

LB&I Process Unit

Knowledge Base – Corporate/Business Issues & Credits

Library Level	Number	Title
Shelf		Corporate Issues
Book	225	Transaction Costs
Chapter	1	Transaction Costs Overview
Section		

Unit Name	Examining a Transaction Costs Issue	
Primary UIL Code	263.14-00	Allocation Between Capital Expenditure and Expense

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Process Overview

Examining a Transaction Costs Issue

When executing a business transaction, a taxpayer may incur legal fees, accounting fees, consulting fees, investment advisory service fees and other transaction costs. If the cost facilitates a transaction described in Treas. Reg. 1.263(a)-5(a), the taxpayer must capitalize the cost. Transactions described in Treas. Reg. 1.263(a)-5(a) include acquiring or selling a trade or business, or changing a company's capital structure.

Other sections of the IRC 263(a) regulations also address facilitative costs. For example, Treas. Reg. 1.263(a)-4 requires capitalization of amounts that facilitate acquiring or creating an intangible. However, this practice unit solely addresses the rules for capitalizing costs that facilitate transactions described in Treas. Reg. 1.263(a)-5 ("transaction costs issue" for purpose of this practice unit). The process presented here for examining a transaction costs issue is recommended as a best practice. However, because the issue is dependent on the taxpayer's particular facts and circumstances, other approaches may be valid as well.

Examining a transaction costs issue can be very time-consuming. It may be necessary to review extensive documentation to identify the type of transaction, the parties to the transaction, and the nature and scope of the services for which the transaction costs were incurred.

The examples below and on the next slide are situations in which the process applies:

- Situation 1: Corporation H (H) manufactures button-shaped chocolates, which are packaged in single-serving bags. H decides to discontinue the manufacturing and sale of single-serving button-shaped chocolates so it can focus on the manufacturing and sale of chocolate bars. H engages an investment banker to find a buyer to purchase the equipment and other assets associated with the production and sale of button-shaped chocolates. The investment banker approaches Corporation M (M) and negotiates an agreement under which M purchases all of the assets used in H's button-shaped chocolates business. H pays the investment banker a fee for services performed in connection with the sale.
 - H's sale of its button-shaped chocolates business is a transaction described in Treas. Reg. 1.263(a)-5(a)(1). The fee H pays to the investment banker is a cost that facilitates the sale of its button-shaped chocolates business and must be capitalized.

Process Overview (cont'd)

Examining a Transaction Costs Issue

- Situation 2: The facts are the same as in Situation 1. In addition, M takes out a loan to finance its purchase of all of the assets used in H's button-shaped chocolates business. M pays a financial advisor for services performed in connection with obtaining the loan.
 - The loan is a "borrowing," which is a transaction described in Treas. Reg. 1.263(a)-5(a)(9). The fee M pays to its financial advisor is a cost that facilitates M's borrowing and must be capitalized.
- Situation 3: The facts are the same as in Situation 1, except that prior to engaging the investment banker, H had not yet decided to sell its button-shaped chocolates business. H engages the investment banker to analyze the business and make recommendations on how to improve it, or whether the business should be sold. The investment banker conducts its analysis and recommends that H sell the business. The investment banker approaches M and negotiates an agreement under which M purchases all of the assets used in H's button-shaped chocolates business. H pays the investment banker a fee for its analysis and recommendation and for services performed in connection with the sale.
 - H's sale of its button-shaped chocolates business is a transaction described in Treas. Reg. 1.263(a)-5(a)(1). The portion of the fee paid to the investment banker that relates to services performed in connection with the sale is a cost that facilitates the sale of the business and must be capitalized. The portion of the fee that relates to the investment banker's analysis of the business and recommendation does not facilitate the sale of the business and may be deducted if the requirements of IRC 162 are met and the cost is not capitalizable under another section of IRC 263, or another provision of the Code.
- Situation 4: Corporation W (W) is the U.S. parent of a consolidated group, which includes Corporation R (R), a wholly-owned subsidiary. W decides to sell its equity interest in R. On behalf of R, W engages an investment banker to locate a buyer and negotiate the sale of R's stock. The investment banker locates Corporation J (J) and negotiates an agreement under which J purchases all of R's stock. R pays the investment banker a fee in connection with the transaction.
 - J's acquisition of R's stock is a transaction described in Treas. Reg. 1.263(a)-5(a)(2). The fee R pays to the investment banker is a transaction cost. The services provided by the investment banker must be analyzed to determine which entity (i.e., W or R) is the proper legal entity to take the fee into account for tax purposes and whether all or a portion of the fee facilitates the acquisition of R's stock.

