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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALTERA CORPORATION AND SUBSIDIARIES,

Petitioner-Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

ON APPEAL FROM DECISIONS OF
THE UNITED STATES TAX COURT

BRIEF OF LAW ACADEMICS AND PROFESSORS AS *AMICI CURIAE* IN OPPOSITION TO THE PETITION FOR REHEARING *EN BANC*

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are tax law academics and professors who have extensive experience teaching and practicing tax law. Amici have written numerous books and articles on taxation, including on transfer pricing and tax procedure. Amici have no financial interest in the outcome of this case. This brief has been prepared and joined by individuals affiliated with various educational institutions, but does not purport to present any school's institutional view. Institutional affiliations are provided for identification purposes only.

The individual amici are as follows:

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STATEMENT OF CONSENT, AUTHORSHIP AND FUNDING

All parties consent to this brief's filing. No party's counsel authored any portion of this brief, in whole or in part. No person or entity other than *amici* has or is expected to contribute money intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

The purpose of this brief is to correct and respond to two arguments in Petitioner-Appellee Altera's petition for rehearing *en banc* and briefs of amici supporting the petition for rehearing.

First, Treasury's regulation requiring cost sharing of stock-based compensation and the Ninth Circuit panel's decision are entirely consistent with longstanding precedents, practices and understandings regarding the meaning of the arm's length standard.

Second, reversal of the U.S. Tax Court by a Court of Appeals is an ordinary occurrence that reflects the federal courts' hierarchy and is not a basis for granting *en banc* review.

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ARGUMENT

I. The Ninth Circuit's decision and the Treasury Regulation are consistent with longstanding precedents, practices and understandings regarding the meaning of the arm's length standard, both under U.S. law and internationally.

A. The arm's length standard does not require and has not required third-party comparables.

The issue in this litigation is the validity under the Administrative Procedure Act of the Treas. Reg. § 1.482-7(d)(2) requirement that, as a condition of a "qualified cost-sharing arrangement" (or QCSA) related parties must share the costs of stock-based compensation. *See, e.g.*, Op. at 23; 26 C.F.R. § 1.482-7(d)(2) (2003) (redesignated in 2009 as Treas. Reg. § 1.482-7A(d)(2)). This regulation allows related parties to share the benefits of to-be-developed intangible property, as long as the parties also share all of the costs. By choosing to adhere to the regulation—and meeting the requirements of a QCSA—taxpayers receive assurance that the government will not challenge the taxpayers' future allocation of income under the QCSA to a lower-taxed offshore affiliate.

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The benefits that result for successful technology companies from the QCSA safe harbor are significant. The regulation allows them to place future foreign profits from their intangible property beyond the reach of the U.S. corporate tax. In exchange, they sacrifice some of the benefit of deductions now, since the portion of costs allocated to offshore affiliates typically cannot be deducted against U.S. income.

Altera and similarly situated corporations have relied on QCSAs to justify their income allocations rather than using other available transfer pricing approaches, such as the comparable uncontrolled transaction method. Yet, they now claim that the cost-sharing regulation, as it applies to stock-based compensation costs, disturbs a clear and uniform understanding that the arm's length standard must rely on comparables. Altera uses this claim to argue that it is necessary to revisit the panel's careful analysis of the validity of the regulation at issue here.

Altera's claim is ahistorical and wrong. The panel's analysis does not need to be revisited.

Altera and its amici have supported their claim by attempting to rewrite history in a way that suggests the stock-based compensation element of the QCSA regulations (but, notably, only that element) constitutes a

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significant change in transfer pricing policy. The revisionist history presented by Altera ignores evidence that shows that the arm's length standard does not and has not required comparable third-party transactions. Most importantly, Altera and its amici fail to engage the Ninth Circuit panel's careful explanation of the relevant history, which shows that the arm's length standard has not required comparable third-party transactions. Op. at 7-19. Below, we review and supplement elements of this history.

B. Transfer pricing regulations and case law have not required third-party comparable transactions to establish arm's length results.

