

August 7, 2018

Ninth Circuit Withdraws *Altera* Opinion Reversing Tax Court on Cost-Sharing Arrangements

New Judge Added to Panel to Reconsider the Appeal

On August 7, 2018, the U.S. Court of Appeals for the Ninth Circuit withdrew its July 24, 2018 opinion in *Altera Corporation v. Commissioner*¹ to allow a reconstituted panel to confer on the decision.² The withdrawn decision had deferred to the U.S. Treasury's interpretation of Section 482 of the Internal Revenue Code stating that U.S. corporations must allocate, and therefore cannot deduct, a portion of the cost of stock-based compensation for employees to the extent those employees' work is for the benefit of the corporations' non-U.S. affiliates pursuant to what is referred to as "qualified cost sharing arrangements." The withdrawal of the opinion was necessitated by the fact that Judge Stephen Reinhardt, who was ostensibly a member of the majority in the 2-1 decision, had been deceased for over three months before the decision was issued. The lack of two living judges in the majority called the validity of the opinion into serious doubt. In an unusual series of events, the Ninth Circuit (i) issued its decision on July 24, stating that Judge Reinhardt had concurred in the opinion before he died, then (ii) on August 2, added Judge Susan P. Graber to the panel to replace Judge Reinhardt, and then (iii) on August 7, withdrew the original opinion altogether.

The reconstituted panel's decision will be awaited by U.S. multinational corporations that, acting in reliance on the Tax Court ruling, did not share stock-based compensation costs with their non-U.S. subsidiaries, as well as by taxpayers engaged in or considering a challenge to Treasury Regulations as violating the requirements of the Administrative Procedure Act. In the meantime, the Tax Court's decision

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in *Altera* is controlling law, and parties to “qualified cost sharing arrangements” are not required to share stock-based compensation costs.

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ENDNOTES

- ¹ 2018 WL 3542989 (9th Cir. 2018). For additional information on the Ninth Circuit’s withdrawn opinion in *Altera*, see our Client Memorandum *Ninth Circuit Reverses Tax Court, Upholds Treasury Regulation on Cost-Sharing Arrangements*, dated August 6, 2018, available at <https://www.sullcrom.com/files/upload/SC-Publication-Ninth-Circuit-Upholds-Treasury-Regulation-on-Cost-Sharing-Arrangements.pdf>.
- ² For additional information on the Tax Court’s decision in *Altera*, see our Client Memorandum *Tax Court Invalidates Treasury Regulation on Cost-Sharing Arrangements*, dated July 31, 2015, available at https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Tax_Court_Invalidates_Treasury_Regulation_on_Cost_Sharing_Arrangements.pdf.

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CONTACTS

New York

| | | |
|-----------------------|-----------------|--|
| Ronald E. Creamer Jr. | +1-212-558-4665 | creamerr@sullcrom.com |
| David P. Hariton | +1-212-558-4248 | haritond@sullcrom.com |
| Jeffrey D. Hochberg | +1-212-558-3266 | hochbergj@sullcrom.com |
| Andrew S. Mason | +1-212-558-3759 | masona@sullcrom.com |
| Matthew A. Schwartz | +1-212-558-4197 | schwartzmatthew@sullcrom.com |
| David C. Spitzer | +1-212-558-4376 | spitzerd@sullcrom.com |
| Davis J. Wang | +1-212-558-3113 | wangd@sullcrom.com |
| S. Eric Wang | +1-212-558-3328 | wangs@sullcrom.com |
| Isaac J. Wheeler | +1-212-558-7863 | wheeleri@sullcrom.com |
| Jennifer M. Leaphart | +1-212-558-3633 | leaphartj@sullcrom.com |
| Eric M. Lopata | +1-212-558-4164 | lopatae@sullcrom.com |

London

| | | |
|-----------------------|------------------|--|
| Ronald E. Creamer Jr. | +44-20-7959-8525 | creamerr@sullcrom.com |
| S. Eric Wang | +44-20-7959-8411 | wangs@sullcrom.com |
