

## AbbVie Catches a Break in Termination Fee Tax Court Case

On June 17, the U.S. Tax Court ruled that AbbVie, Inc. could deduct the fee it paid to terminate its 2014 combination agreement with Shire plc. This decision represents a significant win for AbbVie, and it represents a potential milestone in the longstanding puzzle of how to treat M&A break fees.

The case dates back to 2014, when AbbVie, a U.S. pharmaceutical company, and Shire, an Irish pharmaceutical company agreed to call off the proposed combination they had announced only a few months earlier. In connection with the termination, AbbVie paid Shire a previously agreed break fee of approximately \$1.6 billion, which AbbVie claimed as an ordinary deduction on its 2024 income tax return. In 2022, the IRS challenged AbbVie's deduction, citing Internal Revenue Code Section 1234A, which provides that gain or loss attributable to the cancellation of "a right or obligation . . . with respect to property which is . . . a capital asset in the hands of the taxpayer" is itself treated as a capital gain or loss.

In its decision in *AbbVie v. Commissioner*, however, the Tax Court rejected the IRS's position, holding that the termination payment was not subject to Section 1234A because the agreement between AbbVie and Shire that governed their proposed combination was not a right or obligation "with respect to property." Rather, the Tax Court reasoned that each party's obligations, which the court characterized as facilitating a transaction between the parties' respective public shareholders and a newly formed subsidiary of AbbVie, were more akin to the provision of services, payments for which are generally ordinary deductions.

This ruling will no doubt be welcome news to potential M&A parties (presenting the possibility of a significant tax benefit to ease the sting of a busted deal and a large payment). It is not clear, however, how the IRS will respond to this setback—whether it will appeal the decision in this case or continue to assert the relevance of Section 1234A in other similar transactions. Likewise, it is unclear how this decision would apply to transactions structured differently from the proposed AbbVie-Shire combination. For now, taxpayers entering into M&A agreements with termination fees should not necessarily count on their deductibility—perhaps no more than they should count on the deal going through in the first place.

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