Detailed Explanation of the Process

Examining a Transaction Costs Issue

Analysis

Treas. Reg. 1.263(a)-5(a) requires a taxpayer to capitalize amounts that facilitate:

- Acquiring assets that constitute a trade or business;
- Acquiring an ownership interest in a business entity, if immediately after the acquisition, the taxpayer and the business entity are related within the meaning of IRC 267(b) or 707(b);
- Acquiring an ownership interest in the taxpayer;
- Restructuring, recapitalizing or reorganizing the capital structure of a business entity, including a reorganization described in IRC 368 and a stock distribution described in IRC 355;
- Contributing property to a corporation in exchange for stock, as described in IRC 351, or to a partnership in exchange for a partnership interest, as described in IRC 721;
- Forming or organizing a disregarded entity;
- Acquiring capital;
- Issuing stock;
- Borrowing money; and
- Writing an option.

The rules under Treas. Reg. 1.263(a)-5 describe whether a cost incurred facilitates a transaction listed in paragraph (a) of that regulation and how the costs that facilitate some of those transactions are treated when capitalized. Case law and other published guidance interpret the application of the rules under Treas. Reg. 1.263(a)-5, or provide guidance where Treas. Reg. 1.263(a)-5 does not.

Detailed Explanation of the Process (cont'd)

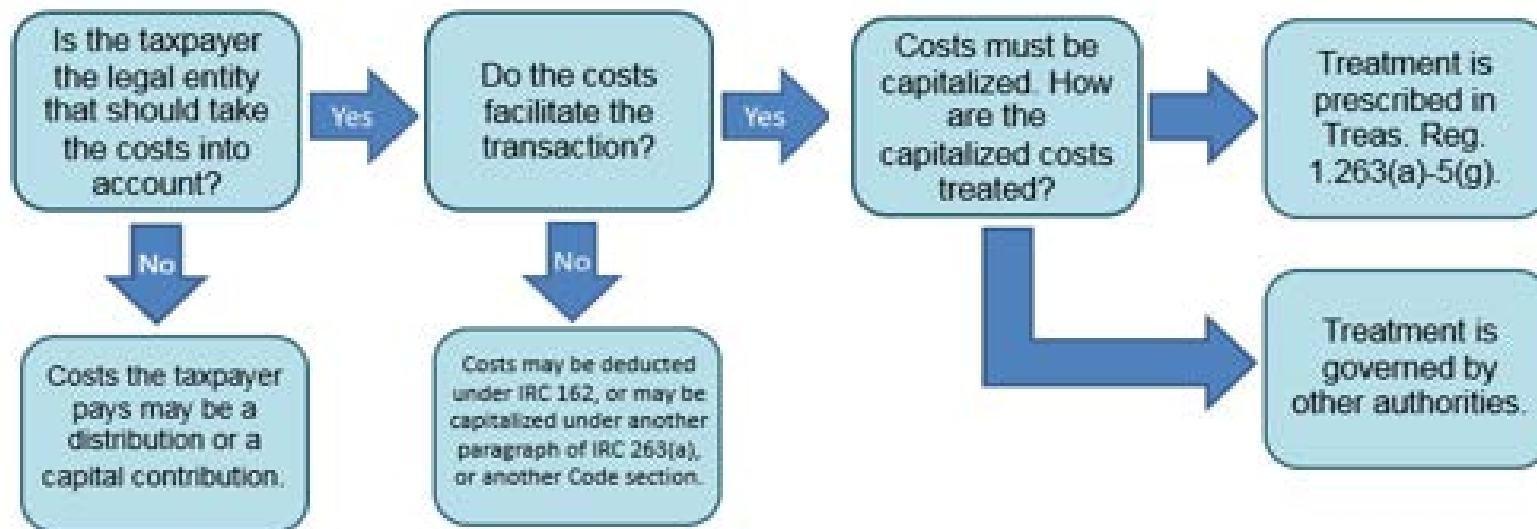
Examining a Transaction Costs Issue

Analysis

This practice unit discusses the following three-step process for analyzing a transaction costs issue:

1. Proper Legal Entity - Determine whether the taxpayer is the proper legal entity to take the transaction costs into account for tax purposes.
2. Facilitative Costs - Determine whether the costs facilitate the transaction.
3. Treatment of Facilitative Costs - Determine how the taxpayer should treat facilitative costs it must capitalize.

The key considerations and outcomes for each step in the process are:



Process Applicability

Examining a Transaction Costs Issue

Before applying the process, determine whether there is a transaction costs issue. If the issue is present, then determine the associated risk and materiality.