In 1968, Treasury finalized regulations providing that "[i]n determining the amount of an arm's length consideration, the standard to be applied is the amount that *would have been* paid by an unrelated party for the same intangible property under the same circumstances." Allocation of Income and Deduction Among Taxpayers, T.D. 6952, 33 Fed. Reg. 5848 (Apr. 16, 1968), 26 C.F.R. § 1.482-2(d)(2)(ii) (1968) (emphasis added). The touchstone was not an observed third-party comparable transaction, but hypothetical results of third parties acting in the positions of the related parties in the examined transaction. The same standard was applied to cost-

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sharing arrangements under the 1968 regulations: costs and benefits were to be allocated with "terms and conditions ... comparable to those which *would have been* adopted by unrelated parties similarly situated had they entered into such an arrangement." 26 C.F.R. § 1.482-2(d)(4) (1968) (emphasis added.) In each case, the standard was not what observed unrelated parties did, but rather what *the result would have been* in similar circumstances between unrelated parties.

This counterfactual standard does not exclude analysis of comparable third-party transactions, but it also does not demand it. Indeed, the 1968 regulations provide a method for determining price allocations for intangible property that does not involve comparables at all. The regulations explain that "[w]here a sufficiently similar transaction involving an unrelated party cannot be found, the following factors, to the extent appropriate (depending on the type of intangible property and the form of the transfer), may be considered in arriving at the amount of the arm's length consideration…" 26 C.F.R. § 1.482-2(d)(2)(iii) (1968).

The 1968 regulations then list 13 potential considerations that might be relevant to determine whether a transfer price for an intangible is acceptable under I.R.C. § 482, including factors such as "the uniqueness of

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the property," the "[p]rospective profits to be realized or costs to be saved," by the transfer, and "the costs incurred by the transferor in developing the property." *Id*. Thus, the 1968 regulations plainly anticipated that an arm's length result could rest on internal factors only, rather than on observed third-party transactions. *Id*.

The 1968 regulations remained in force in 1986, when Congress enacted the "commensurate with . . . income" language. I.R.C. § 482. Subsequent additions and changes to the transfer pricing regulations continued to address situations when third-party transactions are not available or are not comparable.

In 1994, for example, Treasury revised the I.R.C. § 482 regulations that did not pertain to cost sharing. Intercompany Transfer Pricing Regulations Under Section 482, T.D. 8552, 59 Fed. Reg. 34971 (Jul. 8, 1994), 26 C.F.R. § 1.482-1 et seq. (1994). Those 1994 regulations describe the residual profit split method (in a provision that is still in effect in substance, although the language was modified in 2006), which can apply when non-routine contributions are made by both parties to a controlled transaction. 26 C.F.R. § 1.482-6 (1994). The residual profit split method provides for allocation of residual profit based on internal metrics, not on

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third-party comparables. Specifically, "the residual profit generally should be divided among the controlled taxpayers based upon the relative value of their contributions of intangible property to the relevant business activity that was not accounted for as a routine contribution." 26 C.F.R. § 1.482-6(c)(3)(B) (1994).

The 1995 cost-sharing regulations also rely on internal metrics. They instruct taxpayers to divide costs among affiliates based on factors such as projected profits and sales. Neither the preamble to the final regulations nor the regulations themselves reference third-party comparable transactions. Section 482 Cost Sharing Regulations, T.D. 8632, 60 Fed. Reg. 65553, 65556 (Dec. 20, 1995), 26 C.F.R. § 1.482-7(a)(l) (1995).

It is impossible to reconcile either the cost-sharing regulations or the residual profit split method with Altera's assertion that the arm's length standard always requires "actual evidence of unrelated third-party behavior" Pet. 13. As this half-century history of the regulations under I.R.C. § 482 shows, an arm's length result does not require reference to comparables.

