

Mark Allison Talks to Law360 on Transfer Pricing Cases That May Impact Altera Rehearing

09.28.2018

Law360

Chipmaker Altera Corp.'s second crack at challenging Internal Revenue Service cost-sharing rules in the Ninth Circuit will occur against the backdrop of three other transfer pricing cases in which the agency has been accused of overstepping its authority.

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"What you see with all the cases is a real pushback, from at least the Tax Court, and obviously to some degree the appeals courts ... a pushback on the IRS' sort of heavy-handed use of presumptions," said Mark Allison, an attorney who counsels multinational corporations at Caplin & Drysdale, Chtd.

He added that the agency is "trying to take an almost one-size-fits-all hat with these kinds of issues."

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Altera

Before the decision was withdrawn, the majority on the Ninth Circuit panel disagreed with the Tax Court's July 2015 conclusion (2015 Law360 208-95) that the IRS had ignored significant evidence and public comments while issuing its cost-sharing rule.

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According to Allison, the IRS is attempting to treat stock-based compensation a certain way even though there's no evidence that third-party, arm's-length relationships would operate similarly.

He said the government consistently wants to challenge economics that it doesn't think make sense, particularly when a company is reducing its U.S. taxable income - but the courts have been holding the line.

The notion that the IRS can evaluate a controlled transaction and end up with a result that is not consistent with what parties would do in an arm's-length setting doesn't sit well, Allison said.

"It creates an even greater amount of discretion for the government to basically reset transactions in almost any way they want to get the result that they want to, at least to the extent they're involving ... stock-based compensation," he said. "I think the Ninth Circuit decision that was issued, even though it was pulled, was very problematic from that perspective."

Amazon

This effort from the government to recreate what it thinks should be happening between affiliated parties - even if that doesn't match what's happening in the real world - is also evident in Amazon's \$1.5 billion tax dispute with the IRS, according to Allison.

"You have this effort to sort of recreate the economics that doesn't match the way they've structured their relationships," he said.

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Coca-Cola

Judge Lauber was also the Tax Court judge during the Amazon case. Allison said he wouldn't be surprised if Judge Lauber pushed back against the IRS in the Coca-Cola dispute similarly to how he did in the Amazon case, noting that "he's already shown his hand a little bit" with the partial summary judgment ruling.

He added that the summary judgment motion involved a very specific issue and that Judge Lauber could go in a different direction for the main part of the case.

"But consistent with what these cases seem to be indicating ... the judges are not bending just because the government is pushing," Allison said. "I would not be surprised if the court finds that there's continuing overreach by the government in Coca-Cola."

For the full article, please visit *Law360's* website (subscription required).

Excerpt taken from the article "3 Other Cases to Know Ahead of Altera Rehearing" by Natalie Olivio for Law360.

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