Criteria	Resources
<p><u>Disclosure, Discussion or Identification of a Transaction</u></p> <p>Review schedules and statements attached to the return, SEC filings (e.g., 10-K ,10-Qs, S-1s), news articles, and the company website for disclosures and discussions of merger or acquisition transactions, new equity investments, public stock issuances and private placements, new financing, or option issuances.</p>	<ul style="list-style-type: none"> ▪ SEC Website ▪ Capital IQ ▪ Bloomberg
<p><u>Transaction Costs Reported on Schedule M-3</u></p> <p>Review Schedule M-3, Part III, lines 23 through 25 for current-year investment banking fees, legal and accounting fees and other costs incurred for an acquisition or reorganization. Note the total fees incurred (in column (a)) and the total fees deducted (in column (d)).</p>	
<p><u>Significant Professional Fees in Other Deductions</u></p> <p>Review the detail of Form 1120, line 26, Other Deductions, for significant costs that could relate to a transaction described in Treas. Reg. 1.263(a)-5(a). Examples include (but are not limited to) legal and professional fees, transaction advisory fees, merger costs, Initial Public Offering (IPO) costs, loan costs).</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.263(a)-5(a)

Process Applicability (cont'd)

Examining a Transaction Costs Issue	
Criteria	Resources
<u>Significant Increase in Professional Fees</u> Prepare a comparative analysis of legal and professional fees and review for significant increase(s) from prior year(s).	
<u>Issue Risk Warrants an Examination</u> Prepare a risk assessment for the potential issues identified for the case. Determine whether the associated risk warrants an examination of the transaction costs issue. Consult Practice Network for risk analysis assistance, as necessary.	

Summary of Process Steps

Examining a Transaction Costs Issue

Process Steps

The process involves a three-step approach to analyzing transaction costs. To be most effective, the steps should be performed sequentially.

<u>Step 1</u>	Proper Legal Entity - Determine whether the taxpayer is the proper legal entity to take the transaction costs into account for tax purposes.
<u>Step 2</u>	Facilitative Costs - If the taxpayer is the proper legal entity to take the transaction costs into account, the next step is to determine whether the costs facilitate the transaction and must be capitalized under Treas. Reg. 1.263(a)-5.
<u>Step 3</u>	Treatment of Facilitative Costs - If the costs facilitate the transaction, the final step is to determine how the facilitative costs should be treated.

Step 1: Proper Legal Entity

Examining a Transaction Costs Issue

Step 1

Determine whether the taxpayer is the proper legal entity to take the transaction costs into account for tax purposes.

Considerations	Resources
<p>Many of the transactions listed under Treas. Reg. 1.263(a)-5(a) involve multiple parties. Each party can incur transaction costs.</p> <p>Generally, the legal entity that incurs a cost takes the cost into account for tax purposes, either as a deduction, or as a capital expenditure; however, there is an exception for costs that facilitate a borrowing, as defined in Treas. Reg. 1.263(a)-5(a)(9) (see discussion below).</p> <p>The party to the transaction that pays a cost is not always the legal entity that incurs the cost. When applying the rules of Treas. Reg. 1.263(a)-5, an amount considered to have been paid by a party to the transaction includes an amount paid on its behalf by another party to the transaction. See Treas. Reg. 1.263(a)-5(k). In order to be treated as incurring a cost paid on its behalf by another entity, a party must have benefitted from the services for which the payment was made. This requirement prevents the benefit of an expenditure from being “assigned” to a specific party simply by having that party pay the cost.</p> <p>If a taxpayer benefits from services paid for by another party and does not reimburse the paying party, depending on their relationship, the amount paid is treated as either a capital contribution or a distribution to the taxpayer. The taxpayer is then treated as using the funds to pay for the services.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.263(a)-5(a) ▪ Treas. Reg. 1.263(a)-5(k) ▪ PLR 200830009 ▪ PLR 200953014 ▪ <i>Specialty Restaurants Corporation & Subsidiaries v. Commissioner</i> - T.C. Memo 1992-221

Step 1: Proper Legal Entity (cont'd)

Examining a Transaction Costs Issue

[Step 1](#)

Considerations	Resources
<p>The following example illustrates these concepts:</p> <p><u>Example 1</u></p> <p>X, a partnership, owns 75% of the stock of Y, a corporation; the remaining 25% of Y's stock is widely-held. In 2015, Merger Sub, a wholly-owned subsidiary of P, which is unrelated to X and Y, merges with and into Y, with Y surviving. In the transaction, P acquires all the stock of Y and Y becomes a subsidiary of P.</p> <p>X has a working relationship with an investment banker and arranges for the investment banker to provide services to Y in connection with the transaction. Y executes a contract with the investment banker for advisory services to include locating a potential buyer for Y's stock, conducting due diligence on the identified buyer and negotiating the terms of the transaction. The investment banker bills Y for the services it performed; however, since X has an ongoing relationship with the investment banker, X pays the invoice on Y's behalf. Y reimburses X for the fees paid.</p> <p>Since Y directly benefitted from the advisory services, Y is the proper legal entity to take the investment banker's fees into account as a deduction or as a capital expenditure, as appropriate. This is true even though X initially paid the investment banker on Y's behalf.</p>	

