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REZ:TAG:GSR:RF:ATCatterall
5-24255
CMN 2016100654

October 9, 2018

Molly Dwyer, Esquire
Clerk, U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: Altera Corp. & Subs. v. Commissioner of Internal Revenue
(9th Cir. – Nos. 16-70496, 16-70497)

Letter-Brief in Response to the Court's Order Dated
September 28, 2018

Dear Ms. Dwyer:

These consolidated appeals are scheduled for re-argument in San Francisco on October 16, 2018. By order dated September 28, 2018, the Court indicated that the parties are permitted, but not obligated, to file optional supplemental briefs on the question whether the six-year statute of limitations under 28 U.S.C. § 2401(a) – which generally applies to procedural challenges to regulations under the Administrative Procedure Act (APA) – “applies to this case and, if it does, what the implications are for this appeal.” Docket Entry 118

(citing *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1077-79 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 737 (2018)). The Commissioner is submitting this letter-brief in response to that invitation.

It is the Commissioner's position that any pre-enforcement challenge to the regulations at issue here – including a purely procedural challenge under the APA, *cf. Perez-Guzman*, 835 F.3d at 1077-79 – would have been barred by the Anti-Injunction Act. *See* 26 U.S.C. (“I.R.C.” or “Code”) § 7421(a) (stating that, “[e]xcept as provided in” various Code sections (the most significant of which, I.R.C. § 6213(a), allows the pre-payment filing of a Tax Court petition in response to a statutory notice of deficiency), “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person”); *see also* Opening Brief for the Appellants, *Chamber of Commerce of the United States v. Internal Revenue Service*, No. 17-51063 (5th Cir. Mar. 1, 2018), 2018 WL 1378467 & *13 (Government brief arguing that the Anti-Injunction Act barred pre-enforcement APA challenges to regulations issued under I.R.C. § 7874, without distinguishing between the plaintiffs' procedural and

substantive APA challenges).¹ Thus, Altera properly asserted its challenge to the regulations in two Tax Court actions contesting notices of deficiency that reflected the enforcement of the regulations against it. *See Redhouse v. Commissioner*, 728 F.2d 1249, 1253 (9th Cir. 1984).

If Altera's procedural APA challenge to the regulations were nonetheless subject to the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) (which would have started running on the date of issuance of the final regulation, *see Perez-Guzman*, 835 F.3d at 1077), then Altera would have had to pay the tax and file a refund claim within the six-year window – thereby forfeiting the opportunity to contest the enforcement of the regulations against it in the pre-payment

¹ *Chamber of Commerce* involved a challenge to a temporary regulation that was also issued as a proposed regulation on the same day; the temporary regulation took effect immediately, while the proposed regulation went through the normal notice-and-comment procedures. *See* I.R.C. § 7805(e). After the Government filed its opening brief in the *Chamber of Commerce* appeal, Treasury finalized the proposed regulation (generally effective as of the date on which the regulation was issued in temporary and proposed form, *see* I.R.C. § 7805(b)(1)(B)) and withdrew the temporary regulation, rendering the appeal moot. *See Inversions and Related Transactions*, T.D. 9834, 83 Fed. Reg. 32524, 32530-31, 32555 (July 12, 2018). The Fifth Circuit thereafter dismissed the appeal on the Government's motion under Fed. R. App. P. 42(b). *See Chamber of Commerce of the United States v. Internal Revenue Service*, 2018 WL 3946143 (5th Cir. July 26, 2018).

forum of the Tax Court – in order to comply with that time limit.

Because the Commissioner has never expressed the view that the six-year statute of limitations applies to a procedural APA challenge to a tax regulation in the context of a Tax Court deficiency proceeding, and because the IRS issued the notices of deficiency in this case outside the six-year APA window, it would have been unfair to argue below that Altera's procedural APA claims are time-barred. And, given this Court's holding that the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) is not jurisdictional, *Cedars-Sinai Med. Ctr. v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997), the Commissioner waived any defense under that provision by not raising it in the Tax Court.

In sum, it is the Commissioner's position that the six-year statute of limitations that is generally applicable to procedural challenges to regulations under the APA, *see* 28 U.S.C. § 2401(a), does not apply to this case.

Kindly distribute this letter-brief to the members of the panel
assigned to this case.

Respectfully submitted,

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/s/ Arthur T. Catterall

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With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements of Federal Rule of Appellate Procedure 32(a)

Case Nos. 16-70496, 16-70497

1. This letter-brief complies with the Court's order dated September 28, 2018 and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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(s) /s/ Arthur T. Catterall

Attorney for the Commissioner

Dated: October 9, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing letter-brief 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 October 9, 2018.

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.

/s/ Arthur T. Catterall
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