

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

COMMISSIONER'S RESPONSE IN OPPOSITION
TO APPELLEE'S PETITION FOR REHEARING
OR REHEARING EN BANC

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GLOSSARY

“1997 U.S.-Ireland tax treaty” refers to the Convention Between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, July 28, 1997 (S. Treaty Doc. No. 105-31).

“ESO” refers to the term “employee stock option.”

“QCSA” refers to the term “qualified cost-sharing arrangement” within the meaning of Treas. Reg. § 1.482-7, as in effect during the years at issue.

“Treas. Reg.” refers to the Treasury Regulations in effect during the years at issue, unless otherwise noted.

INTRODUCTION

1. I.R.C. § 482 authorizes the Commissioner to allocate income and deductions among commonly controlled organizations as necessary “to prevent evasion of taxes or clearly to reflect the income” of such organizations. Longstanding regulations and case law establish that the appropriate means to that end is an “arm’s-length” approach, pursuant to which the results of the controlled transaction are compared to “the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances (arm’s length result).” Treas. Reg. § 1.482-1(b)(1). Concerned with the “inconsistent results of attempting to impose an arm’s length concept in the absence of comparables,” Congress amended § 482 in 1986 as applied to transfers of intangibles, requiring that the income with respect to such a transfer be commensurate with the income attributable to the transferred intangible. H.R. Rep. No. 99-426, at 423-24 (1985), *reprinted in* 1986-3 C.B. (Vol. 2) 1, 423-24; *see* I.R.C. § 482 (second sentence).

The Conference Committee Report accompanying the amending 1986 legislation specifically provides that intercompany cost-sharing arrangements are an acceptable means of allocating intangibles income among related parties if they are consistent with the purpose of the

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new provision: that such allocation reasonably reflect the actual economic activity undertaken by each party. H.R. Conf. Rep. No. 99-841, at II-638 (1986), *reprinted in* 1986-3 C.B. (Vol. 4) 1, 638 (the “1986 Conference Report”). In that regard, the report further provides that the participants in such an arrangement should be required to share all development-related costs in proportion to their respective profits from the developed intangibles. *Ibid.*

In response to this congressional directive, the IRS issued regulations requiring controlled participants in a “qualified cost sharing arrangement” (QCSA) to share all development-related costs in proportion to their shares of reasonably anticipated benefits attributable to the development activity. At issue in this case is whether the IRS could, pursuant to the “all costs” requirement of former Treas. Reg. § 1.482-7(d) (generally applicable to taxable years prior to 2004), require controlled participants in a QCSA to share stock-based compensation expense (hereafter, “stock option costs”) allocable to the development activity, without regard to whether unrelated

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participants in a cost-sharing arrangement would agree to share such costs.¹

2. The Tax Court concluded that Treas. Reg. § 1.482-1(b)(1), which provides that the arm's-length standard applies in every case, mandated a reading of the all-costs requirement of the former QCSA regulation as referring only to those costs that unrelated participants in a cost-sharing arrangement would agree to share. Based on its finding that unrelated parties would not agree to share stock option costs allocable to the development activity, the court held that the all-costs requirement of the former QCSA regulation did not require QCSA participants to share stock option costs.

On appeal, the Commissioner argued that the Tax Court erred in concluding that his straightforward application of the all-costs requirement of the former QCSA regulation was precluded by § 1.482-1(b)(1). In that regard, the Commissioner argued, *inter alia*, that the all-costs requirement implemented the purpose of the 1986 legislation in the context of cost-sharing arrangements as directed in the 1986

¹ The IRS modified the regulations at issue in 2003 to clarify, *inter alia*, that the compensation component of a controlled participant's operating expenses includes stock option costs. See Treas. Reg. § 1.482-7(d)(2)(i) (2003).

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Conference Report, and that Congress did not consider the amending legislation to be inconsistent with the arm's-length standard. Having indicated that this interpretive issue was confined to regulations no longer in effect, the Commissioner noted that, even if the two regulatory provisions were deemed to conflict with one another, "long-standing principles of statutory/regulatory construction would dictate that the specific provision (§ 1.482-7(d)(1)) prevail over the general one (§ 1.482-1(b)(1)), contrary to the result reached by the Tax Court." Gov't Br. 23 n.8; *see id.* at 5 n.3.

