

ELLISON v. FRANK
Memorandum of Law, 56-2 USTC ¶ 9760 (W.D. Wash. 1956);
Findings of Fact and Conclusions of Law, 562 USTC ¶ 9763;
51 AFTR 1423 (W.D. Wash. 1956).
***Aff'd* 245 F.2d 837; 57-2 USTC ¶ 9748;**
51 AFTR 807 (9th Cir. 1957).

[The opinions which follow are those of the U.S. District Court. The complete text of the Court of Appeals' opinion and the Editor's Summary of the case are at p. 786.]

Case Text
MEMORANDUM DECISION

BOLDT, District Judge: Well gentlemen, in so far as any issue of fact is concerned, if there be one in the case, and irrespective of the parol evidence rule or any other so-called technical rule pertaining either to the admission of evidence or the interpretation of contracts, I can only say that I have not the slightest doubt in my mind but that at the time this contract, Exhibit 3, was entered into it meant to the parties exactly what it says.

The contract was not lightly entered into. It was not some informal thing that parties unversed in law might draft, some exchange of letters that would in law constitute a contract, but which were drafted by persons unlearned in the law. It was only drafted after very full exploration of the various ways in which those logs might be gotten out of that Green Fork tract, and after having explored first the idea of putting the title to the timber or the cut logs in Mr. Ellison and taking back some form of mortgage security or otherwise, that was abandoned for various reasons. And because of the situation at the time the only way that the Northwest Door was ready and willing to go forward with this was on the terms that are contained in this contract and essentially that the contract provides in the most unmistakable terms, reiterated and emphatically stated, that under no circumstances whatever is Ellison to become the owner of the logs or to have any right, title or interest therein.

I am now quoting from paragraph 5 of the contract. All that he was to be entitled to was compensation for his services in doing the logging, getting the logs out of there. It would just be a part of what I believe to be the true facts of the case. As well as written documents solemnly entered into, drafted by competent, able, experienced counsel. When this agreement of contract, Exhibit 3, was drafted, it was drafted not by some naive person unfamiliar with the meaning of the words he was drafting, but a person who knew full well exactly what the words meant and what they were intended to convey, and I have no doubt in my mind whatsoever that it was intended by both parties that it be so. Consequently, it is my judgment that under no conceivable circumstances did Ellison acquire title either legal or equitable or otherwise in the timber or the logs. If so, then 117(k) (2) has no application because 117(k)(2) leads off with the words, "In case of disposal of the timber by the owner thereof under any form of contract--" and so forth and so forth and so forth. Ellison was under no conceivable circumstances the owner of this timber either as it stood before it was cut, or after it was cut or after it was on the trucks or down at the pond or any other place.

In my judgment neither subsection 1 nor subsection 2 are met by what seems to me to be the just unquestioned facts in the case. So far as any fact finding is concerned, I am bound in good conscience to try, much as I'd like to give this tax relief to Mr. Ellison, particularly in view of the fact that Northwest Door didn't claim it, but I am not here to decide cases on any such basis as that. I have taken an oath to decide them according to my conscience and judgment, however good or bad that may be. That is the way I have got to decide them.

In my judgment Mr. Ellison has not qualified for the relief he seeks, regrettable as that may be. That is the judgment of the Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BOLDT, District Judge: This cause came on for trial before the Court at Tacoma, Washington, on March 15 and 16, 1956. Plaintiffs were represented by John L. Flynn and Hugh B. Collins, Esqs., and defendant was represented by Charles P. Moriarty, Esq., United States Attorney, Guy A. B. Dovell, Esq., Assistant United States Attorney, and Kurt W. Melchior and Theodore D. Taubeneck, Esqs., Attorneys, Department of Justice, Washington 25, D. C.

The Court, having considered the evidence and exhibits adduced by the parties and the arguments of counsel, being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the facts herein and states its Conclusions of Law, as follows:

FINDINGS OF FACT

1. Plaintiffs were, at the times material hereto, husband and wife, residing in the State of Washington. As such they filed their joint income tax return for the year 1949 with the Collector of Internal Revenue for the District of Washington and paid the tax shown thereon to be due.
2. Thereafter the Commissioner of Internal Revenue caused an examination of this return to be made, and upon audit assessed a deficiency in income taxes for the year 1949 against plaintiffs in the amount of \$11,839.10, with interest, all of which plaintiffs paid to the defendant on or about December 10, 1953. Defendant then was and now is the District Director of Internal Revenue for the District of Washington, with residence in this judicial District.
3. Thereafter plaintiffs filed a timely claim for refund of said deficiency payment, and more than six months later they commenced this action to recover such taxes.
4. In 1947, the United States, through the Forest Service of the Department of Agriculture, owned the fee to certain timber lands on the Green Fork River in what is now the Gifford Pinchot National Forest, in the State of Washington, The Forest Service was then in the process of offering to sell the timber on said tract to the public under a pay-as-cut contract, providing for payment for the timber as it was cut.
5. Theodore Franklin Wall, an employee of Northwest Door Company, in 1947 had the duty of

procuring logs for that company. Plaintiff Ellison was a logger. Wall heard of the probable sale of the Green Fork timber by the Forest Service; he also knew of Ellison's interest in logging operations. Wall therefore induced Ellison to inspect the Green Forks tract with him. Wall's purpose was to obtain a supply of logs for his employer, Northwest Door Company. As a result of these preliminaries, Northwest Door Company became interested in obtaining the logs off the Green Forks timber, and Ellison in conducting the logging operations.

