



# TaxNewsFlash

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## Ninth Circuit affirms Tax Court; intangible assets and valuation in cost-sharing arrangement

The U.S. Court of Appeals for the Ninth Circuit today affirmed a decision of the U.S. Tax Court concerning the regulatory definition of intangible assets and the method of the intangible assets' valuation in a cost-sharing arrangement.

As the Ninth Circuit explained:

*This case requires us to interpret the meaning of an "intangible" in the applicable (but now outdated) transfer pricing regulations. The case turns on whether, as the Commissioner argues, the regulatory definition is broad enough to include all intangible assets of value, even the more nebulous ones that the Commissioner refers to as "residual-business assets" (i.e., [the taxpayer's] culture of innovation, the value of workforce in place, going concern value, goodwill, and growth options). We conclude that the definition does not include residual-business assets. Although the language of the definition is ambiguous, the drafting history of the regulations shows that "intangible" was understood to be limited to independently transferrable assets. We thus affirm.*

A brief explanation of the case (prepared by the Ninth Circuit) provided the following:

- In the course of restructuring its European businesses in a way that would shift a substantial amount of income from U.S.-based entities to the European subsidiaries, the taxpayer entered into a cost-sharing arrangement in which a holding company for the European subsidiaries made a "buy-in" payment for the taxpayer's assets that met the regulatory definition of an "intangible."
- U.S. tax regulations required that the buy-in payment reflect the fair market value of the taxpayer's pre-existing intangibles.
- After finding that the buy-in payment had not been determined at arm's length in accordance with the transfer pricing regulations, the IRS performed its own calculation. The taxpayer filed a petition in the Tax Court challenging that valuation.
- At issue was the correct method for valuing the pre-existing intangibles under the then-applicable transfer pricing regulations. The IRS sought to include all intangible assets of value, including "residual-business assets" such as the taxpayer's culture of innovation, the value of workforce in place, going concern value, goodwill, and growth options.

- The Ninth Circuit concluded that the definition of “intangible” does not include residual-business assets, and that the definition is limited to independently transferrable assets.

Read text of the Ninth Circuit’s [decision](#) [PDF 172 KB]

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