

PUBLISH

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PEPCOL MANUFACTURING CO.,)	
)	
Petitioner-Appellee,)	No. 92-9008
)	Tax Court No. 38290-86
v.)	
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent-Appellant.)	

AMENDED ORDER

Filed: May 19, 1994

Before SEYMOUR, Chief Judge, GOODWIN* and McKAY, Circuit Judges.

*The Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Because amendments to this court's opinion filed December 29, 1993, were omitted from the March 31, 1994, unpublished order denying rehearing and rehearing in banc, the court, upon its own motion, recalls the mandate and amends that order to read as follows:

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the court's opinion is amended as follows:

1. The third and fourth sentence of the fourth paragraph of the opinion (page 2, lines 21-25) are deleted, and the following substitute sentence is inserted:

Although Pepcol pays the beef packers for the bones, the parties stipulated that the bones are a waste product.

2. The following paragraph is inserted as an additional paragraph after the second full paragraph at page 6:

In addition, the policy goals that underlie I.R.C. § 48(1)(6)(A) support the Commissioner's position. The overriding purpose of the energy tax credit was to encourage investment in property that reduced the demand for foreign energy sources. See S. R. Rep. No. 95-529, 95th Cong., 1st Sess. 3, 80-81 (1978-3 C.B. (Vol. 2) 205, 272-73). The purpose of the statute was to provide an incentive to save energy, not to deal with the solid waste disposal problem. Although we agree that reducing the burden on our nation's landfills by reducing solid waste is a laudatory goal, it was not the purpose of this energy tax credit.

3. The following paragraph is added, as a footnote (footnote 3), to the end of the first paragraph on page 7, after the sentence that ends, ". . . Reg. 1.48.9(g).":

Pepcol argues that the regulation is internally inconsistent because it provides an investment tax credit for equipment used to convert animal waste into useful forms of energy, whereas equipment used to process animal waste into other marketable products is not eligible for the credit. We find no inconsistency here. Although animal waste is not capable of being recycled under the technical definition of the term, animal waste is capable of being converted into fuel or other useful forms of energy.

4. The following replaces the first full paragraph on page 7, lines 6-9, with the following:

We further hold that, because the animal bones involved in Pepcol's bone-processing system constitute animal waste within the meaning of the statute, Pepcol is not entitled to an energy tax credit under the regulation.

The opinion having been so amended, the petition is denied by the panel that rendered the decision sought to be reheard. Judge Seymour voted to grant rehearing.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Because this order includes amendments to the court's opinion filed December 29, 1993, the order is published.

Entered for the Court


ROBERT L. HOECKER, Clerk