

MHC Properties v. United States
96-2 USTC ¶ 50,347 (DC La.)

[Code Sec. 611]

Depletion: Burden of proof: Timber. Age: Merchantability. - For depletion purposes, the unrebutted testimony of lumber companies' expert witnesses established that pine timber on the taxpayers' land became merchantable at ten years of age. Back reference: ¶ 24,529.540.

FINDINGS OF FACT AND CONCLUSIONS OF LA W

LITTLE, JR., District Judge: Plaintiffs Roy O, Martin Lumber Company, Inc., ("ROM") and MHC Properties, Inc. ("MHC") filed this tax refund suit to recover taxes assessed for the 1989 and 1990 tax years. Prior to trial the government and plaintiffs agreed to settle almost all legal and factual issues. The only issues remaining after the settlement were (1) whether plaintiffs' accounting methods regarding, the transfer of pine reforestation and plantation costs complied with applicable regulations and (2) when should the pine reforestation and plantation costs be transferred into pine timber depletion accounts.

On the morning of trial plaintiffs conceded that their accounting methods regarding reforestation and plantation costs were inconsistent with the applicable regulations¹ and agreed to employ the accounting method proposed by the government which requires that premerchantable pine timber costs be moved from the nondepletable accounts into the depletable pulpwood timber accounts when the pine becomes merchantable. Thus, the only issue remaining for trial was the factual determination of the age at which pine timber becomes merchantable on the plaintiffs' lands.

It is well settled that in tax litigation the taxpayer bears the burden of going forward with evidence and bears the initial burden of persuasion at trial. *Helvering v. Taylor* [35-1 USTC ~9044], 293 U.S. 507, 515 (1935); *Portillo v. Commissioner* [91-2 USTC ¶ 50,304], 932 F.2d 1128, 1133 (5th Cir. 1991). In refund suits, in particular, "the taxpayer bears the burden of proving [by a preponderance of the evidence] both the excessiveness of the assessment and the correct amount of any refund to which he is entitled." *Id.*

In this case, plaintiffs presented testimony of (i) Lewis Peters, an expert consulting forester, (2) three of ROM's own foresters (William F. Weiger, James "Freddie" Monroe and William Joseph Hendrixson), and (3) Norman E. Welch, the regional purchasing manager of a major: pine pulpwood purchaser (International Paper). These witnesses' unrebutted testimony generally established that pine timber is merchantable as pulpwood at mills in the vicinity of plaintiffs' timberlands at a size of five inches in diameter at breast height ("dbh"). ROM's own foresters further testified that pine timber on their lands reaches this 5" dbh size at ten years and that ROM thus examines its pine timber for thinning potential at this age and also expects to make its first thinning at this age.

The government presented no witnesses to rebut these statements and elicited no testimony from plaintiffs' foresters or from the expert witness, Mr. Peters, to contradict these statements. Indeed, the only evidence the government offers in support of its contention that the age of merchantability for plaintiffs' pine timber is between twelve and fourteen years are two documents ROM used to compile inventories of the plantations purchased from Texaco in 1989 and 1990-- documents. moreover, that were created and utilized under an accounting method which the government has attacked and which the plaintiffs have agreed to discontinue. Needless to say, these documents provide little, if any, support for the government's position.

Having reviewed all the testimony and evidence presented at trial, the court finds that plaintiffs have clearly established by a preponderance of the evidence that the pine timber on their lands is merchantable at ten years of age.

Accordingly, IT IS ORDERED that the parties prepare a final judgment consistent with this opinion and the stipulations presented at trial.

¹ See Treas. Reg. § 1.611-3(d) & (a)(3), *codified at* 26 C.F.R. § 1.611-3(d) & (a)(3).