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# Washington Dispatch

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## Legislation

### US Supreme Court declines to hear *Altera* case

On 22 June 2020, the 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 (2003 regulations), which requires participants to include stock-based compensation costs in a cost-sharing arrangement. The denial to hear the case puts an end to Altera's Ninth Circuit stock-based compensation challenge.

As background, on 27 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.

On 10 February 2020, Altera filed a [petition](#) for a writ of certiorari asking the Supreme Court to review the Ninth Circuit's decision. Altera contended that Treasury used an indefensible "bait-and-switch" by attempting to justify the 2003 regulations using arguments that it advanced for the first time in the Ninth Circuit after the Tax Court held the regulation invalid.

After Treasury filed a petition opposing Altera's petition for Supreme Court review, Altera filed a [reply brief](#) arguing that the Ninth Circuit committed serious errors by "upholding an arbitrary and capricious regulation based on a rationale presented for the first time in litigation, and even giving the new rationale *Chevron* deference." Altera stressed that the Supreme Court should grant certiorari because the Ninth

Circuit's decision has created uncertainty and confusion for international and domestic tax law. Altera rejected Treasury's argument that the Supreme Court should wait for a circuit split, saying most of the financial impact will be felt in the Ninth Circuit and there are no other cases in the pipeline.

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 a 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 Tax Court decision, issued on 27 July 2015, holding that the 2003 regulations were invalid, remains relevant precedent outside the Ninth Circuit.

## Digital taxation

### US Treasury Secretary calls for 'pause' in BEPS 2.0 Pillar 1 discussions

Treasury Secretary Steven Mnuchin on 12 June 2020, sent a letter to several of his European counterparts regarding the ongoing BEPS 2.0 project, in response to their proposal to approach the project's Pillar 1 nexus and profit allocation element with a staged approach under which new Pillar 1 rules in 2020 would cover only digital business activity.

The US letter rejected this proposal, indicating that talks had reached an impasse and called for a pause in the Pillar 1 discussions, with a view to resuming discussions later in the year and the hope that agreement can be reached in 2020. The letter further indicated that the discussions of the Pillar 2 minimum tax element are closer to agreement and communicated that the US fully supports concluding the Pillar 2 work this year.

The OECD responded by issuing a [statement](#) from the Secretary General that called on all members of the Inclusive Framework on BEPS to remain engaged on the project and expressed concern about the implications of unilateral action rather than a multilateral solution. The OECD plans to continue the technical work on the project as well as planned meetings.

Testifying during a House Ways and Means Committee hearing on 17 June, US Trade Representative (USTR) Robert Lighthizer addressed the situation. He said a variety of countries had decided that the easiest way to raise revenue is to tax other nations' companies like US tech companies; the US will not let that happen. The OECD negotiations were "not making headway on Pillar 1, which is the most important pillar in there," he said.

The USTR said we need an international regime that not only focuses on certain sides and industries, but how to tax corporations internationally.

In the wake of the US Treasury Secretary's letter, 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."

### **USTR initiates investigations into digital services taxes either adopted, or under consideration, by 10 jurisdictions**

On 2 June 2020, the United States Trade Representative (USTR) announced investigations will be conducted into certain jurisdictions relating to the adoption – or contemplated adoption – of a digital services tax (DST). As outlined in a corresponding Federal Register Notice, jurisdictions included within the scope of the announcement include: Austria, Brazil, the Czech Republic, the European Union (EU), India, Indonesia, Italy, Spain, Turkey and the United Kingdom.

Investigations will be conducted pursuant to Section 301 of the *Trade Act of 1974* (Section 301), with the goal of determining whether the adopted or contemplated DST of the relevant jurisdiction is unreasonable or discriminatory as well as whether it burdens or restricts US commerce.

In the event the USTR concludes that a particular DST policy falls within the scope of Section 301, the USTR will then decide how the DST policy is to be addressed.

Past USTR actions have included targeting specific categories of goods in certain industry subsectors. If the respective DSTs are found to be discriminatory, similar actions may be taken with respect to each implicated jurisdiction. Consequently, as the investigations progress, companies should be sure to fully understand the extent of products, particularly, the Harmonized Tariff Schedule of the US classifications and country of origin for trade flows between the impacted jurisdictions and the US.

Companies with transactions involving the investigated jurisdictions, and therefore, potentially subject to actions on DST, should closely monitor the investigation process, consider submitting comments per the FRN (due 15 July 2020), and assess the impact if action is taken.

## **IRS news**

### **IRS LB&I official offers insights to TCJA compliance campaign**

A senior official in the IRS Large Business and International Division in June provided more details with regard to the recently announced *Tax Cuts and Jobs Act* (TCJA) compliance campaign. The official distinguished the new TCJA campaign from others by saying it will not focus on specific transactions or issues. Rather he was quoted as saying IRS examiners would be reviewing taxpayers' entire returns to "develop a base-level of understanding of the *Tax Cuts and Jobs Act* to bridge from where we are to where we want to be with our employees."

The campaign exams reportedly will begin soon after the IRS suspension of compliance action ends on 15 July 2020.

### **IRS seeks 2020-2021 Priority Guidance Plan recommendations**

The IRS in early June issued Notice 2020-47, requesting recommendations from the public for guidance projects to be included in the 2020 - 2021 Priority Guidance Plan. Recommendations are requested to be submitted by 22 July 2020, although suggestions will be accepted anytime during the year.

## OECD news

### **OECD releases Platform for Collaboration on Tax toolkit on taxation of offshore indirect transfers of assets**

On 4 June 2020, the OECD released the final version of the Taxation of Offshore Indirect Transfers Toolkit, which is part of the Platform for the Collaboration on Tax project. The toolkit provides guidance on design and implementation issues when one country seeks to tax an entity that is a tax resident in another country on gains on the sale of interests in an entity that owns assets located in that country. It also includes two models for domestic legislation that countries could adopt to impose tax on such offshore indirect transfers.

The Platform for the Collaboration on Tax, begun at the request of the G-20, is a joint initiative of the International Monetary Fund, the OECD, the United Nations, and World Bank Group. It includes the development of a series of “toolkits” to help guide developing countries in the implementation of policy options for issues in international taxation. The latest toolkit represents the analysis and conclusions of the staffs of the four partner organizations, and does not represent the official views of the organizations or their member countries.

According to the [press release](#) accompanying the release of the indirect transfer toolkit, the taxation of offshore indirect transfers is a particular concern to developing countries, mostly but not exclusively countries that are rich in natural resources. The relevance of the topic is also magnified by the revenue challenges that governments around the world currently face as a consequence of the COVID-19 crisis.

Businesses may want to review the toolkit and monitor the country developments related to the tax treatment of offshore indirect transfers.

### **OECD circulates COVID-19 transfer pricing survey to BIAC members**

The OECD's Working Party 6 and Mutual Agreement Procedure Forum in June 2020 reportedly circulated a confidential questionnaire to members of the Business at OECD (BIAC) group. The questionnaire, which was due by 17 June 2020, was meant to determine transfer pricing compliance challenges resulting from the COVID-19 pandemic and identify issues that require guidance. The BIAC asked members to list up to five of the most pressing transfer pricing issues related to the coronavirus crisis.

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