In an opinion issued on May 27, 2009 (567 F.3d 482), a divided panel of this Court, consisting of Judges Reinhardt, Noonan, and Fisher, reversed the Tax Court's decision, agreeing with the Commissioner that the plain language of the all-costs requirement of the former QCSA regulation did not permit the Tax Court's reading of that provision as referring only to those costs that unrelated participants in a cost-sharing arrangement would agree to share. The majority rejected, however, the Commissioner's argument that the plain language of the all-costs requirement did not conflict with § 1.482-1(b) as then in effect, although it recognized that current regulations validly and expressly reconcile the two provisions. The

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majority therefore based its decision on the Commissioner's fall-back position that, as between conflicting provisions, the specific prevails over the general. It is this rationale for the majority's decision – pursuant to which the majority validated a former regulation that, in the panel's view, did not produce an arm's-length result within the meaning of § 1.482-1(b) as then in effect – that Xilinx contends warrants further review. Specifically, Xilinx seeks rehearing on the grounds that the decision “improperly abandons the arm's-length standard” as the guiding principle of U.S. transfer pricing law (Pet. 7) and “cannot be reconciled with the arm's-length provisions of U.S. tax treaties” (Pet. 13).²

As explained more fully below, neither of Xilinx's assertions provides an appropriate basis for rehearing. First and foremost, regardless of Xilinx's concern with the stated rationale, the majority reached the correct result in this case, so that a prerequisite for

² As indicated in our response to the motions for leave filed by the *amici curiae*, two of the amicus briefs purport to introduce another ground for rehearing, *viz.*, that the Court erred in sustaining the Commissioner's position that stock option costs are “costs” within the meaning of the former QCSA regulation. As Xilinx did not assert that ground in its petition as a basis for rehearing, we do not address it here.

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rehearing a case on the basis of “exceptional importance” – the need to correct an erroneous judgment – is not present. Moreover, Xilinx’s claim of “exceptional importance” is undermined by the fact that, as the majority acknowledged, the current regulatory scheme does not support the reading of the term “arm’s-length result” in § 1.482-1(b)(1) that prompted it to adopt the rationale to which Xilinx objects. Thus, the majority’s reasoning has no continuing significance in terms of U.S. transfer pricing law. And any issue going forward regarding whether U.S. treaty partners share the United States’ understanding of the arm’s-length principles contained in its tax treaties – what the majority referred to as “the Treasury Department’s consistent view over the years,” slip op. 6170 – is properly the subject of the mutual agreement procedures contained in those treaties and, in any event, is wholly speculative.

ARGUMENT

- A. Because the panel majority reached the correct result in this case, rehearing on the basis of “exceptional importance” – the only ground proffered by Xilinx – is not warranted**

In its Rule 35 statement (Pet. 1-3), Xilinx does not (because it cannot) contend that the panel’s decision conflicts with a decision of the

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United States Supreme Court, or that it conflicts with a decision of this Court, and thus makes no claim that rehearing is “necessary to secure and maintain uniformity of the court’s decisions.” Fed. R. App. P. 35(b)(1)(A). Nor does it contend that the majority’s opinion “directly conflicts with an existing opinion by another court of appeals.” 9th Cir. R. 35-1; *see also* Fed R. App. P. 35(b)(1)(B). Instead, Xilinx seeks rehearing on the ground that the decision “presents an exceptionally important question.” Pet. 1; *see* Fed. R. App. P. 35(a)(2).

“Exceptional importance” alone, however, is not a sufficient basis for rehearing; rather, it must be accompanied by the need to correct an erroneous judgment. *See Newdow v. U.S. Congress*, 328 F.3d 466, 470 (9th Cir. 2003) (Reinhardt, J., concurring in the order denying rehearing en banc) (“To rehear a case en banc *simply* on the basis that it involves an important issue would undermine the three-judge panel system and create an impractical and crushing burden on what otherwise should be, as Rule 35(a) suggests, an exceptional occurrence.”), *panel decision rev’d sub nom. Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004). Thus, Xilinx’s concern with the majority’s rationale could form an appropriate basis for rehearing only if the allegedly erroneous legal reasoning resulted in an erroneous

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judgment. *See United States v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring in the order denying rehearing en banc). As demonstrated below, that circumstance is not present here.