In 2003, Treasury finalized the regulation at issue in this case, requiring the cost sharing of stock-based compensation costs. Compensatory Stock Options Under Section 482, T.D. 9088, 68 Fed. Reg. 51171 (Aug. 26,

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2003), 26 C.F.R. § 1.482-7(d)(2) (2003). This regulation built on a then 35-year old (now 51-year old) regulatory regime dating back to the 1968 regulations that explicitly permitted both comparability analysis and other methods. Moreover, this regime did so under a framework that was described as—and was broadly understood to represent—the arm's length standard. Indeed, a principal attribute of QCSAs, and a reason taxpayers like Altera may benefit from QSCAs, is that taxpayers need not identify comparable third-party transactions.

The conclusion that the arm's length standard permits—but does not require—reliance on third-party comparables to determine arm's length results has been affirmed in the courts as well, as summarized in the Ninth Circuit panel's opinion. Op. at 8-12. Case law includes other examples as well. *See, e.g.*, *Hospital Corporation of America v. Comm'r*, 81 T.C. 520, 596-97, 601 (1983), *nonacq.*, 1987-2 C.B. 1 (adopting a profit split based not on any comparable transaction but rather on "management expertise and experience").

The 2003 regulation at issue here was not a sea change in policy. Rather, it was a further elaboration of a consistent policy: an arm's length

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standard that necessarily entails considerations beyond third-party comparability.

C. International application of the arm's length standard is not uniform and does not require evidence of third-party comparables.

Altera and its amici claim without basis that a rigid formulation of the arm's length standard represents an international consensus. Altera and its amici also claim that failure to adhere to their vision of arm's length will lead to increased uncertainty and risk of double taxation. Pet. 15. These inchoate fears are without foundation. The international standard is not rigid and does not demand a comparability analysis.

History demonstrates a longstanding international understanding of a concept of arm's length that is not exclusively based on comparables. *See* JENS WITTENDORF, TRANSFER PRICING AND THE ARM'S LENGTH PRINCIPLE IN INTERNATIONAL TAX LAW 84-111 (2010) (tracing history from 1920 to 2008). For instance, the first OECD transfer pricing report, published in 1979, said that sometimes an arm's length test would be based on an internal analysis of companies' "functions and risks." *Id*. at 100. Also, the 1995 OECD Transfer Pricing Guidelines provided for a profit split method and

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also anticipated splitting residual profit "so that each of the associated enterprises participating in the controlled transactions earns the same rate of return on the capital it employs in that transaction." OECD, TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS ¶ 3.24 (OECD 1995).

Thus, the OECD Guidelines have long accepted use of methods that do not rely on third-party comparables. This approach has been refined and expanded in subsequent versions of these transfer pricing guidelines. *See generally* OECD, TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS (OECD 2017). Acceptance of an arm's length standard not exclusively based on comparables is also evidenced in bilateral U.S. treaty negotiations, which show that U.S. treaty partners have accepted the 2003 regulation at issue here. Op. at 33 (citing the U.S.-Poland 2013 tax treaty technical explanation).

There is a variety of international practice in the application of the arm's length standard. As observed by the Supreme Court in *Container Corp. of America v. Franchise Tax Bd.*, "even though most nations have adopted the arm's length approach in its general outlines, the precise rules under which they reallocate income among affiliated corporations often

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differ substantially, and whenever that difference exists, the possibility of double taxation also exists." 463 U.S. 159, 191 (1983). This observation was repeated 11 years later in *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 319 (1994). It remains true today.

Because of the possibility that countries will disagree about transfer pricing results, virtually all tax treaties specify a negotiation process (the "mutual agreement procedure"). *See, e.g.*, U.S. DEP'T OF TREASURY, UNITED STATES MODEL TAX CONVENTION, Art. 25 (2016). Mutual agreement procedure exists largely because application of the arm's length standard is not uniform among countries. *See* OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL, Art. 25 (2017); OECD, Mutual Agreement Procedure Statistics for 2017, https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm (last visited Aug. 24, 2019) (reporting 3681 transfer pricing cases under treaty mutual agreement procedures outstanding at Dec. 31, 2017). Endorsing a rigid approach to the interpretation of the arm's length standard would make dispute resolution under the treaties' mutual agreement procedures more, not less, difficult.

