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Working Paper
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A THREAT TO M&A MARKET VITALITY:
"BREAK-UP FEE" TAXATION IN THE PENDING APPEAL OF *ABBVIE V. COMM. OF INTERNAL REVENUE*

EXECUTIVE SUMMARY

What's at Stake? Why Should You Care About a Tax Court Decision?

The June 2025 U.S. Tax Court opinion in *AbbVie Inc. and Subsidiaries v. Commissioner of Internal Revenue*[1] interpreted the U.S. Tax Code in a manner that properly characterized "break-up fees" under the U.S. Tax Code as an "ordinary business expense" in a way that helps fuel a robust mergers and acquisitions (M&A) market in the United States. Plus, it was an accurate statutory interpretation, faithful to the text. Reversing that decision will hurt the M&A market and would be an improper statutory interpretation.

The M&A market has proven itself to be an engine of economic growth, moving resources to higher and better management and uses. Economic growth and productivity are good for consumer welfare and contribute to the nation's competitiveness. Competitiveness is key to national security and prosperity.

If break-up fees are treated as "capital losses" under Section 1234A of the Tax Code—as the IRS has recently advocated in a change in position—then the added risk to investing in the M&A market will mean less of that investment. A less robust M&A market will be less capable of contributing to economic growth and all the positive spillover effects of growth.

Thus, to advance economic growth and avoid adding a disincentive to investing in the M&A market, the U.S. Court of Appeals for the Seventh Circuit should uphold the Tax Court, treating break-up fees as deductible "ordinary business expenses." Doing so will fulfill the duty of judges to give Section 1234(A)(1) a proper textualist interpretation consistent with foundational principles of property law that are relevant to the meaning of the words in that statutory provision.

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[1] *Abbvie Inc. v. Commissioner*, No. 2597-23, 164 T.C. No. 10, 2025 BL 210531, 2025 US Tax CT Lexis 1533 (June 17, 2025), https://perma.cc/T7QP-MGHN. For an earlier analysis of this case upon which this paper builds, *see* Donald J. Kochan, *Competitiveness Wins if IRS Accepts Tax Court Ruling in* AbbVie, BLOOMBERG LAW, Sept. 12, 2025, https://perma.cc/XTN7-ES5S.

Current Posture: Why Is This Timely?

The *AbbVie* opinion interpreted the Tax Code in a manner that properly characterized break-up fees—also called "termination fees"—as an ordinary business expense in a way that is beneficial for the effective and efficient functioning of the mergers and acquisitions market, a key contributor to a healthy and robust economy and consumer welfare. The Tax Court's ruling was a positive one for the free market. A ruling to the contrary would have had serious consequences for efficient market functioning.

Yet such a contrary ruling is what the IRS seems to still be requesting. In September 2025, the IRS filed a notice of appeal,[2] preserving its right to appeal this June 2025 Tax Court ruling and seek its reversal at the Seventh Circuit.

Several things are possible next. The IRS could decline to file an opening brief with the Seventh Circuit, now due in early February 2026,[3] and thus abandon the appeal. That would be the best course. If the IRS continues to support its own market-debilitating interpretation through an appeal, the fate of the Tax Court's proper course correction will fall to the Seventh Circuit and, perhaps ultimately, the U.S. Supreme Court. Certainly, if either court or both reverse the Tax Court, Congress could ultimately amend the Code to clarify that break-up fees are ordinary business expenses. One thing is clear though: The interpretation of this Tax Code provision is not a sleepy matter for tax geeks alone. We should all care about getting it right, as we all will be affected when the vibrancy of the general market is buttressed by the vitality of the merger markets within it.

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[2] *See* https://perma.cc/AQQ3-2DBT.

[3] Natalie Olivo, *Busy DOJ Tax Atty Seeks More Time In 7th Circ. AbbVie Case*, LAW360, Jan. 2, 2026, https://perma.cc/TLY6-JF6P (noting "the U.S. solicitor general has not yet concluded his review of the case and made a final decision whether to authorize the appeal;" and "If the appeal is authorized, the opening brief will need to include the solicitor general's views, and then the Internal Revenue Service's Office of Chief Counsel will need to review it prior to filing, according to extension request.").