1. The Commissioner has argued throughout this litigation that the 1986 addition of the commensurate-with-income requirement to § 482, coupled with the lack of any indication that Congress intended that requirement to supplant the arm's-length standard, *see* Notice 88-123, 1988-2 C.B. 458, 471-77, requires a reading of former Treas. Reg. § 1.482-1(b) that accommodates Congress's view that the arm's-length result is not invariably determined solely by reference to uncontrolled transactions. The panel did not agree with this reasoning, finding instead that the plain meaning of the term "arm's-length result" in that regulation did not permit such a conclusion. The majority acknowledged, however, that "Congress and regulators may adopt a technical definition of a term that is distinct from its plain meaning," and that in fact "the Secretary has since modified the regulations to state explicitly that ... the all costs requirement is an arm's length result." Slip op. 6169 n.9 (citations omitted). Thus, the majority rejected the centerpiece of Xilinx's argument – that the IRS had no authority to prescribe an arm's-length result for QCSAs without

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reference to uncontrolled transactions to determine the cost pool – but was unwilling to conclude that the IRS had actually exercised that authority in the absence of explicit regulatory language to that effect. *See ibid.* (“the regulations in effect in 1997, 1998, and 1999 ... did not *explicitly* define an ‘arm’s length’ result to require sharing of ESOs [employee stock options]”) (emphasis added).

The Commissioner continues to maintain that, in light of the 1986 amendment of § 482 and the issuance of the former QCSA regulation in response to the 1986 Conference Report, Treas. Reg. § 1.482-1(b)(1) necessarily embodied the technical connotation that the panel majority acknowledged would have been dispositive had it been expressly set forth therein. As noted above, by the mid-1980s Congress had become concerned that, in the context of intercompany transfers of intangibles, § 482 “may not be operating to assure adequate allocations [of income] to the U.S. taxable entity” due to the “recurrent problem” of “the absence of comparable arm’s length transactions between unrelated parties.” H.R. Rep. No. 99-426 at 423-24. In Congress’s view, the tendency of courts to “unduly emphasize the concept of comparables” was “sufficiently troublesome where transfers of intangibles are concerned that a statutory modification to the intercompany pricing

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rules regarding transfers of intangibles is necessary.” *Id.* at 424.

Congress enacted this modification – the commensurate-with-income requirement – as part of the Tax Reform Act of 1986, Pub. L. No. 99-514, § 1231(e)(1), 100 Stat. 2085, 2562-63 (1986).

By its very terms,³ the statutory commensurate-with-income requirement injects an element of economic analysis to U.S. transfer pricing law that is not grounded solely in comparison to uncontrolled transactions. And the legislative history confirms that the requirement is intended to provide an internal benchmark for verifying that putatively comparable uncontrolled transactions are in fact comparable. *See* H.R. Rep. No. 99-426 at 425 (given the “extreme difficulties in determining whether the arm’s length transfers between unrelated parties are comparable,” “it is appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation ... be commensurate with the income attributable to the intangible”). This approach simply reflects Congress’s view that reference to purportedly comparable uncontrolled transactions that are not, in fact, comparable transactions for these purposes cannot, by

³ See attached addendum.

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definition, produce an arm's-length result. That is the "technical" limitation on the regulatory term "arm's-length result" that the majority declined to read into the former regulations at issue.

