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U.S. Tax Court: Taxpayer not required to treat payment as a result of failed merger as capital loss under section 1234A(1)

The U.S. Tax Court today held that the taxpayer was not required to treat a payment to its counterparty as a result of a failed merger as a capital loss because the taxpayer did not have a "right or obligation . . . with respect to property" within the meaning of section 1234A(1).

The case is: *Abbvie Inc. and Subsidiaries v. Commissioner,* 164 T.C. No. 10 (June 17, 2025). Read the Tax Court's **opinion**

Summary

In 2014, the taxpayer, a U.S. public corporation, and S, a foreign public limited company, agreed to work toward a proposed merger. They entered into multiple agreements to facilitate that work including a "Co-operation Agreement," under which the taxpayer promised to pay S a fee of approximately $1.6 billion if the taxpayer's board ultimately failed to recommend the combination to the taxpayer's shareholders.

After the U.S. Treasury Department released adverse guidance concerning the tax treatment of transactions like the potential combination, the taxpayer's board chose not to recommend the combination to the taxpayer's shareholders. Instead, the taxpayer and S entered into a "Termination Agreement," which ended the "Co-operation Agreement" and required the taxpayer to pay S a fee of approximately $1.6 billion.

On its 2014 return, the taxpayer reported the fee as an ordinary deduction. However, the IRS disallowed the deduction on the grounds that section 1234A(1) required the taxpayer to treat the payment as a capital loss.

The Tax Court held that the taxpayer's rights and obligations under the Co-operation Agreement were fundamentally in the nature of services and thus section 1234A(1) did not apply to the taxpayer's payment to S under the Termination Agreement.

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