Step 1: Proper Legal Entity (cont'd)

Examining a Transaction Costs Issue

[Step 1](#)

Considerations	Resources
<p><u>Example 1 (cont'd)</u></p> <p>If Y did not reimburse X for the fees, Y would still be the proper legal entity to take the advisory fees into account since it directly benefitted from the advisory services provided. Treas. Reg. 1.263(a)-5(k) treats Y as paying the fees X paid on Y's behalf. X is deemed to make a nondeductible capital contribution to Y. Y is treated as using the funds deemed received from X to pay the investment banker.</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5(k)

Step 1: Proper Legal Entity (cont'd)

Examining a Transaction Costs Issue

[Step 1](#)

Considerations	Resources
<p>In some cases, a service provider's activities may benefit more than one party involved in the transaction. In that case, the fee paid to the service provider should be allocated among the benefitting parties.</p> <p>The following example illustrates this concept.</p> <p><u>Example 2</u></p> <p>X, a partnership, owns 75% of the stock of Y, a corporation; the remaining 25% of Y's stock is widely-held. In 2015, Merger Sub, a wholly-owned subsidiary of P, which is unrelated to X and Y, merges with and into Y, with Y surviving. In the transaction, P acquires all the stock of Y and Y becomes a subsidiary of P.</p> <p>P arranges and pays for an investment banker and a law firm to provide financial advisory and legal services to Merger Sub and Y in connection with the transaction, including negotiating and structuring the transaction and preparing the merger agreement. The investment banker and law firm provided some services directly to Merger Sub and/or Y. Other services provided by the investment banker and law firm directly benefitted Merger Sub and/or Y.</p>	

Step 1: Proper Legal Entity (cont'd)

Examining a Transaction Costs Issue

[Step 1](#)

Considerations	Resources
<p><u>Example 2 (cont'd)</u></p> <p>The investment banking fees and legal fees for services provided to Merger Sub and Y should be allocated to and taken into account by either Merger Sub and Y, based upon the entity to which the services were rendered and/or on whose behalf the services were provided, even if P paid the fees for the services.</p>	

Step 1: Proper Legal Entity (cont'd)

Examining a Transaction Costs Issue

[Step 1](#)

Considerations	Resources
<p>Determining which legal entity should take a cost into account requires an analysis of the relevant facts and circumstances. Questions to consider include:</p> <ul style="list-style-type: none">▪ What service was provided?▪ On whose behalf was the service rendered?▪ To whom was the service rendered?▪ To whom did the service provider report?▪ Who directly benefitted from the service?▪ Who incurred the economic burden for the service?▪ Who paid for the service?	

Step 1: Proper Legal Entity (cont'd)

Examining a Transaction Costs Issue


[Step 1](#)

Considerations	Resources
<p>Documentation which may be helpful in determining which legal entity incurred the costs include (but are not limited to):</p> <ul style="list-style-type: none">▪ Engagement letter, contract or agreement describing the services and to which entity the services are to be provided;▪ Invoices showing to which entity the service provider billed the fees;▪ Documentation showing which entity actually paid the fees;▪ Written communication between the service provider, the taxpayer and other parties regarding the work performed (e.g., letters, memos, electronic mail);▪ Minutes of meetings regarding the work performed;▪ Taxpayer's written explanation of the activities performed by the service provider and the benefit(s) realized by the party(ies) taking the costs into account.	

Step 1: Proper Legal Entity (cont'd)

Examining a Transaction Costs Issue

[Step 1](#)

Considerations	Resources
<p data-bbox="87 505 559 536"><u>Costs That Facilitate a Borrowing</u></p> <p data-bbox="87 596 1404 739">Loan costs are generally treated as incurred by the borrower. Where the loan proceeds and repayment obligation are assumed (or deemed assumed) by a successor of the borrower, the successor is generally allowed to amortize the capitalized costs over the loan term. See Treas. Reg. 1.446-5.</p> <p data-bbox="87 791 1404 1018"> DECISION POINT: Is the taxpayer the proper legal entity to take the costs into account for tax purposes? If the taxpayer is not the proper legal entity to take the transaction costs into account, the amount (if paid by the taxpayer) may be a capital contribution, a distribution or a loan. If the taxpayer is the proper legal entity to take the transaction costs into account, the next step is to determine whether the costs facilitate the transaction and must be capitalized.</p>	<ul data-bbox="1425 505 1968 619" style="list-style-type: none">▪ <i>Square D Co. v. Commissioner</i> - 121 T.C. 168 (2003)▪ Treas. Reg. 1.446-5

Step 2: Facilitative Costs

Examining a Transaction Costs Issue

Step 2

If the taxpayer is the proper legal entity to take the transaction costs into account, the next step is to determine whether the costs facilitate the transaction and must be capitalized under Treas. Reg. 1.263(a)-5.