2. In the 1986 Conference Report, Congress made its views on cost-sharing arrangements unmistakably clear:

In revising section 482, the conferees do not intend to preclude the use of certain bona fide research and development cost-sharing arrangements as an appropriate method of allocating income attributable to intangibles among related parties, *if and to the extent such agreements are consistent with the purposes of this provision that the income allocated among the parties reasonably reflect the actual economic activity undertaken by each. ...*

H.R. Conf. Rep. No. 99-841, at II-638 (emphasis added). The report went a step further by expressly stating that, "[u]nder such a bona fide cost-sharing arrangement, the cost-sharer would be expected to bear its portion of all research and development costs," and that "[i]n order for cost-sharing arrangements to produce results consistent with the changes made by the Act to royalty arrangements," such sharing "generally should be proportionate to profit" from the developed intangible. *Ibid.* That, of course, is precisely what former Treas. Reg. § 1.482-7, the QCSA regulation at issue in this case, required: that controlled participants in a QCSA share all development-related costs

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in proportion to their reasonably anticipated benefits from the developed intangible.

As the Commissioner has argued throughout this litigation, the “reasonably anticipated benefits” sharing ratio is meaningless without the corresponding requirement that the QCSA participants share *all* development-related costs – including stock option costs – regardless whether unrelated parties would do so. That is, if QCSA participants were free to exclude certain development-related costs from the cost pool, then by definition (unless the participants incurred the *excluded* costs in the exact proportion in which they shared the *included* costs), one participant’s share of aggregate development-related costs would exceed its proportionate share of anticipated profits, and the other participant’s share of anticipated profits would exceed its proportionate share of aggregate costs. It follows that, in order to “produce results consistent with the changes made by the [1986] Act to royalty arrangements,” H.R. Conf. Rep. No. 99-841 at II-638, a QCSA must encompass *all* development-related costs. That being the case, purportedly comparable uncontrolled cost-sharing arrangements that exclude stock option costs cannot be comparable transactions for these purposes, and reference to such transactions therefore cannot, by

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definition, produce an arm's-length result. This is simply another way of saying that the term "arm's-length result" in § 1.482-1(b)(1) necessarily had the technical meaning to which the panel majority referred in its opinion.

The all-costs requirement of the former QCSA regulation at issue in this case implemented the purpose of the 1986 legislation in the context of cost-sharing arrangements precisely in the manner set forth in the 1986 Conference Report. In upholding the validity of this regulation, albeit on the basis of the Commissioner's fall-back position, the majority reached the result intended by Congress. The panel's *decision* thus does not require correction, and consequently, the rehearing sought by Xilinx is unwarranted.

B. In any event, Xilinx's claim of "exceptional importance" is wholly undermined by the subsequent changes to the QCSA regulation and the overall regulatory scheme

"Congress and regulators may adopt a technical definition of a term that is distinct from its plain meaning." Slip op. 6169 n.9 (citing *Ernzen v. United States*, 922 F.2d 1433, 1436 (9th Cir. 1991)). As the majority recognized, *ibid.*, the current regulations make explicit the Commissioner's interpretation of the term "arm's-length result" under

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the former regulations. Accordingly, the panel majority's validation of a former regulation that, in the panel's view, did not produce an arm's-length result as described in former Treas. Reg. § 1.482-1(b) – the aspect of the decision that forms the basis of Xilinx's petition for rehearing – has no continuing significance.

The majority expressly limited its analysis to the interplay between former §§ 1.482-1(b) and 1.482-7(d), acknowledged that the Secretary subsequently had modified the regulations “to state explicitly that ESOs are costs that must be shared and that the all costs requirement is an arm's length result, *see* 26 C.F.R. § 1.482-7T(a) & (d)(1)(iii) (2009),” and made clear that the rationale of its opinion turned on the fact that the QCSA regulation applicable in this case, contrary to the current regulation, “did not explicitly define an ‘arm's length’ result to require sharing of ESOs.” *Ibid.* Indeed, the IRS first issued the clarifying regulations cited by the majority on August 26, 2003. *See* T.D. 9088, 2003-2 C.B. 841. Accordingly, the reasoning of the majority that Xilinx contends is in urgent need of further review has no application to taxable years beginning on or after that date. *See* Treas. Reg. §§ 1.482-1(b)(2)(i), 1.482-1(j)(5), 1.482-7(a)(3), 1.482-7(k) (2003).

