



Federal Tax ADVISORY ■

SEPTEMBER 3, 2019

Treasury's Section 482 Regulation Losses

The Ninth Circuit recently [affirmed](#) the decision of the Tax Court in *Amazon.com Inc. v. Commissioner*, 148 T.C. 108 (2017). That means Amazon mostly won its transfer-pricing dispute with the IRS over how much its European subsidiary should pay for intangibles transferred in 2005 and 2006. In contrast, the same Ninth Circuit recently [reversed](#) the unanimous reviewed ruling of the Tax Court in *Altera Corp. & Subsidiaries v. Commissioner*, 145 T.C. 91 (2015). It also involved transfer pricing.

What is going on? The two recent rulings are consistent, even though the taxpayer lost one and not the other.

Altera involves a huge dispute about the meaning of the arm's-length standard for pricing dealings with controlled taxpayers. Treasury regulations say that the related taxpayers should do what unrelated taxpayers would do, and *Altera* offered proof that unrelated taxpayers would not share stock-based compensation. But the IRS contended that is not what the regulation meant and that proof was not dispositive.

The Tax Court held the IRS to the literal terms of its regulation. The Ninth Circuit, 2–1, was willing to cut the IRS some slack based on general language Treasury used in adopting the regulation, which it read to telegraph the view argued in the trial by the IRS. Therefore, it ruled that the cost sharing need not literally depend on finding a comparable.

In *Amazon.com*, the IRS similarly relied on a part of the same regulation that did not clearly support its position that residual intangibles like going-concern value were within the special “commensurate with income” rule of Section 482. But in this case, both the Tax Court and the Ninth Circuit found that Treasury had never indicated the regulation meant what the IRS argued it meant until after it was adopted.

So both results are based on what the agency said when it was adopting a regulation. This is what is known as the *State Farm/Chenery* issue in the application of the *Chevron* doctrine. It also tripped up the Secretary of Commerce in the recent Supreme Court ruling against the citizenship question on the 2020 census.

The takeaway is that Treasury preambles to regulations are more important than ever before. And even more important are the notices of proposed rulemaking. Because if the public did not know what the Treasury was thinking it was doing before it adopted a regulation, it could never comment. Both *Altera* and *Amazon.com* support that point.

For more information, please contact [Jack Cummings](#) at 919.862.2302.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

You can subscribe to future *Federal Tax* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

Click [here](#) for Alston & Bird's Tax Blog.

Stay engaged with the aftereffects of the Tax Cuts and Jobs Act with our new [resource page](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Federal Tax Group

John F. Baron
Chair
704.444.1434
john.baron@alston.com

George B. Abney
404.881.7980
george.abney@alston.com

Jasper L. Cummings, Jr.
919.862.2302
jack.cummings@alston.com

Sam K. Kaywood, Jr.
404.881.7481
sam.kaywood@alston.com

Heather Ripley
212.210.9549
heather.ripley@alston.com

John F. Baron
704.444.1434
john.baron@alston.com

Scott Harty
404.881.7867
scott.harty@alston.com

Brian E. Lebowitz
202.239.3394
brian.lebowitz@alston.com

Michael Senger
404.881.4988
michael.senger@alston.com

Henry J. Birnkrant
202.239.3319
henry.birnkrant@alston.com

Brian D. Harvel
404.881.4491
brian.harvel@alston.com

Clay A. Littlefield
704.444.1440
clay.littlefield@alston.com

Edward Tanenbaum
212.210.9425
edward.tanenbaum@alston.com

Seth M. Buchwald
404.881.7836
seth.buchwald@alston.com

L. Andrew Immerman
404.881.7532
andy.immerman@alston.com

Ashley B. Menser
919.862.2209
ashley.menser@alston.com

James E. Croker, Jr.
202.239.3309
jim.croker@alston.com

Stefanie Kavanagh
202.239.3914
stefanie.kavanagh@alston.com

Daniel M. Reach
704.444.1272
danny.reach@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2019

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghai Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, California, USA, 94304 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333