

Report on recent US international tax developments - 26 June 2020

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On 22 June 2020, the United States (US) Supreme Court announced that it was denying the petition for certiorari for *Altera Corporation & Subsidiaries v. Commissioner*. Altera filed the petition asking the Supreme Court to review a decision of the Ninth Circuit Court of Appeals upholding the 2003 version of Reg. Section 1.482-7, which requires participants to include stock-based compensation costs in a cost-sharing arrangement.

In 2003, the Treasury and the Internal Revenue Service (IRS) issued the 2003 regulations, which require stock-based compensation costs to be included in intangible development costs, which participants in a cost-sharing arrangement share. In July 2015, the Tax Court ruled that the 2003 regulations were invalid under the *Administrative Procedure Act*. The Tax Court found that Treasury's conclusion that the final rule was consistent with the arm's-length standard was contrary to the evidence before it, namely that unrelated parties, acting at arm's length, would never agree to share each other's stock-based compensation costs.

On 7 June 2019, in a 2-1 opinion, a Ninth Circuit panel [reversed](#) the Tax Court's holding and ruled that the 2003 regulations complied with the *Administrative Procedure Act*. The Ninth Circuit found that the Government had adequately supported in the record that stock-based compensation should be treated as an intangible development cost in a cost-sharing arrangement and Treasury's position on the issue was not a policy change.

The Supreme Court's denial of the petition for certiorari is important because the Ninth Circuit's decision stands. Companies within the Ninth Circuit must consider the Ninth Circuit decision concerning the inclusion of stock-based compensation in the cost-sharing agreement. Companies outside the Ninth Circuit must now consider how the Supreme Court's denial to hear the petition impacts their tax positions under the 2003 regulations. To this end, the 2015 Tax Court decision holding that the 2003 regulations were invalid, remains relevant precedent outside the Ninth Circuit.

In the wake of Treasury Secretary Steven Mnuchin's call for a pause in OECD¹ negotiations to develop a new regime for taxing local profits of global companies under Pillar 1 of

the BEPS² 2.0 project, Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration, reiterated on 24 June that the talks are still alive. "The U.S. has said . . . they are engaged, they want a solution, but we should shift it to 2021, or at least [until] after the [US] election." The comments were reportedly made during a press-sponsored webinar and suggested more details might emerge after the scheduled G-20 Finance Ministers meeting in July.

"What is for sure is that . . . we keep working, we're alive, we are not on life support," Saint-Amans said. "COVID has not done too much harm yet on this, but we recognize the difficulties."

Endnotes

1. Organisation for Economic Co-operation and Development.
2. Base Erosion and Profit Shifting.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP, International Tax and Transaction Services, Washington, DC

- ▶ Arlene Fitzpatrick arlene.fitzpatrick@ey.com
- ▶ Joshua Ruland joshua.ruland@ey.com

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EYG no. 004463-20Gbl

1508-1600216 NY
ED None

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