

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|----------------------------------|---|---------------|
| XILINX, INC., and CONSOLIDATED |) | |
| SUBSIDIARIES |) | |
| |) | |
| Petitioner-Appellee |) | |
| |) | Nos. 06-74246 |
| v. |) | 06-74269 |
| |) | |
| COMMISSIONER OF INTERNAL REVENUE |) | |
| |) | |
| Respondent-Appellant |) | |
| |) | |

**COMMISSIONER’S OPPOSITION TO APPELLEE’S MOTION
FOR LEAVE TO FILE A REPLY TO THE COMMISSIONER’S
RESPONSE TO THE PETITION FOR REHEARING**

The Commissioner of Internal Revenue, appellant herein, respectfully objects to appellee’s motion for leave to file a reply to the Commissioner’s response in opposition to appellee’s petition for rehearing or rehearing en banc. The applicable Federal Rules and Ninth Circuit Rules do not even contemplate a motion for leave to file a *response* to the *petition*, much less a motion for leave to file a *reply* to a *response*. Instead, the rules contemplate that the Court will request a response to the petition if it deems one necessary, *see* Fed. R. App. P. 35(e), 40(a)(3); 9th Cir. R. 35-2, 40-1, and they make no mention of a

-2-

possible reply to a court-ordered response. *See also* 9th Cir. R. 35-4(a), 40-1(a) (each prescribing the format of a petition and any response thereto, with no mention of a possible reply to a response).¹

Allowing the filing of a reply to a court-ordered response to a petition for rehearing would undermine the abbreviated page limits applicable to such petitions and responses. This is especially true in the instant case, where Xilinx already has had the benefit of no less than *five* amicus briefs to help get its point across. In the interest of sparing the Court from having to wade through still more paper, the Commissioner did not request additional words to respond more fully to the amicus briefs. But, if the Court were to grant Xilinx's motion for leave to file a reply, the Commissioner would be compelled to seek permission to file a surreply in order to protect the Government's interests.

¹ Xilinx's citation to Fed. R. App. P. 2, "Suspension of Rules," is entirely misplaced, as the advisory committee's notes to that rule make abundantly clear. In any event, its attempt to show "good cause" thereunder amounts to nothing more than a desire to have the last word, regardless of the rules applicable to petitions for rehearing.

-3-

The Commissioner further objects to Xilinx's improper inclusion of an abridged version of its proposed reply in its motion for leave, and responds as follows:

- Xilinx's statement of the issue (Mot. 1) fails to acknowledge that the "all costs" requirement of former Treas. Reg. § 1.482-7(d) derived directly from the Conference Committee report discussing the 1986 amendment of I.R.C. § 482.
- Xilinx's assertion that "billions of dollars are at stake" (*ibid.*) is supported by nothing more than the hyperbolic (and unsupported) statements of companies looking out for their own financial interests.
- Xilinx's citation to the 2007 Treasury report to Congress (*ibid.*) ignores footnote 47 thereof (explaining that the *Xilinx* case involves regulations no longer in effect).
- Xilinx downplays the significance of the statutory commensurate-with-income requirement (*ibid.*), but fails to explain how the plain language of that requirement squares with its position that the "arm's-length result" as expressed in the former regulations is invariably determined solely by reference to uncontrolled transactions.

-4-

- Xilinx’s assertion that a “later-adopted regulation ... implicates the same issues” (*ibid.*) ignores the panel majority’s acknowledgment that the Secretary could (and did), pursuant to his authority to “adopt a technical definition of a term that is distinct from its plain meaning,” slip op. 6169 n.9, amend the regulations to state explicitly what the Commissioner maintained was implicit in the former regulations.

- The Commissioner does not, as Xilinx would have it, view the panel’s decision as “an erroneous articulation of the transfer pricing statute” (Mot. 2); rather, the Commissioner contends that former Treas. Reg. §§ 1.482-1(b) and 1.482-7(d) did not conflict with one another.

-5-

WHEREFORE, the Commissioner respectfully requests that the Court deny appellee's motion for leave to file a reply to the Commissioner's response in opposition to appellee's petition for rehearing or rehearing en banc.

/s/ ARTHUR T. CATTERALL
U.S. Department of Justice
Tax Division, Appellate Section
P.O. Box 502
Washington, D.C. 20044
(202) 514-2937
Attorney for Appellant

Dated: October 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, 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 CM/ECF system.

Participants in the case who are listed on the CM/ECF service list for this case and are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that the participants in the case listed on the attached service mailing list are either not listed on the CM/ECF service list for this case or are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to those participants.

/s/ ARTHUR T. CATTERALL
Attorney for Appellant

SERVICE MAILING LIST FOR 9TH CIR. NOS. 06-74246, 06-74269

Thomas Kittle-Kamp
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606

Charles Triplett
Mayer Brown LLP
1909 K Street NW
Washington, DC 20006-1101

Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062

Larry R. Langdon
C. Cabell Chinnis, Jr.
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real, Suite 300
Palo Alto, CA 94306-2112

Lynda Walker
United States Council for International Business
1400 K Street NW, Suite 905
Washington, DC 20005

Mark A. Oates
Thomas V. Linguanti
Baker & McKenzie LLP
One Prudential Plaza
130 East Prudential Plaza
Chicago, IL 60601

Russell J. Pinilis
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NY 10036

James C. Carter
DF-4
One Bowerman Drive
Beaverton, OR 97005-6453