



Pat Smith Quoted in Tax Notes on Implications of Tax Courts Altera Decision

PRACTICE AREAS

Tax

Tax Accounting

Tax Controversies

Tax Notes

April 19, 2016

Ivins attorney Pat Smith was quoted in a Tax Notes article on the implications of the Tax Court's Altera decision for potential challenges to the validity of other tax regulations. *News Analysis: Will an APA Attack on Temporary Regs Affect Tax?*

Patrick J. Smith of Ivins, Phillips & Barker Chtd. agreed and said practitioners could expect to see more APA challenges to regs generally, and temporary regs specifically, in the wake of Altera.

"The reaction to the [Altera] decision focused a lot on the failure of the IRS to properly deal with comments, and I think that is clearly an important part of the case. But I think some people in the tax world may have gotten the erroneous sense that in order to bring an APA challenge, they had to bring it on the same basis," Smith said. "Clearly, that is a misunderstanding of the APA arbitrary and capricious standard."

Smith said the broader implication is that under the arbitrary and capricious standard, the agency must provide an explanation at the time it issues regulations of its rationale for the regs' content. This could lead to challenges to all types of regs, he added.

Treasury's view that its regs are interpretive and therefore exempt from the APA reflects the idea that the tax world has a different meaning for interpretive and legislative regs, Smith said.

"The traditional tax view is, legislative regulations are only those that are very specifically authorized by a particular code section, and interpretative regulations are those that are authorized by section 7805(a). But that's not the way the terms have come to



| 2 | Pat Smith Quoted in Tax Notes on Implications of Tax Courts Altera Decision

be used outside of the tax world," Smith argued. "Clearly, [Altera] rejects the notion that IRS regulations that are issued under the general authority of [section] 7805(a) are exempt from notice and comment as interpretative regulations."

Smith was more skeptical whether good cause could ever be asserted by the IRS or Treasury, arguing that it typically applies to issues of public health or public safety. "I can't imagine an IRS regulation that would ever meet that standard, quite frankly," he said.

Smith surmised that the question of curing would likely be the subject of continued litigation.

Smith noted that the government argued in *United States v. Microsoft*, No. 2:15-cv-00102 (W.D. Wash.) , that specific references in section 7805(e) to temporary regs give the IRS and Treasury special treatment.

"Just because there are specific rules in section 7805(e) dealing with temporary regulations does not at all mean that there is a general congressional blessing for the IRS," Smith said. "The reliance of the IRS and the Justice Department on [section] 7805(e) is clearly misplaced because [section] 7805(e) doesn't say when temporary regs can be used; it simply says if they are used, then certain things have to happen."

Smith said there was a fundamental difference in litigating regs in the tax world compared with elsewhere. Outside tax, challenges are often presented as soon as regs are issued, as opposed to being challenged by a particular taxpayer for a particular tax year, he said.

"Because of that difference, in a tax case that is litigated the traditional way, if a court agrees that the notice and comment requirement was violated, then I think they have no choice but to say the taxpayer wins," Smith argued.

Smith argued that the serial inversion rule may be impermissibly retroactive because it provides for adverse consequences regarding events that occurred within the last three years. And while the IRS could argue that in substance, it satisfied notice and comment by issuing the notices, that argument doesn't apply to anything not described in the notices, Smith said.