



Pat Smith Quoted in Tax Notes Regarding Altera Decision

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September 13, 2016

Ivins attorney Pat Smith was quoted in a Tax Notes story about the taxpayer's brief in the Ninth Circuit appeal of the Tax Court's *Altera* decision, *Tax Court Decision 'Beyond Meaningful Challenge,' Altera Argues*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that the taxpayer's argument that the commensurate-with-income standard is inapplicable to cost-sharing arrangements, apart from the initial buy-in payment, since the case involves creation of intangibles and not transfers or licensing, is "very important" and a "powerful" one.

"The government's brief placed a great deal of weight on the 1986 committee report, which in the context of the commensurate-with-income standard has a fairly lengthy discussion of cost-sharing arrangements," Smith said. "But since there is nothing in the statute about cost-sharing arrangements, all of that legislative history is basically irrelevant."

"What the government relied upon exclusively in its appeals brief is the argument that because of the commensurate-with-income standard, which was added to [section] 482 in 1986, the effect of that . . . is that when that standard applies, the IRS is not required to consider what uncontrolled parties would do," Smith said. "The huge problem with that is that that is not the rationale that IRS and Treasury relied on when they issued these regulations." He pointed to the regs' reference to what the agencies believed would be the action by uncontrolled parties instead, calling this "the strongest



| 2 | Pat Smith Quoted in Tax Notes Regarding Altera Decision

and most powerful argument" in favor of the taxpayer.

The government's brief cited *McFarland v. Kempthorne*, 545 F.3d 1106 (9th Cir. 2008), for the proposition that if an agency's determination can be supported on any rational basis, it must be upheld. Smith said that this decision is incorrect in its holding as a matter of administrative law and "flatly inconsistent with the *Chenery* principle." Altera does not mention *McFarland* in its brief.

"I suspect that they probably didn't want to say in a Ninth Circuit brief that a Ninth Circuit case is wrong," Smith surmised. "I'd be surprised if the panel that gets this case would be taken in by [*McFarland*]."

Smith argued that the very concept of remand without vacatur was controversial and that some judges found it contrary to the terms of the APA.

"For all federal agencies other than the IRS, the standard way for people to challenge regulations is to bring a challenge as soon as the regs are issued. . . . Because of the traditional interpretation of the Anti-Injunction Act, section 7421 of the code, the [standard] approach to challenging tax regulations had been thought by just about everybody to be unavailable until the Supreme Court case in *Direct Marketing*," Smith said. Section 7421 prohibits the suit for the purpose of restraining the assessment or collection of any tax.

In *Direct Marketing Association v. Brohl*, No. 13-1032 (2015), the Court held that a challenge to a tax reporting requirement was not barred by the Tax Injunction Act, which was modeled after the AIA. Smith argued that given the similarities between the two statutes, the reasoning behind that case could be equally applicable to similar facts under the AIA, but those facts were not present in *Altera*.

"In a [traditional case like] *Altera*, what the court needs to decide is what is a taxpayer's correct liability in the year at issue? Remanding to the agency doesn't do that. It's simply not a remedy that is available in this context," Smith said, adding that he was surprised that the amici made that argument.