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Xilinx's assertion that the rationale of the majority opinion has continuing significance because "the 2003 amendments ... merely reassert, in regulatory form, the rejected position that ESO adjustments produce an arm's-length result," Pet. 10 n.5, completely ignores the 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 clarify that ESO adjustments *do* produce an arm's-length result. Thus, Xilinx ignores the majority's acknowledgment of the limited effect of its rationale, *i.e.*, that the basis for its decision in this case would not be applicable in a case arising under the current regulations. In short, because the majority's rationale is founded on the terms of a former regulation that was materially (and, as the majority recognized, validly) modified in 2003, the panel's decision, far from involving an issue of exceptional importance, has little continuing significance.

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C. This case is not the proper forum for addressing whether the United States and Ireland – or any other U.S. treaty partner – have a common understanding of the arm’s-length principles contained in tax treaties

Because all modern U.S. income tax treaties embrace the arm’s-length standard as the basis for evaluating transactions between related entities that are residents of the respective contracting states, Xilinx and the *amici* point to potential international ramifications arising out of the majority’s rationale as further reason why rehearing should be granted in this case. The treaty-based arguments of Xilinx and the *amici*, however, provide no valid grounds for granting Xilinx’s rehearing petition.

1. That this case does not provide an appropriate forum for considering treaty issues is borne out by Xilinx’s own discussion of the 1997 U.S.-Ireland tax treaty. As the majority correctly held, by reason of its saving clause (Article 1(4)), that treaty has no direct application to the instant dispute between the United States and a U.S. corporation. *See, e.g., Green, Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 Yale J. Int’l L. 79, 131 & n.275 (1998) (referring to the standard saving clause in support of the observation that, “[f]or

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the most part, ... tax treaties constrain only one aspect of taxation: the manner in which it applies to foreign persons.”).⁴ In that regard, Xilinx’s suggestion that application of the saving clause here would allow the United States to tax a U.S. corporation in a manner that conflicts with the treaty simply reflects Xilinx’s position on an issue that neither the Tax Court nor this Court addressed (nor could they have addressed) in this case.

To be sure, Article 1(5) of the treaty contains exceptions to the saving clause that permit U.S. persons, including U.S. corporations, to benefit from certain enumerated treaty provisions, including (as Xilinx notes) Articles 26 and 9(2). Neither of those exceptions, however, prevents the IRS from applying § 482 in this case. Article 26 contains mutual agreement procedures, pursuant to which Xilinx (or its Irish subsidiary) can request that the U.S. and Irish competent authorities

⁴ Xilinx’s suggestion that the 1949 U.S.-Ireland tax treaty has some direct application to this proceeding because it “does not contain a comparable saving clause,” Pet. 16, is meritless. See Letter of Submittal (1950), 2 Tax Treaties (CCH) ¶ 4442 (“the right of the United States to tax its own citizens, residents, or corporations is reserved” through the definition of “resident of Ireland”); cf. *Maximov v. United States*, 299 F.2d 565, 571 n.15 (2d Cir. 1962) (definition of “resident of the United Kingdom” in former U.S.-U.K. tax treaty plays the same limiting function as a saving clause), *aff’d*, 373 U.S. 49 (1963).

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“endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.”

Article 26(3); *see also* Article 9(2) (“the competent authorities of the Contracting States shall if necessary consult each other” with regard to correlative adjustments necessitated by any reallocation under Article 9(1)). Indeed, the letter from Revenue Ireland attached as Addendum D to Xilinx’s petition confirms the foregoing.

2. Nor do Xilinx’s broader treaty-based arguments provide a valid ground for rehearing. First, the majority’s conclusion that the IRS could issue a regulation in derogation of the arm’s-length standard (as expressed in former Treas. Reg. § 1.482-1(b)) has no practical significance in terms of the U.S. tax treaty network, since the majority’s conclusion does not reflect the Treasury Department’s view. In that regard, the majority freely acknowledged that the Treasury Department’s “consistent view over the years,” slip op. 6170, has been that the all-costs requirement is consistent with the arm’s-length standard.⁵ *See ibid.* (referring to the dissent’s “false premise that

⁵ Xilinx’s suggestion to the contrary (Pet. 15-16), based on language in Treasury Department technical explanations of various income tax treaties to the effect that cost-sharing arrangements must

(continued...)

