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IRS acquiesces to result in Third and Federal Circuit decisions that "Hatch-Waxman" litigation expenses are deductible under section 162

The IRS released AOD 2026-3 indicating its acquiescence in the decisions of the Third Circuit in *Mylan Inc. v. Commissioner*, 76 F.4th 230 (3rd Cir. 2023), and the Federal Circuit in *Actavis Laboratories, FL, Inc. v. United States*, 131 F.4th 1345 (Fed. Cir. 2025), that legal expenses incurred in defending abbreviated new drug application (ANDA) lawsuits brought under 35 U.S.C. § 271(e)(2) during the pendency of a generic's ANDA with the FDA (i.e., "Hatch-Waxman" litigation expenses) are ordinary and necessary business expenses deductible under section 162 and are not required to be capitalized under section 263.

The IRS will thus no longer assert the position taken in Generic Legal Advice Memorandum No. 2014-6 that legal fees incurred to defend against an ANDA lawsuit must be capitalized as facilitating the creation of an intangible asset under Treas. Reg. § 1.263(a)-4(e)(1).

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