumber Company, is a corporation organized and existing under the laws of the State of Washington engaged in the lumber business, having its principal place of business and its lumber manufacturing plants during the years 1949 and 1950 at Yakima, Washington. The defendant, Clark Squire, at all times hereinafter mentioned until October 30, 1952, was the duly appointed and acting Collector of Internal Revenue for the Collection District of Washington, and the defendant Squire is now a resident within the Western District of Washington, The defendant, William E. Frank, at all times hereinafter mentioned from and after October 30, 1952, was and now is the District Director of Internal Revenue for the Collection District of Washington, and the defendant Frank is now a resident within the Western District of Washington.

II. The oral memorandum Decision of the Court rendered in this cause on June 7, 1957, is by this reference incorporated into and made a part of these Findings of Fact to the same effect as if such decision were fully set forth herein. The findings of fact expressed by the Court in such Memorandum Decision, as well as the weight and value to be given to the evidence in the record of the trial, are hereby expressly adopted and incorporated herein by this reference as if fully set forth in this paragraph.

III. Plaintiff duly and timely filed a federal corporation income tax return for the calendar year 1949 with the defendant, Clark Squire. Said return reported a tax liability in the amount of $139,297.30, which was duly paid to defendant Squire in installments, the last payment of $34,297.30 being made on December 1, 1950.

IV. In its said return for the calendar year 1949 plaintiff applied Section l17(k)(1) of the Internal Revenue Code of 1939, as amended, with respect to the gain or loss upon the cutting of timber, having previously elected to apply said Section 117(k)(1) as to its previous taxable years. By reason of such election a long-term capital gain is to be recognized upon the cutting of timber (in the amounts and species hereinafter referred to in paragraph
XVII) by plaintiff during the year 1949 held by plaintiff in excess of six months prior to January 1, 1949, in the amount of the difference between the adjusted basis for depletion of said timber and the fair market value thereof as of January 1, 1949. The adjusted basis for depletion of plaintiff's said timber for the taxable year 1949 was $110,180.72.

V. On November 5, 1952, plaintiff executed and delivered to the Internal Revenue Service a

Consent Fixing the Period of Limitation on Form 872 extending the statute of limitations with respect to the collection of the plaintiff's 1949 income tax until June 30, 1954.

VI. On or about February 25, 1954, as a result of a review and audit of plaintiff's 1949 income tax return, defendant Frank proposed a deficiency in plaintiff's income tax return for the taxable year 1949, in the mount of $22,545.17. On July 6, 1954, the plaintiff paid to defendant Frank said sum of $22,545.17 as additional income tax assessed by defendant Frank for the year 1949, together with interest thereon in the sum of $5,786.08.

VII. On May 24, 1954, plaintiff filed with the defendant Frank a timely and proper amended claim for refund for taxes paid by plaintiff for the taxable year 1949 in the amount of $12,984, together with statutory interest thereon.

VIII. On May 31, 1955, plaintiff filed with defendant Frank a timely and proper second amended claim for refund for the year 1949 in the amount of $35,529.26, which second amended claim for refund included (a) the sum of $12,984.09 claimed in plaintiff's amended claim for refund and (b) the sum of $22,545.17, together with interest thereon in the amount of $5,786.08, together with interest as provided by law.

IX. More than six months' time has elapsed since the filing of plaintiff's amended claim for refund and the plaintiffs second amended claim for refund.

X. Plaintiff duly and timely filed a federal corporation income tax return for the calendar year 1950 with the defendant Squire. Said return reported a tax liability in the amount of $335,284.83, the amount of which tax was duly paid by plaintiff in installments, the last payment of $67.20 being made on December 21, 1951. The tax indicated by said return was paid by plaintiff to defendant Squire as said Collector of Internal Revenue.

XI. In its said return for the calendar year 1950, plaintiff applied Section l17(k)(1) of the Internal Revenue Code of 1939, as amended, with respect to the gain or loss upon the cutting of timber, having previously elected to apply said Section l17(k)(1) as to its previous taxable years. By reason of such election, a long term capital gain is to be recognized upon the cutting of timber (in the amounts and species hereinafter set forth in paragraph
XVIII) by plaintiff during the year 1950, held by plaintiff in excess of six months prior to January 1, 1950, in the amount of the difference between the adjusted basis for depletion of said timber and the fair market value thereof as of January 1, 1950. The adjusted basis for depletion of plaintiff's said timber for the taxable year 1950 was $49,920.42.

XII. On or about February 25, 1954, as a result of a review and audit of plaintiff's income tax returns for the taxable year 1950, defendant Frank proposed a deficiency in plaintiff's income tax for the taxable year 1950 in the sum of $40,663.52.

