

Cautious Optimism as Ninth Circuit Withdraws *Xilinx* Decision

January 13, 2010

On January 13, the U.S. Court of Appeals for the Ninth Circuit withdrew the opinion and dissent filed on May 27, 2009 in *Xilinx, Inc. v. Commissioner*. The *Xilinx* decision has far-ranging implications for cost-sharing structures under Section 482 of the Internal Revenue Code (IRC), and transfer pricing in general. Today's news is met with cautious optimism, as it is not yet clear what the court intends to do. Nonetheless, the withdrawal is welcomed at this point based on the fact that the Ninth Circuit's prior decision was the target of widespread criticism by taxpayers and the tax bar.

This development obviously has an impact on any taxpayers struggling with the decision of whether or not to include stock option costs in their pool of costs to be shared. In particular, those taxpayers who have tied their treatment of such costs to the outcome of the *Xilinx* case are once again faced with the possibility that the taxpayer-favorable decision in the Tax Court will be upheld.

The original *Xilinx* Tax Court case led to a 2005 decision from Judge Foley that *Xilinx* was not required to include the costs associated with stock option grants in the pool of costs that were shared between the parties to a cost-sharing agreement. On May 27, 2009, the Ninth Circuit reversed the Tax Court's decision, holding instead that the Section 482 regulations in effect between 1997 and 1999 required that the "costs" associated with stock option grants do in fact need to be included in the costs that must be shared by parties to a cost-sharing agreement. The Ninth Circuit's original decision was heavily criticized for a number of reasons, including its failure to apply the overriding arm's length standard of Section 482.

Prior to today's withdrawal, there had been a number of procedural filings made in the case with the Ninth Circuit. *Xilinx* filed a Petition for Rehearing with the Ninth Circuit on August 12, 2009. *Xilinx*'s petition requested an *en banc* hearing before the Ninth Circuit in an effort to have the full court reconsider the prior decision of the three-judge panel. Thereafter, the government filed a response to the taxpayer's Petition for Rehearing, followed by a motion from *Xilinx* for leave to file a reply brief to the Commissioner's response, which the Court denied.¹

¹ While frequently denied, such requests can nonetheless be useful as a mechanism to lodge a written response with the court regarding the other party's response.

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