Considerations	Resources
<p>A taxpayer must capitalize a cost that facilitates a transaction described in Treas. Reg. 1.263(a)-5(a) (see list on Slide 6).</p> <p><u>General Rule of “Facilitate”</u></p> <p>Whether a cost facilitates a transaction is based on all the facts and circumstances. The cost must be paid to investigate or otherwise pursue the transaction. The fact that a cost would (or would not) have been paid but for the transaction is relevant, but does not determine whether the amount facilitates the transaction. See Treas. Reg. 1.263(a)-5(b)(1).</p> <p>Examples of costs to investigate or otherwise pursue a transaction include (but are not limited to) a fee paid to:</p> <ul style="list-style-type: none"> ▪ An appraiser to determine the value or purchase price of acquired assets which constitute a trade or business; ▪ An attorney to assist the taxpayer in executing an IPO of its stock; and ▪ An investment banker to market a bond issuance to the public. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.263(a)-5(a) ▪ Treas. Reg. 1.263(a)-5(b)(1) ▪ Treas. Reg. 1.263(a)-5(l), Example 1

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue


[Step 2](#)

Considerations	Resources
<p><u>General Rule of “Facilitate” (cont'd)</u></p> <p>The purchase price of corporate assets or stock is not an amount paid to investigate or otherwise pursue a transaction; therefore, is not a facilitative cost. See Treas. Reg. 1.263(a)-5(b)(1). However, an ownership interest in a corporation is an intangible asset and an amount paid to acquire an intangible asset is capitalizable under Treas. Reg. 1.263(a)-4. See Treas. Reg. 1.263(a)-4(b)(1)(i) & (c)(1)(ii).</p> <p>A cost to investigate or otherwise pursue a transaction described in Treas. Reg. 1.263(a)-5 can also be a cost to investigate or otherwise pursue acquiring or creating an intangible asset under Treas. Reg. 1.263(a)-4. For example, legal fees incurred by a taxpayer to investigate or otherwise pursue acquiring all the stock of a corporation may facilitate acquiring an ownership interest in a business entity, which is a transaction described in Treas. Reg. 1.263(a)-5(a)(2). Under Treas. Reg. 1.263(a)-4(e)(1)(i), the same fees may also facilitate acquiring an intangible asset described in Treas. Reg. 1.263(a)-4(c)(1)(i). When both Treas. Reg. 1.263(a)-5 and Treas. Reg. 1.263(a)-4 apply to the same cost, the rules of Treas. Reg. 1.263(a)-5 govern the treatment of the cost. See Treas. Reg. 1.263(a)-5(b)(2).</p> <p>An amount required to be capitalized by Reg. 1.263(a)-1, Reg. 1.263(a)-2, or Reg. 1.263(a)-4 does not facilitate a transaction described in Reg. 1.263(a)-5(a).</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.263(a)-1 ▪ Treas. Reg. 1.263(a)-2 ▪ Treas. Reg. 1.263(a)-4 ▪ Treas. Reg. 1.263(a)-4(b)(1)(i) ▪ Treas. Reg. 1.263(a)-4(c)(1)(i) ▪ Treas. Reg. 1.263(a)-4(c)(1)(ii) ▪ Treas. Reg. 1.263(a)-4(e)(1)(i) ▪ Treas. Reg. 1.263(a)-5 ▪ Treas. Reg. 1.263(a)-5(a)(2) ▪ Treas. Reg. 1.263(a)-5(b)(1) ▪ Treas. Reg. 1.263(a)-5(b)(2)

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Costs Resulting From the Transaction</u></p> <p>Costs which result from the transaction are not facilitative costs. For example, when a taxpayer executes an IPO, it may be obligated to pay a fee to terminate a service agreement such as a management agreement. The fee to terminate the agreement is a fee for management services provided or compensation for foregone services that would have been provided if the IPO had not occurred. Since the termination fee is not a payment for services rendered in connection with the IPO, it is not incurred to investigate or otherwise pursue the IPO, does not facilitate the transaction and is not capitalizable under Treas. Reg. 1.263(a)-5. See PLR 201518012.</p> <p>Additionally, the cost of representation and warranty insurance, or directors' and officers' insurance required by the terms of the transaction agreement does not facilitate the transaction, but may be capitalizable as a cost to create the insurance contract (an intangible). See Treas. Reg. 1.263(a)-4(d)(2)(i)(D).</p> <p> DECISION POINT: Was the cost paid or incurred to investigate or otherwise pursue the transaction? If no, the cost is not capitalizable under Treas. Reg. 1.263(a)-5, but may still be capitalizable under another provision of the Code (e.g., IRC 195) or under another section of the IRC 263(a) regulations (e.g., Treas. Reg. 1.263(a)-4(e)). See discussion on Slide 23.</p>	<ul style="list-style-type: none">▪ IRC 263(a)▪ Treas. Reg. 1.263(a)-4(d)(2) & (d)(3)▪ Treas. Reg. 1.263(a)-4(e)▪ Treas. Reg. 1.263(a)-5▪ PLR 201518012

