

WACKER v. COMMISSIONER
40 T.C.M. (CCH) 1009 (1980)
1980 P-H T.C. Memo ¶ 80,324
(Timber issue only)

Editor's Summary

Key Topics

CAPITAL v. EXPENSE

· Surveying

Facts

Timberland was surveyed to remark obliterated boundary lines. The taxpayer contended that the survey was necessary to prevent loss of land through adverse possession or fines from cutting timber on adjacent tracts. The land was used for cutting timber. The Commissioner of Internal Revenue contended that the surveying cost was not deductible as an ordinary and necessary business expense under Section 162, but was a capital expenditure under Section 263(a).

Tax Court

HELD: For the Government. The cost of defending or perfecting title is a capital expenditure. Taxpayer failed to prove his lands were threatened by adverse possession or that he was under threat of fine. The survey did little more than establish definite boundaries for whatever benefit might result during subsequent years. [The case does not state at what point in time the survey was made. Depending upon whether the survey was made at acquisition, during management, preparatory to cutting, etc, different tax consequences may ensue--TTJ.]

Case Text

Memorandum Opinion

Scott, Judge: Respondent determined deficiencies in the joint Federal income tax of Orville C. Wacker and Pearl Wacker in the amounts of \$119,914.64 and \$42 for calendar years 1974 and 1975, respectively.

Some of the issues raised by the pleadings have been disposed of by agreement of the parties, leaving for decision:

* * * * *

(6) whether the amount of \$5,964 paid by petitioners in 1974 for a property survey qualifies for an ordinary and necessary business expense deduction, or whether petitioners must capitalize that expenditure.

All of the facts have been stipulated and are found accordingly.

Orville C. Wacker and Pearl Wacker, husband and wife, who resided in Carmichael, California, at

the time of filing their petition in this case, timely filed their joint Federal income tax returns for calendar years 1974 and 1975 with the Internal Revenue Service Center, Fresno, California. For calendar year 1974, petitioners filed their amended joint Federal income tax return with the Internal Revenue Service Center, Fresno, California.

The final issue for decision is whether petitioners are entitled to deduct the \$5,964 survey cost in 1974 as an ordinary and necessary business expense under section 162 or whether that amount constitutes a capital expenditure which is nondeductible under the provisions of section 263(a). As we stated in *Louisiana Land and Exploration Co. v. Commissioner* [Dec. 15,308], 7 T. C. 507, 515 (1946), affd. [47-1 uste ¶ 9266] 161 F. 2d 842 (5th Cir. 1947)--

The distinction between capital expenditures and business expenses is generally made by looking to the extent and permanency of the benefit derived from the outlay. The benefit from business expenses is generally realized and exhausted within a year and the expense is therefore said to be of a recurring nature. * * * On the other hand, an item of expense is of a capital nature where it results in the taxpayer's acquisition or retention of a capital asset, or in the improvement or development of a capital asset in such a way that the benefit of the expenditure is enjoyed over a comparatively lengthy period of business operation. * * * A capital expenditure is thus nonrecurring, even though many similar expenditures are made by the taxpayer.

Petitioners contend that the survey expenditure is deductible because "it was necessary to remark [sic] obliterated boundaries and prevent loss of land through adverse possession or fines from cutting timber on U. S. forestry land. "Petitioners rely on our decision in *Brier Hill Collieries v. Commissioner* [Dec. 4080], 12 B. T. A. 500 (1928), affd. in part [5 uste ¶ 1433] 50 F. 2d 777 (6th Cir. 1931).⁷ There, the taxpayer owned wooded mountainous land. The property had been surveyed and the boundaries marked sometime prior to 1918, but the markings had been obliterated. In 1918 and 1919 the taxpayer hired a surveyor to resurvey the land and demark the boundaries in an effort to prevent the loss of land by adverse possession. We held that the expenditures were ordinary and necessary expenses incurred for the taxpayer's protection of its property against adverse possession.

Here respondent submits that petitioner is not entitled to an ordinary and necessary business expense deduction because petitioners have failed to produce evidence that "would indicate that his lands were either threatened by adverse possession or that he was under threat of fine from cutting timber on government land. "The record indicates that the land was used for cutting timber, including Christmas trees. While petitioners assert the possibility of a loss of land through adverse possession or fines, they have failed to prove that the survey expenses were incurred for any reason other than to establish definite boundaries for whatever benefit might result therefrom during subsequent years. The cost of defending or perfecting a property's title is a capital expenditure and is not deductible under section 162 or section 212. See section 1.263(a)-2(c), Income Tax Regs. The evidence in the record fails to establish that the survey expenditures were recurring in nature and resulted in a benefit generally realized and exhausted within one year, In our view, the survey costs were incurred to perfect the property's title and therefore constitute a capital expenditure within the meaning of section 263.

Because of the agreement of the parties with respect to a loss carryback deduction in 1974,

Decision will be entered under Rule 155.

7 Petitioners also cite *Churchill Farms, Inc. v. Commissioner* [Dec. 29,748(M)], T. C. M. 1969-192, which briefly discusses *Brier Hill Collieries, supra*.