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II. Altera and its amici incorrectly claim that the reversal of the decision below supports granting *en banc* review because it was a Tax Court decision that was reversed.

A. Altera and its amici incorrectly place the Tax Court decision on the same level as a decision by a sister Court of Appeals.

Altera argues that the Ninth Circuit's reversal of the Tax Court warrants *en banc* review because the difference in the two courts' opinions "threatens the uniform application of the tax laws." Pet. 20. Altera's goal is apparently to bootstrap the rule that notes that a Court of Appeals might consider *en banc* review when there is a circuit split. This rule defines such a split as "When the opinion of a panel *directly conflicts with an existing opinion by another court of appeals* and substantially affects a rule of national application in which there is an overriding need for national uniformity . . . ." Ninth Cir. R. 35-1 (emphasis added); *see also* Fed. R. App. P. 35(a)(2).

Altera's argument fails because the Tax Court is not a Court of Appeals. Rather is it an Article I trial-level federal court. *See* I.R.C. § 7441; *see also* HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 175, 233 (2d ed. 2014). By statute,

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Courts of Appeals are required to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury . . . ." I.R.C. § 7482(a)(1).

B. The *Altera* Tax Court decision is not final, is not binding precedent for any court or agency, and does not have national effect.

Altera and some of its amici argue that the tension between the Ninth Circuit decision and the reversed Tax Court decision produces inconsistency because of the "nationwide jurisdiction" of the Tax Court. *E.g.* Pet. 3. An amicus even seems to suggest that the Tax Court decision somehow survived reversal: "Due to the inconsistency between the panel decision and the Tax Court decision," whether parties cost-share stock-based compensation costs "could turn largely on geography." Br. of Pricewaterhousecoopers LLP et al. at 6. Both propositions are incorrect and reflect a fundamental misunderstanding of the role of the Tax Court.

First, the Tax Court's decision in the case is not yet final. When it is, it will incorporate the final holding on appeal. *See* I.R.C. § 7481(a) (providing for a final Tax Court decision "rendered in accordance with the mandate of" a reviewing appellate court); Decision at 2, *Altera Corp. v. Comm'r*, 145 T.C. 91 (2015) (No. 6253-12) (setting forth alternative tax

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consequences depending on the ultimate outcome in the case "after all appeals have been exhausted").

Second, the Tax Court's *Altera* opinion is not binding precedent for any Court of Appeals or District Court. It is also not binding precedent for the Tax Court itself. As discussed below, the Tax Court can and does arrive at different decisions after initial holdings are reversed by one or more Courts of Appeal.

Third, the Tax Court's decision below does not constrain Treasury or IRS practice. Its only direct use is that taxpayers outside the Ninth Circuit might cite the opinion to help protect against a penalty (over and above regular tax deficiencies) for failing to share stock option costs. *See* 26 C.F.R. § 1.6662-4(d)(3)(iii) (for purposes of amassing "substantial authority" for a tax return position so as to avoid a potential substantial understatement penalty, "a Tax Court opinion is not considered to be overruled or modified by a court of appeals to which a taxpayer does not have a right of appeal, unless the Tax Court adopts the holding of the court of appeals"). The IRS may challenge any taxpayer who refuses to cost-share stock-based compensation costs. If the taxpayer still refuses to follow the regulation, the parties can proceed to litigation. *See* Gary L. Rodgers, *The Commissioner*

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Does Not Acquiesce, 59 NEB. L. REV. 1001, 1003 (1980). Moreover, it is an ordinary-course occurrence for an administrative agency to disagree with a judicial decision in a particular case. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 688-89 (1989); Rodgers, *supra*, at 1004-07.

Fourth, the Tax Court's decision did not involve a "nationwide" remedy. The decision below is about a single taxpayer's tax liability. *See* Decision, *Altera*, 145 T.C. 191 (No. 6253-12). *Altera* does not present a general challenge to the validity of a regulation. Injunctive relief is not at issue.