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue


[Step 2](#)

Considerations	Resources
<p><u>Non-Facilitative Costs</u></p> <p>Under special rules and simplifying conventions, certain costs do NOT facilitate a transaction described in Treas. Reg. 1.263(a)-5(a). See Treas. Reg. 1.263(a)-5(c) and (d).</p> <p>For example, business integration costs are incurred to combine two or more businesses and typically include costs to relocate equipment and personnel, combine records and information systems, provide severance benefits to employees who are terminated because of the business combination, prepare financial statements for the combined entity and reduce redundancies in the combined business operations. Business integration costs do not facilitate the transaction that resulted in the combined business. See Treas. Reg. 1.263(a)-5(c)(6) & 1.263(a)-5(l), Example 6.</p> <p>Also, compensation paid to employees is not a facilitative cost. See Treas. Reg. 1.263(a)-5(d)(1). This is true even if the employee is paid for performing services in connection with the transaction. See Treas. Reg. 1.263(a)-5(l), Examples 5 and 8.</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5(c)▪ Treas. Reg. 1.263(a)-5(c)(3)▪ Treas. Reg. 1.263(a)-5(c)(6)▪ Treas. Reg. 1.263(a)-5(c)(8)▪ Treas. Reg. 1.263(a)-5(d)▪ Treas. Reg. 1.263(a)-5(d)(1)▪ Treas. Reg. 1.263(a)-5(l), Examples 5, 6, & 8

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Non-Facilitative Costs (cont'd)</u></p> <p>Costs that are not facilitative and not capitalizable under Treas. Reg. 1.263(a)-5(a) may be deductible as an ordinary or necessary expense under IRC 162, or may be capitalizable under another section of the Code (e.g., a start-up cost under IRC 195), or under another provision of IRC 263(a) (e.g., a cost that facilitates the acquisition or creation of an intangible under Treas. Reg. 1.263(a)-4(e)).</p> <p> DECISION POINT: Does the taxpayer take into account any of the costs as non-facilitative costs under Treas. Reg. 1.263(a)-5(c) or (d)? A cost that is not facilitative under Treas. Reg. 1.263(a)-5(c) or (d) is not capitalizable under Treas. Reg. 1.263(a)-5, but as discussed above, may still be capitalizable under another provision of the Code (e.g., IRC 195) or under another section of the IRC 263(a) regulations (e.g., Treas. Reg. 1.263(a)-4(e)).</p>	<ul style="list-style-type: none"> ▪ IRC 263(a) ▪ IRC 162 ▪ IRC 195 ▪ Treas. Reg. 1.263(a)-4(e) ▪ Treas. Reg. 1.263(a)-5 ▪ Treas. Reg. 1.263(a)-5(a) ▪ Treas. Reg. 1.263(a)-5(c) ▪ Treas. Reg. 1.263(a)-5(d)

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue


[Step 2](#)

Considerations	Resources
<p><u>Covered Transactions</u></p> <p>For “covered transactions,” there are special rules to determine which costs are facilitative.</p> <p>“Covered transactions” include:</p> <ul style="list-style-type: none"> ▪ Acquiring assets that constitute a trade or business in a taxable transaction; ▪ Acquiring an ownership interest in a business entity (whether the taxpayer is the acquirer or the target) in a taxable transaction if, immediately after the transaction, the acquirer and the target are related within the meaning of IRC 267(b) or 707(b); ▪ A reorganization described in IRC 368(a)(1)(A), (B), or (C), or a reorganization described in IRC 368(a)(1)(D) in which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under IRC 354 or 356 (whether the taxpayer is the acquirer or the target). <p>A covered transaction does not include a taxable transaction in which the taxpayer’s assets are acquired, or are deemed to be acquired in a transaction that is not structured as an asset acquisition, but is recast as an asset acquisition under applicable law (e.g., a qualified stock purchase with an IRC 338 election).</p>	<ul style="list-style-type: none"> ▪ IRC 267(b) ▪ IRC 338 ▪ IRC 354 ▪ IRC 356 ▪ IRC 368(a)(1)(A), (B), (C), (D) ▪ IRC 707(b) ▪ Treas. Reg. 1.263(a)-5(b)(1) ▪ Treas. Reg. 1.263(a)-5(e)(3) ▪ CCA 201624021

