

Nos. 06-74246, 06-74269

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

XILINX, INC. AND CONSOLIDATED SUBSIDIARIES,

Petitioner-Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

**ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT**

**MOTION FOR LEAVE TO FILE REPLY IN ANSWER TO
COMMISSIONER'S RESPONSE AND TO SUPPORT PETITION FOR
REHEARING OR REHEARING EN BANC OF APPELLEE XILINX, INC.**

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Petitioner-Appellee Xilinx, Inc., respectfully moves for leave to file the attached short reply to answer the IRS's response and in support of Xilinx's petition for rehearing or rehearing en banc. The rules relating to petitions do not prohibit a reply, and Xilinx seeks leave to file based on good cause, set forth below. *See* Fed. R. App. P. 35, 40, 2. The IRS's counsel opposes this motion.

The central question presented by Xilinx's petition—whether this Court may apply a U.S. transfer-pricing regulation in a way that departs from the arm's-length standard that has always previously been the U.S. statutory and treaty standard for the taxation of related-party transactions—is relatively straightforward. The IRS's response is far less so. It does not deny that billions of dollars are at stake or Treasury's previous report to Congress confirming the national importance of this case.¹ Rather, it disavows the panel majority's core reasoning, but claims that the case is not significant because it likes the result. It tries to defend the result based on a statutory amendment that every member of the panel already concluded does not apply, a redefinition of "arm's length" that every member of the panel (and the Tax Court) has rejected, a later-adopted regulation that implicates the same issues that are involved in this appeal, and the notion that foreign governments might be more receptive to his redefinition than any U.S. judge has been.

Good cause exists for a reply. Xilinx believes that the attached reply would

¹ Report to the Congress on Earnings Stripping, Transfer Pricing and U.S. Income Tax Treaties (November 28, 2007), 2007 TNT 230-17, at 29, 37.

be helpful to the Court to clarify the issues and to assess the importance of the question presented. The IRS's willingness to let stand as precedent what it believes is an erroneous articulation of the transfer pricing statute is highly unusual and warrants comment. Finally, a reply is warranted because of the broad practical and professional interest in this case demonstrated by the five amicus briefs (and the letter from former senior foreign tax officials) submitted in support of the petition.

October 13, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kenneth B. Clark, hereby certify that I electronically filed the foregoing MOTION FOR LEAVE TO FILE REPLY IN ANSWER TO COMMISSIONER'S RESPONSE AND TO SUPPORT PETITION FOR REHEARING OR REHEARING EN BANC OF APPELLEE XILINX, INC. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage paid, to the following non-CM/ECF participants:

SEE ATTACHED SERVICE LIST

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