FILED
United States Court of Appeals
Tenth Circuit

JAN 23 1990

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALAN R. RACKSTRAW and MARCIA Y. RACKSTRAW, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	)	No. 89-9009 (Tax Court No. 176-88)

ORDER AND JUDGMENT*

Submitted on the Briefs:

Before **LOGAN**, **MOORE**, and **ANDERSON**, Circuit Judges.

This is an appeal from a tax court determination that an addition to the home of petitioners, Mr. and Mrs. Rackstraw, is not renewable energy source property which would entitle

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

petitioners to tax credits for tax years 1982 and 1983. Our review of the issues and the record leads us to the conclusion the tax court correctly decided the issues, and we therefore affirm its decision.

The main contention of the petitioners centers on their belief the structure is an energy source property because they use it only for that purpose. While the record supports petitioners' claim that their use for other purposes was only incidental, unfortunately for them the test is not based upon actual use. The tax court's analysis leading to the conclusion that the potential use of the property governs whether it meets the definition of a renewable energy source property is correct. For the reasons set forth in its memorandum of fact and opinion, the judgment of the tax court is **AFFIRMED.** The mandate shall issue forthwith.

Entered for the Court

John P. Moore
Circuit Judge