



Pat Smith Quoted in Tax Notes on Government Brief in Opposition to Cert Petition in Altera

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IPB attorney Pat Smith was quoted in a *Tax Notes* article on the government's recently filed brief in opposition to the Supreme Court cert petition in the *Altera* case. *Positions Remain Entrenched After Government's Altera Brief*

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said he wasn't surprised by the government's position that *Altera* is just an extremely complex tax case that isn't worth the Supreme Court's attention, rather than "an administrative law case where the Ninth Circuit violated the basic administrative law principle that a reviewing court is permitted to uphold agency action only based on the rationale the agency itself applied in making its decision."

Smith said the government's brief incorrectly asserts that Treasury and the IRS relied on the commensurate with income standard when issuing the regs. In the preambles to the proposed and final regs, Treasury and the IRS cited language in the 1986 conference report to support the proposition that sharing stock-based compensation is what unrelated parties would do, he said.

"Neither that conference report nor the preambles to the proposed or final regulations took the position that cost-sharing arrangements are directly subject to the commensurate with income standard," Smith said. "The Ninth Circuit relied heavily on its own conclusion that cost-sharing arrangements are subject to the commensurate with income standard as a basis for upholding the validity of the regulations," he added.



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That aspect of the Ninth Circuit majority's conclusion "was the clearest violation of *Chenery*," Smith said, referring to *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), which held that courts must judge the propriety of agency actions solely on the grounds invoked by the agency in the administrative record.