



## Pat Smith Quoted in Tax Notes re Tax Court's Decision in Altera

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Ivins attorney Pat Smith was quoted in a Tax Notes story about the government's opening brief in the Ninth Circuit in the appeal of the Tax Court's decision in *Altera*. *IRS Altera Appeal: Arm's Length Isn't Always About Compensation*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that although the brief did a better job presenting the argument than the IRS did in *Altera*, he was not convinced that the arguments put forth in the brief could overcome the hurdles presented by the APA. He said it was wise that the brief abandoned the argument that *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983), was inapplicable to the case.

"In the Tax Court, the IRS argued that *State Farm* and *Chevron* are basically mutually exclusive. . . that's clearly not right," Smith said, citing the Supreme Court's June 20 decision in *Encino Motorcars, LLC v. Navarro*, No. 15-415.

Smith said that the brief "distorts the content of the State Farm analysis." Under that examination, Treasury and the IRS would be required to provide a reasoned explanation for their decision when they make such a decision, he said.

"The [reasoned explanation standard] is not an end in itself. It's a mechanism that a reviewing court uses to decide if the underlying decision by the agency was appropriate or not," Smith said.

Basing that argument on language from 1986 congressional reports, "the Justice Department takes the position that it doesn't matter whether unrelated parties would have included



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stock-based compensation in their cost-sharing arrangements," Smith said. But, in the preambles to the proposed and final regs, the IRS and Treasury did not take that position, instead opting for the argument that unrelated parties would necessarily include such compensation in cost-sharing arrangements, he said. The brief's post hoc rationalization "just doesn't work" as a matter of administrative law, as *State Farm* makes clear, and furthermore was "totally fatal" to the brief's position, Smith said.

"I think it is fair to say that when you see the words 'to be sure,' you need to look very carefully at what follows. Because they use those words when they have to deal with what is the strongest thing that is against them," Smith said.

Smith lauded the Tax Court's decision in *Altera*, although he acknowledged that the court did not have much experience in applying *State Farm* and the arbitrary and capricious standard. That experience was not lacking in the Ninth Circuit, given the plethora of challenges to environmental regs it encounters, Smith said. However, the DOJ and Treasury may not like the result they obtain from the higher court, he argued.

"It's hard to understand the decision [to appeal]. Obviously, people in the IRS felt very strongly about their loss. It's very hard for me to see how they are going to get anything they like out of this," Smith concluded.