

Opinion No. 37-1736

August 14, 1937

BY: FRANK H. PATTON, Attorney General

TO: Bureau of Revenue Severance Tax Division Santa Fe, New Mexico. Attention: R. B. Waggoman, Director

{*150} We have your letter of August 13th requesting an opinion in regard to the taxability of timber severed from Government lands by others than the Government, and which is severed under contract to buy all the timber on certain Government lands. You state that payments for such timber are made after severance and after the same is measured by the Government, and that for that reason it is claimed that the {*151} property is owned by the Government and not subject to tax.

It is my opinion that the severance of such timber by others than the Government is subject to the severance tax provided by Chapter 103 of the Laws of 1937. This law is a reenactment, with amendments, of Chapter 72 of the Laws of 1933. That statute was construed in case of Flynn, Welch & Yates vs. State Tax Commission, 38 N.M. 131, 28 P. (2d) 889, and was held to be an excise tax, in the nature of a privilege tax. The Court said in that case:

"The tax is tied absolutely to the act or privilege of producing or severing. **It is not imposed because** of ownership."

It is presumed that it was the intention of the legislature, by employing the same language as that construed by the Supreme Court in the above case, to enact an excise tax in the nature of a privilege tax, for the privilege of severing timber and other minerals, measured by the value of the things severed.

True by Section 1 of the act it is provided that "such tax shall be paid by the owner or proportionately by the owners thereof at the time of severance"; but Section 22 also provides:

"The term 'owner' when used in connection with the severing of any of the natural resource products covered by this act under any lease or contract with the state or United States, shall include any person having the right to sever such products."

It would seem to me that the moment the timber is severed there is acquired under the contract with the Government an equity in the timber itself, and that it can not be said the timber then belongs to the Government and is exempt from taxation. Regardless of that, however, it is clear from the above that the severance by others than the Government would be subject to taxation, regardless of the ownership of the timber.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.