XIII. On March 11, 1954, plaintiff filed a timely and proper claim for refund for the taxable year 1950 in the amount of $15,610.91, Plus statutory interest, with the defendant Frank.

XIV. On July 6, 1954, plaintiff paid to defendant Frank the sum of $40,663.52 as additional income tax as assessed by defendant Frank against plaintiff for the taxable year 1950, together with interest thereon in the sum of $7,996.23.

XV. On May 31, 1955, plaintiff filed with the defendant Frank a timely and proper amended claim for refund for the year 1950, in the amount of $56,274.43 which claim included (a) the sum of $15,610.91 claimed as a refund in plaintiff's claim for refund and (b) the sum of $40,663.52, together with interest thereon in the amount of $7,996.23, together with interest as provided by law.

XVI. More than six months, time has elapsed since the filing of plaintiff's claim for refund for the taxable year 1950 and since the filing of plaintiff's amended claim for refund for the year 1950.

XVII. During the year 1949 plaintiff cut the following timber subject to Section l17(k)(1) of the Internal Revenue Code of 1939, as amended:

Specie	Volume in Board Feet
Ponderosa Pine	35,190,715
Douglas Fir	5,368,277
White Fir	98,100
Total	40,657,092

XVIII. During the 'year 1950 plaintiff cut the following timber subject to Section l17(k)(1) of the Internal Revenue Code of 1939, as amended:

Specie	Volume in Board Feet
Ponderosa Pine	36,612,542
Douglas Fir	8,224,548
White Fir	136,460
Total	44,973,550

XIX. That the parties, by and through their respective attorneys of record, have heretofore stipulated herein for the sole purpose of settling the issue in this controversy that the fair market value as of January 1, 1949 of the Douglas fir and white fir cut by the plaintiff in the year 1949 for the purpose of applying Section l17(k)(1) of the Internal Revenue Code of 1939, as amended, is as follows:

Specie	Volume in Bd. Ft.	Average Unit Fair Market Value per M Bd. Ft.	Total Value Fair Market
Douglas Fir	2,159,836	$4.50	$ 9,719.26
Douglas Fir	1,640,171	4.85	7,954.83
Douglas Fir	1,568,270	5.00	7,841.35
White Fir	98,100	5.00	490.50
Totals	5,466,377		$26,005.94

XX. That the parties, by and through their respective attorneys of record, have heretofore stipulated herein for the sole purpose of settling the issue in this controversy that the fair market value as of January 1, 1950 of the Douglas fir and white fir cut by the plaintiff in the year 1950 for the purpose of applying Section 117(k)(1) of the Internal Revenue Code of 1939, as amended, is as follows:

Specie	Volume in Bd. Ft.	Average Unit Fair Market Value per M Bd. Ft.	Total Value Fair Market
Douglas Fir	8,224,548	$5.00	$41,122.74
White Fir	136,460	$5.00	682.30
Totals	8,361,008		$41,805.04

XXI. The value used as the fair market value per thousand board feet of the ponderosa pine timber cut during the year 1949 for purposes of said Section l17(k)(1) in: (a) the plaintiff's 1949 Federal Income Tax Return, (b) defendant Frank's 90-day deficiency letter, and (c) the plaintiff's second amended claim for refund, are as follows:

Species Cut	Volume in Bd. Ft.	Per M Values in Tax Return	Per M Values Determined by Defendant Frank	Per M Value in Plaintiff's Second Amended Claim for Refund
Ponderosa Pine	16,345,330	$12.50	$7.72	$16.00
Ponderosa Pine	7,512.860	15.60	9.68	16.00
Ponderosa Pine	11,332.525	12.50	7.72	16.00
Total	35,190,715			

XXII. The values used as the fair market value per thousand board feet of the ponderosa pine timber cut during the year 1950 for the purposes of said Section l17(k)(1) in: (a) the plaintiff's 1950 Federal Income Tax Return, (b) defendant Frank's 90-day deficiency letter, and (c) the plaintiff's amended claim for refund for 1950, are as follows:

Species Cut	Volume in Bd. Ft.	Per M Values in Tax Return	Per M Values Determined by Defendant Frank	Per M Value in Plaintiff's Second Amended Claim for Refund
Ponderosa Pine	14,754,360	$12.50	$9.46	$17.00
Ponderosa Pine	13,554,370	12.50	8.68	17.00
Ponderosa Pine	8,303,612	12.50	9.46	17.00
Total	36,612,542			

XXIII. That the average unit fair market value per thousand board feet as of January 1, 1949 of the 35,190,715 board feet of Ponderosa pine timber cut by the plaintiff in the year 1949 and subject to Section l17(k)(1) of the Internal Revenue Code of 1939, as amended, is $16.00 per thousand and the total fair market value as of January 1, 1949 of the 35,190,715 board feet of

Ponderosa pine timber cut by the plaintiff in 1949 and subject to Section 117(k)(1) of the Internal Revenue Code of 1939, as amended, is $563,051.44.