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Bright-Line Date</u></p> <p>Except for inherently facilitative costs, a cost incurred for services rendered before the “bright-line date” to investigate or otherwise pursue the transaction does not facilitate the transaction.</p> <p>The “bright-line date” is the earlier of the following:</p> <ul style="list-style-type: none"> ▪ Date on which representatives of the acquirer and the target execute a letter of intent, exclusivity agreement, term sheet or similar written document (other than a confidentiality agreement) reflecting the terms of the transaction (“letter of intent date”), or ▪ Date on which the taxpayer’s board of directors, or its appropriate governing officials (if the taxpayer is not a corporation), authorize or approve the material terms of the transaction as agreed to by representatives of the acquirer and the target (“board approval date”). <p> DECISION POINT: Is the transaction a covered transaction? If the transaction is a covered transaction, facilitative costs are determined based on the bright-line date and whether or not the related services are inherently facilitative. If the transaction is not a covered transaction, facilitative costs are determined under the general rule of Treas. Reg. 1.263(a)-5(b)(1) discussed previously.</p>	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.263(a)-5(e)(1)

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Inherently Facilitative Costs</u></p> <p>An “inherently facilitative” cost is an amount paid for certain types of activities (i.e., services performed) to investigate or otherwise pursue the transaction. Inherently facilitative costs must be capitalized regardless of when the related services are performed.</p> <p>A cost is inherently facilitative if it is paid for one of the following activities (or similar types of activities):</p> <ul style="list-style-type: none">▪ An appraisal, written evaluation, or fairness opinion related to the transaction;▪ Advice and assistance in structuring the transaction, including negotiating the structure and obtaining tax advice on the structure of the transaction;▪ Preparing and reviewing transaction documents such as a purchase agreement or merger agreement;▪ Advice and assistance in obtaining regulatory approval of the transaction, including preparing and reviewing regulatory filings;▪ Obtaining shareholder approval of the transaction (e.g., proxy, solicitation and promotion costs); or▪ Conveying property between the parties to the transaction (e.g., transfer taxes and title registration fees).	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5(e)(2)

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Success-Based Fees</u></p> <p>A cost that is payable upon the successful completion of a transaction (a “success-based fee”) is presumed to facilitate the transaction and must be capitalized.</p> <p>A taxpayer may rebut the presumption that the cost facilitates the transaction by providing sufficient documentation to support allocating some or all of the cost to activities that do not facilitate the transaction. This documentation must:</p> <ul style="list-style-type: none">▪ Be completed on or before the due date of the taxpayer’s timely filed return (including extensions) for the tax year during which the transaction closes (i.e., contemporaneous),▪ Consist of more than merely an allocation between facilitative and non-facilitative activities, and	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5(f)

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Success-Based Fees (cont'd)</u></p> <ul style="list-style-type: none">▪ Consist of supporting records (e.g., time records, itemized invoices, or other records) that identify:<ul style="list-style-type: none">– Activities performed by the service provider;– Amount of fee (or percentage of time) allocable to each activity;– Where the date the activity is performed is relevant to determining whether the fee is facilitative, the amount of fee (or percentage of time) allocable to the performance of the activity before and after the relevant date, and– Name, business address, and business telephone number of the service provider. <p>“Other records” in Treas. Reg. 1.263(a)-5(f) include allocation spreadsheets an accounting firm developed based on discussions with the taxpayer and the service provider and must be considered in allocating the success-based fee between facilitative and non-facilitative activities.</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5(f)

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

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Considerations	Resources
<p><u>Success-Based Fees (cont'd)</u></p> <p>Although the regulations set forth the scope and timing for documentation to support a success-based fee, through the ruling process, a taxpayer may request (and might be granted) relief under Treas. Reg. 301.9100 for an extension of time to meet the documentation requirements of Treas. Reg. 1.263(a)-5(f).</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5(f)▪ Treas. Reg. 301.9100▪ TAM 201002036▪ PLR 200837005▪ PLR 200907018▪ PLR 200945007

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Rev. Proc. 2011-29</u></p> <p>Under Rev. Proc. 2011-29, a taxpayer that incurs success-based fees in connection with a covered transaction in tax years ending on or after April 8, 2011, can elect to treat 70% of the success-based fees as not facilitating the transaction. The taxpayer must capitalize the remaining 30% of the success-based fees on its timely-filed original return (including extensions). If the taxpayer elects to apply this “safe-harbor allocation” to success-based fees, the taxpayer avoids the documentation requirements of Treas. Reg. 1.263(a)-5(f); however, the taxpayer must apply the safe-harbor allocation to the total amount of success-based fees incurred in connection with the transaction and cannot revoke the election.</p> <p>Although Rev. Proc. 2011-29 provides that the safe-harbor allocation election must be made by the extended due date of the original return, through the ruling process, a taxpayer may request (and might be granted) relief under Treas. Reg. 301.9100 for an extension of time to make the election.</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5(f)▪ Treas. Reg. 301.9100▪ Rev. Proc. 2011-29▪ PLR 201606003▪ PLR 201622002