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Treasury officials involved in the treaty negotiations believed the all costs requirement was inconsistent with the arm's length standard"). The majority expressly declined to opine whether Treasury's consistent view of the arm's-length standard comports with those of U.S. treaty partners; instead, it simply concluded that such view did not match up with the expression of the arm's-length standard in former Treas. Reg. § 1.482-1(b). *See ibid.* & n.11 (referring to "the arm's length standard, as articulated by the tax regulations in effect at the time") (emphasis added). Thus, the notion that the panel's decision somehow unmoors U.S. transfer pricing law from the arm's-length standard embodied in the network of U.S. tax treaties is completely unfounded.

Second, Xilinx and the *amici* fail to acknowledge that the aspect of the panel's decision that they contend will have international ramifications – the majority's conclusion that the arm's-length standard set forth in former Treas. Reg. § 1.482-1(b) could be overridden by a more specific regulation – has no continuing

⁵(...continued)
be examined for compliance with the arm's-length standard like any other transaction, ignores the role that comparability analysis plays in establishing QCSA participants' respective shares of reasonably anticipated benefits from the developed intangible. *See* Treas. Reg. § 1.482-7(f)(3)(i).

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significance. As the majority recognized, the perceived regulatory conflict on which that conclusion is premised no longer exists (and has not since 2003). Although some may argue that the revised regulations create treaty-based issues going forward, those regulations are not the subject of any case or controversy that this Court could resolve in the instant proceeding. Thus, granting a rehearing in this case would do nothing to resolve any alleged, potential controversy regarding whether the arm's-length result as formulated under the current regulations – including the express statement therein that the QCSA regulation produces an arm's-length result – is consistent with our treaty partners' understanding of the arm's-length principles contained in tax treaties.

Finally, the claims of Xilinx and the *amici* that the panel's decision has the potential to result in actions by U.S. treaty partners that could result in the double taxation of U.S. taxpayers are purely speculative and, as such, are plainly insufficient to warrant the granting of rehearing in this case. The wholly speculative possibility that a decision by a panel of this Court may have some adverse economic effect in the future on unknown parties in certain unknown circumstances hardly demonstrates that the panel's decision involves

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an issue of exceptional importance. Moreover, the reaction (potential or otherwise) to a panel decision by interested persons – even though they be sovereign nations – is not an appropriate ground for rehearing. *Cf. Newdow*, 328 F.3d at 470 (Reinhardt, J., concurring in the order denying rehearing en banc) (decrying the notion that a case should be reheard based on the “public and political reaction” to the panel decision). That is particularly so in this case, where any reaction by a treaty partner would focus not on whether the panel reached the right result under U.S. transfer pricing law – the only law at issue here – but rather on whether U.S. transfer pricing law (specifically, its incorporation of commensurate-with-income principles in the QCSA regulations) comports with the treaty partner’s understanding of the arm’s-length principle set forth in the relevant treaty.

CONCLUSION

Xilinx's petition for rehearing or rehearing en banc should be denied.

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ADDENDUM

Convention Between the Government of the United States of America and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, July 28, 1997 (S. Treaty Doc. No. 105-31)

ARTICLE 1

General Scope

....

4. Notwithstanding any provision of the Convention, a Contracting State may tax its residents (as determined under Article 4 (Residence)), and by reason of citizenship may tax its citizens, as if the Convention had not come into effect. ...

....

Internal Revenue Code (26 U.S.C.):

Sec. 482. Allocation of Income and Deductions Among Taxpayers.

In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to 9th Cir. R. 35-4 and 40-1, the attached Response in Opposition to Appellee's Petition for Rehearing or Rehearing En Banc is proportionately spaced, has a typeface of 14 points in Century Schoolbook font, and contains 4,199 words.

/s/ Arthur T. Catterall
ARTHUR T. CATTERALL
Attorney for the Appellant

Dated: October 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 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 appellate 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
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