6. The Forest Service awarded the Green Forks timber and the contract right to cut that timber to Northwest Door Company by Contract Form 202, No. A6 fs-16060. This contract by its terms provided that Northwest Door would purchase, cut and pay for the timber from the Green Forks tract. Title to the timber remained in the United States until after the timber had been felled, sealed, paid for, etc., and then passed to Northwest Door Company. Northwest Door Company was financially liable to the United States for performance of the contract.

7. Ellison is not mentioned in Contract A6 fs-16060. Neither title to the timber nor the contract right to cut the timber ever lay in Ellison.

8. Northwest Door Company was interested in the Green Forks timber for its plywood operations rather than for any profit from the logging. Ellison became a contract logger for Northwest Door Company on the Green Forks tract, and received large advances of operating funds from Northwest Door Company in that connection. Northwest Door Company and Ellison entered into a contract, drafted by an able and experienced attorney, which provided in part as follows:

- (a) Northwest Door Company was described as the Owner of the timber;
- (b) Ellison was described as a logger;
- (c) Ellison agreed to "fail, buck, yard, load and transport to navigable water * * * all of the timber" on the Green Forks tract;
- (d) Ellison agreed to assume certain of the costs of the logging;
- (e) Ellison undertook to perform all conditions required of Northwest Door Company under the Forest Service contract, and to keep that company harmless from ail claims in connection with his logging operations;
- (f) All logs, timber and forest products on the Green Forks tract were to remain the property of Northwest Door Company and another company, and Ellison was to have no right, title or interest therein other than the right to receive his compensation under the contract;
- (g) Ellison was to be paid the Columbia River market price of the logs for his logging services, in full payment and discharge of Northwest's obligations to him;
- (h) Northwest Door Company was to advance reasonable amounts of operating capital to Ellison, for which it could withhold portions of the sums due Ellison under (g) above.

9. The foregoing contract was drafted after a full exploration of the situation by all concerned, and reflected the intentions of the parties precisely. Its provisions are clear and unambiguous. If the contract be subject to parol construction, then the evidence fully shows that the contract meant what it said.

10. Ellison had no right, title or interest in the timber at any time. He was to perform the service

of logging the timber for Northwest Door Company and was to be paid for his services only. The payment was to be measured by the market value of the logs. Title to the timber lay at all pertinent times only in the United States and in Northwest Door Company, but not in Ellison.

11. Taxpayers bore the economic risk of the logging operations on the Green Forks tract, but in the absence of any right, title or interest in the timber on their part that fact is not relevant. Neither is it material that Northwest Door Company, which was not interested in economic gain on the logging operation and wanted only the loss at the Columbia River market price, had no gain or loss on the logging operation and therefore did not claim any capital gain thereon.

12. Ellison's logging contract had extended over a period in excess of six months when he received payments for logging services from the Northwest Door Company in 1949, and plaintiffs reported the excess of these payments over their costs on their 1949 income tax return as capital gain from the cutting of timber they owned or had a contract right to cut, for use in their own business or for sale. The Commissioner of Internal Revenue held that Ellison did not own the timber, nor was he buying it under a contract right to cut the timber, nor did he cut it, for sale or for use in his own business, and that therefore the proceeds from his logging operations were taxable to the taxpayers as ordinary income. It is this determination which gave rise to the present dispute.

13. The present taxpayers did not at any time own or have a contract right to cut the Green Forks timber, nor did they cut said timber for use in their own business or for resale. The Commissioner correctly determined that the gain from Ellison's logging operations was taxable to the taxpayers as ordinary income. Taxpayers did not overpay any tax and are entitled to no recovery.

14. During the calendar years 1947 through 1949, inclusive, Robert F. Ellison was self-employed and was exclusively engaged as a sole proprietor in the business of producing, transporting, and marketing logs and other raw products of the forest.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action.
2. A logger who has or obtains no right, title or interest in the timber which he cuts may not elect to report the gain from his logging operations as capital gain under Section 117(k)(1) or 117(k)(2) of the Internal Revenue Code of 1939, 26 U. S. C. Sec. 117(1952 ed.). *Carlen v. Commissioner*, 220 Fed. (2d) 338 (C. A. 9th). In that connection it is not material whether the contract logger assumes all or any part of the economic risk of the logging operation. A taxpayer must have an interest in the nature of title in the timber in order to avail himself of the election provided by that statute.
3. The defendant acted properly and lawfully in collecting the taxes complained of herein.
4. Plaintiffs are not entitled to any recovery from the defendant. The defendant is entitled to a judgment of dismissal of this action with prejudice.