XXIV. That the average unit fair market value per thousand board feet as of January 1, 1950 of the 36,612,542 board feet of Ponderosa pine timber cut by the plaintiff in the year 1950 and subject to Section l17(k)(1) of the Internal Revenue Code of 1939, as amended, is $17.00 per thousand and the total fair market value as of January 1, 1950 of the 36,612,542 board feet of Ponderosa pine timber cut by the plaintiff in 1950 and subject to Section l17(k)(1) of the Internal Revenue Code of 1939, as amended, is $622,413.21.

XXV. The Commissioner of Internal Revenue's determination of the fair market value as of January 1, 1949 of the 35,190,715 board feet of Ponderosa pine timber cut by the plaintiff in the year 1949 and subject to Section 117 (k)(1) of the Internal Revenue Code of 1939, as amended, as set forth in Finding of Fact XXI is erroneous.

XXVI. The Commissioner of Internal Revenue's determination of the fair market value as of January 1, I950 of the 36,612,542 board feet of Ponderosa pine timber cut by the plaintiff in the year 1950 and subject to Section l17(k)(1) of the Internal Revenue Code of 1939, as amended, as set forth in Finding of Fact XXII is erroneous.

XXVII. Probable cause existed for the defendant Clark Squire in collecting the Federal Income Taxes set forth in Findings Nos., III and X and in so doing said defendant acted under the direction of the Secretary of the Treasury or other proper Government officer.

XXVIII. Probable cause existed for the defendant William E. Frank in collecting the Federal Income Taxes set forth in Findings Nos. VI and XIV and in so doing said defendant acted under the direction of the Secretary of the Treasury or other proper Government officer.

From the foregoing Findings of Fact, the Court does hereby make the following:

CONCLUSIONS OF LAW

I. This Court has jurisdiction of the above entitled cause, the parties hereto and the subject matter thereof.

II. The plaintiff sustained its burden of proof by a preponderance of the evidence, that the average unit fair market value per thousand board feet as of January 1, 1949 of the 35,190,715 bd. ft. of ponderosa pine timber cut by the plaintiff in the year 1949 and subject to Section i 17(k)(1) of the Internal Revenue Code of 1939, as amended, is $16.00 per thousand board feet.

III. The plaintiff sustained its burden of proof by the preponderance of the evidence that the average unit fair market value per thousand board feet as of January 1, 1950 of the 36,612,542 bd. ft. of ponderosa pine timber cut by the plaintiff in the year 1950 and subject to Section 117 (k)(1) of the Internal Revenue Code of 1939, as amended, is $17.00 per thousand bd. ft.

IV. All conclusions of law expressed by the Court in its oral Memorandum Decision rendered in this cause on June 7, 1957 are hereby expressly adopted and incorporated herein by this reference as if fully set forth in this paragraph.

V. The plaintiff is entitled to a judgment on its First Cause of Action against defendant Clark Squire in the sum of $16,306.99, together with interest thereon at the rate of 6 per cent per annum, from December 4, 1950, until paid, together with plaintiff's costs and disbursements herein to be taxed.

VI. Plaintiff is entitled to a judgment on its Second Cause of Action against defendant Clark Squire in the sum of $7,186.36, together with interest thereon at the rate of 6 per cent per annum, from December 13, 1951, and to a judgment against said defendant Clark Squire in the sum of $67.20, together with interest thereon at the rate of 6 per cent per annum from December 21, 1951, until paid.

VII. Plaintiff is entitled to a judgment on its First Cause of Action against defendant William E. Frank in 'the sum of $28,331.25, together with interest thereon at the rate of 6 per cent per annum from July 6, 1954, until paid, together with plaintiff's costs and disbursements herein to be taxed.

VIII. Plaintiff is entitled to judgment on its Second Cause of Action against defendant William E. Frank in the sum of $48,659.75, together with interest thereon at the rate of 6 per cent per annum from July 6, 1954, until paid.

IX. Defendant Clark Squire is entitled to the issuance by this Court of a Certificate of Probable Cause pursuant to 28 U. S. Code, Section 2006.

X. Defendant William E. Frank is entitled to the issuance by this Court of a Certificate of Probable Cause pursuant to 28 U. S. Code, Section 2006.