



Pat Smith Quoted in Tax Notes on Cert Petition in Altera

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IPB attorney Pat Smith was quoted in a *Tax Notes* article on the cert petition that was filed in the Supreme Court in the Ninth Circuit *Altera* case on Monday of this week. *Altera Alleges IRS Bait and Switch' in Plea to Supreme Court.*

Patrick J. Smith of Ivins, Phillips & Barker Chtd. told *Tax Notes* he was pleased to see that Altera's petition "gives such prominence to the *Chenery* argument, which to me is the central reason why the Ninth Circuit decision is wrong."

Smith said he thinks Altera persuasively argued that the Ninth Circuit violated the *Chenery* doctrine.

The preambles in the proposed and final regs made it clear that Treasury and the IRS were requiring stock-based compensation costs to be shared because they believed that is what unrelated parties would do, Smith said.

But the government convinced the Ninth Circuit that it didn't matter what unrelated parties would do, Smith said. "This change in rationale is a clear violation of the *Chenery* principle," he said.

Smith added that the petition should have pointed out that the majority also violated *Chenery* by holding that cost-sharing arrangements represent transfers of intangibles within the meaning of the commensurate with income standard.

"This provided a key basis for the majority to uphold the regulations, but Treasury and the IRS never argued that point during the rulemaking process," he said.



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The petition made a good argument that the majority opinion violated the Supreme Court's holding in the 2016 *Encino Motorcars* case, in which the court made it clear that before applying *Chevron* deference, a reviewing court must first decide whether a regulation is procedurally valid under *State Farm*, Smith said.

"Here, the Ninth Circuit violated that rule by applying *Chevron* before considering whether the regulation was procedurally valid," Smith said.