



Pat Smith Quoted in Both Tax Notes and the Daily Tax Report on Ninth Circuit Altera Decision

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Tax Notes and Bloomberg BNA's Daily Tax Report

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Ivins attorney Pat Smith was quoted in articles in both *Tax Notes* and Bloomberg BNA's *Daily Tax Report* on the Ninth Circuit's decision in the *Altera* case, reversing the Tax Court decision.

Altera Reversal Could Limit Procedural Challenges to Regs. *Tax Notes*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said he was disappointed in the Ninth Circuit's opinion.

Smith said that Judge Kathleen M. O'Malley's "dissent was completely right on all points." The government's litigation position differed significantly from the position that Treasury and the IRS expressed in the notice of proposed rulemaking and the preamble to the final rule, he explained.

"As the dissent pointed out, it's a basic principle of administrative law that agency action like this can only be upheld in court based on the rationales the agency actually articulated and relied on itself," Smith said. To the extent that government lawyers in subsequent litigation adopt a different rationale, courts should not uphold the agency action, he said. "It's called post hoc rationalization and is not permitted."

The majority's heavy reliance on Congress's 1986 amendments to section 482 was misplaced, Smith said. "The dissent correctly pointed out that the amendment simply does not apply to cost-sharing agreements," he said. "What it applies to are transfers or licenses of intangibles. Cost-sharing agreements are about the creation of new intangibles that didn't exist before they don't concern transfers of intangibles."



| 2 | Pat Smith Quoted in Both Tax Notes and the Daily Tax Report on Ninth Circuit Altera

Smith said he hopes Altera files a petition for rehearing en banc. Ordinarily, the taxpayer would first ask for rehearing by just the panel. But in this case, Judge Stephen Reinhardt the other judge who concurred in the majority opinion died five months after the October 2017 oral arguments. The first page of the Ninth Circuit's opinion states that "Judge Reinhardt fully participated in this case and formally concurred in the majority opinion prior to his death."

"I can't imagine how you could have rehearing with just the panel when one of the majority opinion judges passed away," Smith said.

Beyond the opinion's implications for the cost-sharing regs, Smith said it will be interesting to see how the Tax Court deals with future APA challenges on grounds that Treasury and the IRS didn't sufficiently consider and respond to comments. "This has muddied the waters on where we are on those sorts of challenges," he said.

Intel Subsidiary Altera Loses Court Fight With IRS on Cost-Sharing. *Daily Tax Report*.

The reversal "is very unfortunate and disappointing," Patrick J. Smith, a partner at Ivins, Phillips & Barker, Chartered, told Bloomberg Tax in a phone interview.

That ruling [by the Tax Court] "was widely viewed as a landmark decision," Smith said, because it was "the first time the Tax Court seriously considered an APA-based argument" that concluded "the IRS and Treasury [had not] properly followed the rules that applied to issuing regulations."

"It's particularly unfortunate that the Ninth Circuit didn't simply unanimously affirm that," Smith continued, "and it will reinstate some of that uncertainty to what extent general administrative law principles apply."

Brett Kavanaugh, who was recently nominated to the Supreme Court, could seek to eliminate the use of the landmark administrative law [*Chevron*] ruling, Smith said.

"It was obviously gratifying that the dissent could express so clearly and correctly what the answer should be," Smith said, "but it was very disappointing that the majority came out a different way."

The IRS would certainly take new heart in resisting challenges to tax regulation based on the arbitrary and capricious standard, he said.

Smith predicted Altera will file a petition for rehearing. But, he said, this might be complicated by the fact that one of the three judges, Stephen Roy Reinhardt, died between oral arguments and the issuance of the decision.