



# Pat Smith was Quoted in Both the Bloomberg BNA Daily Tax Report and Tax Notes on the IRS Decision to Appeal its Loss in the Tax Court in Altera to the Ninth Circuit

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*Bloomberg BNA Daily Report & Tax Notes*

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### ***It's Official: IRS Files Appeal of Altera' in Ninth Circuit. Daily Tax Report***

"They lost on a vote of 15 to 0 in the Tax Court," said Patrick J. Smith, a partner with Ivins, Phillips & Barker Chartered in Washington.

"Although the Tax Court isn't given any special deference, generally, on tax issues, still, the Ninth Circuit will look at the fact that the vote in the Tax Court was 15 to 0, and it will have a hard time saying that the court was wrong," said Smith, who has represented Altera on other issues.

There is no question, however, that the stakes for the agency are high. Taxpayers are already emboldened by the lower court ruling to challenge the IRS on multiple regulations, Smith said.

"When they issue the regulations carrying out the anti-inversion notices, I am sure people will look at the APA as a basis for a challenge there. And for the regulation under Section 367 on foreign goodwill, I have no doubt there will be a challenge under the APA," Smith said.

"The IRS has not thought that it was subject to the arbitrary and capricious standard" of the APA, Smith said, and it has not drafted preambles to its regulations that show it believed it was necessary to explain its thinking.

"They took the opposite position until recently," he said.



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The IRS also argued that the 2003 cost-sharing regulations were exempt from the APA's notice and comment requirements because they are "interpretive," Smith said. However, that position is inconsistent with the agency's arguments that its regulations also "have the force of law," he noted.

The Tax Court rightly called out the IRS on the contradiction, he said.

### ***IRS Appeals Altera to Ninth Circuit. Tax Notes***

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that while the appeal has been expected,

"it seems, just objectively, like a fairly audacious thing for the government to do after losing 15 to zero in the Tax Court." He predicted that a challenge to the application of the *State Farm* standard to tax regulations will fail.

Smith, whose firm has done some unrelated work for Altera, said the government obviously cares about the issues and will devote significant attention to both the APA and the underlying cost-sharing regs, adding that the Tax Court decision was persuasive on both issues.

"It will be very interesting to see what arguments [the government makes] in their brief," he said. "I think they have an uphill road to get [the Tax Court decision] reversed."

The route to applying *State Farm* in *Altera* was interesting, according to Smith, because the D.C. Circuit usually applies both *Chevron* and *State Farm* to challenges to agency actions.

Instead, the Tax Court relied on *Judulang v. Holder*, 132 S. Ct. 476 (2011), to establish that the relevant *Chevron* analysis would be subsumed by the *State Farm* analysis.