

CLEMENS v. UNITED STATES
439 F.2d 705 (9th Cir. 1971); 71-1 USTC ¶9258
27 AFTR 2d 834
***Affirming*, 295 F. Supp. 1339 (D. Ore. 1968)**

Editor's Summary

Key Topics

CUTTING AS A SALE OR EXCHANGE

- Holding period
- Date of acquiring ownership/contract right to cut

Facts

On June 18 and June 28, 1963, the taxpayers submitted bids on timber being offered for sale at auction by the Bureau of Land Management. Government regulations provided that bids would be received, either sealed, in writing, or orally, with the contract awarded to the highest bidder unless all bids were rejected or the bidder was not responsible or qualified. The taxpayers were the only bidders to qualify on the sales, and upon the expiration of the time to receive additional bids, the taxpayers were declared to be the highest bidders. The taxpayers submitted a written bid deposit to the Bureau of Land Management. On July 5 and July 16, 1963, the taxpayers were notified that their bids on the timber in question had been accepted. They then executed the standard timber sales contract and performance bond. The taxpayers cut the timber during 1964 and elected to treat their cutting as a sale or exchange under Section 631(a) ¹ which requires a six month holding period before the beginning of the taxable year. The taxpayers contended that they became the owners of the timber, with a contract right to cut, when their bids were submitted and when they were declared the high bidders on June 16 and June 28. The Government argued that the taxpayers did not acquire title or a contract right to cut until the bids were accepted, admittedly after July 1st and less than six months before the beginning of the taxable year.

District Court*

HELD: FOR THE GOVERNMENT. The District Court rejected the taxpayers' argument that they became the owners of the timber on June 18 and June 28, 1963, when they were declared to be the highest bidders. The general rule that in auction sales a bid is regarded as an offer to contract which is accepted "by the fall of the hammer" is inapplicable since the timber auction was conducted under government regulations which indicated that the "fall of the hammer" did not complete the contract. The instructions to bidders made clear that there was no contract until the bids were accepted by the proper authority. Since the taxpayers did not receive formal notification that their bids were accepted until after July 1st, they did not meet the six month holding period requirement of Section 631 (a).

Court of Appeals

HELD: FOR THE GOVERNMENT. The Court of Appeals, in a very brief per curiam opinion, affirmed the District Court's opinion.. The Court of Appeals noted that the bidding notice gave the government the right to reject bids "when it is in [its] interest to do so."

Case Text

PER CURIAM: The judgment of the district court [68-2 USTC ¶ 9620] against the taxpayer is affirmed.

Pursuant to authorization under a government contract, Clemens cut timber in 1964 and sold it. He and his wife on their joint return seek long term capital gains treatment under IRC §631(a). The question is did Clemens hold the timber for a full six months before January 1, 1964. If one takes the bid date in June, 1963, he did hold it six months. If the formal acceptance by the Bureau of Land Management in July, 1963, is the date, he did not.

The bidding notice gave the government the fight to reject bids "when it is in [its] interest to do so."

Much as we would like to, we cannot say that Clemens had a vested interest in the timber prior to July 1, 1963.

The trouble is the government almost always has a right to retreat until it finally signs up. See *Ferry v. Udall*, 9 Cir., 336 F.2d 706.

1 Section 631. GAIN OR LOSS IN THE CASE OF TIMBER, COAL, OR DOMESTIC IRON ORE.

(e) Election To Consider Cutting As Sale Or Exchange.--If the taxpayer so elects on his return for a taxable year, the cutting of timber (for sale or for use in the taxpayer's trade or business) during such year by the taxpayer who owns, or has a contract right to cut, such timber (providing he has owned such timber or has held such contract right for a period of more then 6 months before the beginning of such year) shall be considered as a sale or exchange of such timber cut during such year. If such election has been made, gain or loss to the taxpayer shall be recognized in an amount equal to the difference between the fair market value of such timber, and the adjusted basis for depletion of such timber in the hands of the taxpayer. Such fair market value shall be the fair market value as of the first day of the taxable year in which such timber is cut, and shall thereafter be considered as the cost of such cut timber to the taxpayer for all purposes for which such cost is a necessary factor. If a taxpayer makes an election under this subsection, such election shall apply with respect to ail timber which is owned by the taxpayer or which the taxpayer has a contract right to cut and shall be binding on the taxpayer for the taxable year for which the election is made

and for all subsequent years, unless the Secretary or his delegate, on showing of undue hardship, permits the taxpayer to revoke his election; such revocation, however, shall preclude any further elections under this subsection except with the consent of the Secretary or his delegate. For purposes of this subsection and subsection (b), the term "timber" includes evergreen trees which are more than 6 years old at the time severed from the roots and are sold for ornamental purposes.

* The opinion of the District Court and editor's summary of the District Court decision appears at 5 Timber Tax Journal 139 (1969).