C. Altera and its amici misunderstand the role of the Tax Court in the federal system.

Altera and its amici argue that this case counsels *en banc* review because the trial-level court was the Tax Court, not a federal District Court. *See, e.g.*, Pet. 20 (noting Tax Court's "nationwide jurisdiction"). These arguments are simply wrong. The status of the Tax Court in the federal courts system is no greater than that of a federal District Court. *See* I.R.C. § 7482(a) (aligning the standards of review on appeal).

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There is important history here, which Altera and its amici fail to note. There was a five-year period in the 1940s during which Courts of Appeal were instructed by the U.S. Supreme Court to accord extra deference to the opinions of the Tax Court. *See Dobson v. Comm'r*, 320 U.S. 489, 501-02 (1943). At the time, the entity now known as the United States Tax Court was an executive agency. *See* Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1839-40 (2014). Congress quickly acted to override the *Dobson* precedent, enacting the predecessor of I.R.C. § 7482(a) in 1948. *See id.* at 1855. As the Supreme Court has explained, "[t]he purpose of the 1948 legislation was to remove from the law the favored position . . . enjoyed by the Tax Court under this Court's ruling in *Dobson* . . . ." *Comm'r v. Duberstein*, 363 U.S. 278, 291 n. 13 (1960); *see also Freytag v. Comm'r*, 501 U.S. 868, 890-92 (1991) (noting that "[t]he Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts").

Consistent with I.R.C. § 7482, the Ninth Circuit correctly employs a *de novo* standard of review for questions of law when a case is appealed from the Tax Court. *See, e.g., Amazon.com, Inc. v. Comm'r*, 2019 U.S. App. LEXIS 24453,*15 (9th Cir. 2019); *Cristo v. Comm'r*, 2019 U.S. App. LEXIS 22092, *1 (9th Cir. 2019); *MK Hillside Partners v. Comm'r*, 826

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F.3d 1200, 1203 (9th Cir. 2016) (citing *DHL Corp. & Subsidiaries v. Comm'r*, 285 F.3d 1210, 1216 (9th Cir. 2002)).

The Ninth Circuit still periodically observes that the "special expertise" of the Tax Court in the field of tax law is "entitled to respect." *Meruelo v. Comm'r*, 691 F.3d 1108, 1114 (9th Cir. 2012) (quoting *Merkel v. Comm'r*, 192 F.3d 844, 847-48 (9th Cir. 1999)). But respect does not mean extra deference, even on questions of tax law (let alone administrative law). This Court has recognized that Congress overturned *Dobson* and that no special deference applies to Tax Court decisions:

> Congress decided to overrule *Dobson*. . . . Those cases holding that we review de novo Tax Court decisions on questions of law are consistent with the intent underlying § 7482(a). The frequent recitations of special deference are apparently mutations that this court has ignored when we disagree with the tax court [sic]. *Cf. Allstate Savings & Loan Ass'n v. Commissioner*, 600 F.2d 760, 762 (9th Cir. 1979) (reciting substantial deference rule but analyzing the issues independently).

Vukasovich, Inc. v. Comm'r, 790 F.2d 1409, 1413 (9th Cir. 1986).

In fact, language about respect for the Tax Court often coexists with language clarifying that "we do not give the Tax Court special deference in a de novo review," *Meruelo*, 691 F.3d at 1114. In addition, as cases in the *Meruelo* and *Merkel* line reveal, and consistent with *Vukasovich*'s

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observation, Ninth Circuit cases that mention respect for the Tax Court nevertheless give results that turn on original Ninth Circuit legal analysis. In *Meruelo*, this analysis included the review of at least six interrelated statutory provisions, which occupies four pages in the Federal Reports. *Meruelo*, 691 F.3d at 1115-19.

Altera also fails to note that the *Dobson* view of deference to the Tax Court not only was overturned by the enactment of I.R.C. § 7482, but also arose at a time when what is now the United States Tax Court was a federal executive agency. This is no longer the case. The Tax Court is an Article I federal trial court. This is confirmed by I.R.C. § 7441, as amended in 1969, and which, since 2015, has provided that "[t]he Tax Court is not an agency of . . . the executive branch of the Government."

