

Client Alert

July 2018

The Federal Circuit Vacates and Remands *Alta Wind* to the Court of Federal Claims

On July 27, 2018, the United States Court of Appeals for the Federal Circuit (the “Federal Circuit”) vacated the decision of the United States Court of Federal Claims (“CFC”) in *Alta Wind I Owner-Lessor C v. United States*, 128 Fed. Cl. 722 (2016) (“*Alta Wind*”), and remanded the case to the CFC. See link to case [here](#). The plaintiffs in *Alta Wind* acquired six windfarms between 2010 and 2012 through five sale-leaseback transactions and one out-right sale. Immediately thereafter, plaintiffs placed the windfarms into service and applied for approximately \$703 million in cash grants provided by Congress pursuant to section 1603 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 364-66 (“Section 1603”). The Government awarded plaintiffs grants of approximately \$495 million. Plaintiffs brought suit in the CFC to recover approximately \$206 million in additional grant payments that they believed the Government should have paid them. The Government filed a \$59 million counterclaim.

In *Alta Wind*, plaintiffs argued that the eligible basis for purposes of determining the amount of the cash grants equaled their entire purchase price (minus some grant-ineligible property). The Government contended that the six transactions included intangibles, such as goodwill, and that the entire purchase price was not the appropriate basis amount. The Government argued that the purchase price must be allocated between grant-eligible tangible property and grant-ineligible intangibles using the residual method under I.R.C. § 1060. The CFC agreed with the plaintiffs and entered judgment for the full amount sought by the plaintiffs. The Government appealed to the Federal Circuit.

On appeal, the Federal Circuit held that the CFC erred in its failure to utilize the residual method under I.R.C. § 1060. According to the Federal Circuit, the residual method I.R.C. § 1060 must be used to calculate basis in the case of “applicable asset acquisition[s],” defined as “any transfer . . . of assets which constitute a trade or business.” The Federal Circuit stated that “[a] group of assets constitutes a trade or business if the ‘character’ of the group of assets transferred ‘is such that goodwill or going concern value could under any circumstances attach.’ Treas. Reg. § 1.1060-1(b)(2)(i)(A)-(B).” The Federal Circuit added that “there is no need to show that a transaction had actual, accrued goodwill or going concern value at the time of the transaction.”

Applying these conclusions, in considering whether goodwill or going concern value could attach to the windfarm assets, the Federal Circuit considered three factors: (1) the presence of any intangible assets, (2) the existence of an excess of the total consideration over the aggregate book value of the tangible and intangible assets purchased, and (3) related transactions, including lease agreements, licenses, or other similar agreements between the purchaser and seller in connection with the transfer. The Federal Circuit said there was no dispute that the latter two factors existed: The purchase prices for the facilities were in excess of their development costs and the transactions involved numerous related agreements.

The Federal Circuit also believed in the circumstances of the *Alta Wind* transactions that at least some intangible assets might be present (the Federal Circuit raised the specific power purchase agreements and transmission rights in the *Alta Wind* case as possibilities). At the time of the transaction, the Federal Circuit described the windfarms as being “on the cusp of operation.” When they were sold, no further development or construction work was necessary. The Federal Circuit concluded under these

circumstances that the three factors above supported the possibility of goodwill and therefore meeting its analysis of the Treasury Regulations.

Because the assets transferred constitute a trade or business, I.R.C. §1060 applied, and the Federal Circuit indicated that the purchase price for the transactions therefore must be allocated using the residual method. The residual method allocates basis in accordance with seven classes: (I) cash and general deposits accounts, (II) actively traded personal property, certificates of deposits, U.S. government securities, and publicly traded stock, (III) debt instruments, (IV) inventory and other property held for sale to customers, (V) assets that do not fit within any other class, including tangible personal property, (VI) I.R.C. § 197 intangibles, including contract rights, but not goodwill or going concern, and (VII) goodwill and going concern value. The court remanded the case to the CFC to determine the proper allocation of the *Alta Wind* purchase prices in accordance with the I.R.C. § 1060 asset classes. For purposes of the remand, the Federal Circuit instructed that “turn-key value is considered part of the tangible assets in a transaction rather than a separate intangible asset, . . . so it is a Class V asset for purposes of the residual method.” The Federal Circuit described “turn-key value” as “the increased value of the individual tangible assets because they were assembled, installed, integrated, tested, coordinated, and in operating order.” In applying the residual method, the Federal Circuit instructed the CFC on remand to distinguish between turn-key value and goodwill and other intangibles.

If you have any questions regarding the Federal Circuit’s decision, please contact us:

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