Any *Dobson*esque argument that attempts to invert the institutional relationship between the trial-level Tax Court and the Courts of Appeals is obsolete. Such an argument draws on superseded law and old ideas stemming from the Tax Court's expertise on tax law—not administrative law. It also dates from a time when the Tax Court had the status of an executive agency rather than its current status as a trial-level federal court. When a Court of Appeals panel decision corrects a Tax Court mistake, it

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acts in the ordinary course of the relationship between a trial court and an appellate court. No special deference is due to Tax Court decisions. The situation merits no special consideration for *en banc* review.

D. The Tax Court would not "undoubtedly" refuse to follow the Ninth Circuit decision in a case appealable to a different Court of Appeals.

To fuel its argument that this Court's reversal of the Tax Court's decision is somehow problematic, Altera also predicts that, in a future case, "the Tax Court undoubtedly would apply its unanimous view that the regulation is invalid." Pet. 20. This argument also fails.

In cases that arise within the Ninth Circuit, the Tax Court considers itself bound by the Ninth Circuit decision. *See Golsen v. Comm'r*, 54 T.C. 742, 757-58 (1970). In cases that arise outside the Ninth Circuit, the Tax Court does not consider the Ninth Circuit decision binding precedent, *see id.*, but Tax Court internal practice directs that the full Tax Court would review such a case in court conference, and carefully reconsider its prior view in light of the Ninth Circuit's opinion. Tax Court judges have written about the court's practice of fully reviewing cases after a Court of Appeals reversal. *See* Mary Ann Cohen, *How to Read Tax Court Opinions*, 1 HOUS.

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BUS & TAX L. J. 1, 5-6 (2001) ("Court review is directed if the report . . . reconsiders an issue on which we have been reversed."); James S. Halpern, *What Has the Tax Court Been Doing? An Update*, 151 TAX NOTES 1277, 1281 (2016) (describing conference procedures).

The reversal of the Tax Court by the Ninth Circuit does not suggest that the Ninth Circuit needs to perform an *en banc* review. Instead it suggests that the full Tax Court should and will reconsider the issue, if it is presented to that court in the future. This is consistent with the structural relationship between the two courts and fully accords with the Tax Court's established practice.

The most that can be said in support of Altera's claim is that the Tax Court sometimes decides to follow its own prior reversed holdings rather than a Court of Appeals decision. However, the Tax Court regularly changes its view when it considers Court of Appeals decisions that reversed earlier Tax Court holdings. *See, e.g.*, *Analog Devices, Inc. v. Comm'r*, 147 T.C. 429, 444 (2016) (after reversal by one Court of Appeals, Tax Court emphasized the importance of reconsideration in light of that opinion and changed its view); *Hood v. Comm'r*, 115 T.C. 172, 178-79 (2000) (changing its view after reversal by one Court of Appeals). This is particularly

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appropriate when the case involves a question of administrative law, where the Tax Court has comparatively less expertise. *See, e.g.*, *Square D. Co. v. Comm'r*, 118 T.C. 299, 304 (2002) (changing its view and upholding a regulation after reversal on invalidity issue by one Court of Appeals); *Cent. Pa. Sav. Ass'n v. Comm'r*, 104 T.C. 384, 396-97 (1995) (upholding a regulation after reversal on invalidity issue by three Courts of Appeals).

In short, Altera misrepresents the law and Tax Court practice with the claim that the regulation at issue in *Altera* "undoubtedly" would be upheld in a case arising outside the Ninth Circuit. The institutional hierarchy of the federal courts is clear. It is the Ninth Circuit's job to correct the Tax Court's legal mistakes. That is exactly what has already happened in this case.

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CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny the petition for rehearing *en banc*.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amici respectfully inform the Court that they are not aware of any cases related to the instant appeal that are pending before the Court.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4120 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The word count was computed by Microsoft Word, the word processing program used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

/s/ Susan C. Morse

Dated: September 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 6, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 6, 2019

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