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue


[Step 2](#)

Considerations	Resources
<p>Rev. Proc. 2011-29 (cont'd)</p> <p>Rev. Proc. 2011-29 applies only to success-based fees incurred for covered transactions in tax years ending on or after April 8, 2011. However, LB&I Directive - <i>Examination of Success-Based Fees in the Acquisition of Businesses</i> instructs LB&I examiners not to challenge a taxpayer's treatment of success-based fees paid or incurred in a covered transaction in taxable years that ended before April 8, 2011, where the taxpayer's original return position was to capitalize at least 30% of the total success-based fees incurred in connection with the transaction.</p> <p>If a taxpayer elects the safe-harbor allocation under Rev. Proc. 2011-29 and an inherently facilitative cost (such as a fee paid for a fairness opinion) is included in the success-based fee, it is possible for the taxpayer to treat up to 70% of the inherently facilitative cost as not facilitating the transaction, assuming the other criteria of Rev. Proc. 2011-29 are met.</p> <p>If, under the terms of the engagement, the fee for the fairness opinion is payable upon the occurrence of an event other than the successful closing of the transaction (e.g., the passage of time), the fee may be a "milestone payment." By definition, a milestone payment, which becomes payable when an event other than the successful closing of the transaction occurs, is not a success-based fee and is not eligible for the safe-harbor allocation under Rev. Proc. 2011-29.</p>	<ul style="list-style-type: none"> ▪ LB&I Directive - <i>Examination of Success-Based Fees in the Acquisition of Businesses</i> (7/28/11) ▪ Treas. Reg. 1.263(a)-5(e)(2) ▪ Rev. Proc. 2011-29 ▪ CCA 201234027

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p><u>Rev. Proc. 2011-29 (cont'd)</u></p> <p>However, based on LB&I Directives, <i>Examination of Milestone Payments in the Acquisition of Businesses</i> and <i>Updated Guidance on the Examination of Milestone Payments in the Acquisition of Businesses</i>, you should not challenge a taxpayer's treatment of an eligible milestone payment (assuming the other criteria of the directives are met) even if the milestone payment is for an inherently facilitative service listed in Treas. Reg. 1.263(a)-5(e)(2). Therefore, if the fee for the fairness opinion is an eligible milestone payment and the taxpayer meets the other requirements of the directives, then the taxpayer may be allowed to treat up to 70% of the fee for the fairness opinion as not facilitating the transaction.</p> <p> DECISION POINT: Are any of the transaction costs incurred success-based? A success-based fee facilitates the transaction, unless the taxpayer provides documentation to support allocating a portion of the fee to non-facilitative activities, or the taxpayer elects the safe-harbor allocation under Rev. Proc. 2011-29. If the taxpayer elects the safe-harbor allocation and otherwise meets the requirements of Rev. Proc. 2011-29, the taxpayer may treat 70% of all success-based fees incurred in connection with the transaction as not facilitative, must capitalize the remaining 30% as facilitative and need not provide documentation to support the allocation.</p>	<ul style="list-style-type: none"> ▪ LB&I Directive - <i>Examination of Milestone Payments in the Acquisition of Businesses</i> (4/29/13) ▪ LB&I Directive - <i>Updated Guidance on the Examination of Milestone Payments in the Acquisition of Businesses</i> (1/27/14) ▪ Rev. Proc. 2011-29

Step 2: Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 2](#)

Considerations	Resources
<p>Documentation which may be helpful in obtaining an understanding of the facts regarding transaction costs incurred include (but are not limited to):</p> <ul style="list-style-type: none">▪ Purchase and sale agreement or merger agreement;▪ Timeline or transaction calendar;▪ Engagement letters, and amendments thereto, for services provided;▪ All correspondence, including e-mails, between service providers and the taxpayer during the relevant engagement period;▪ Minutes of meetings, including meetings between service providers, the taxpayer and other parties to the transaction, and meetings of the taxpayer's board of directors;▪ Copies of materials from presentations made by service providers to the board of directors or the officers of the taxpayer during the relevant engagement period;▪ Legal invoices, which can be used to construct a timeline for the transaction, if the taxpayer cannot or does not provide a timeline or transaction calendar;▪ Allocation spreadsheets developed by an accounting firm and the records the accounting firm relied on in determining the allocation. <p>Interviewing the service providers' employees who actually performed the services may also help to determine how the service providers spent their time and how the fees paid to the service providers should be allocated.</p>	

Step 3: Treatment of Facilitative Costs

Examining a Transaction Costs Issue

Step 3

If the costs facilitate the transaction, the final step is to determine how the facilitative costs should be treated.

Considerations	Resources
<p>Costs that are facilitative and must be capitalized under Treas. Reg. 1.263(a)-5 may be recoverable immediately, may be recoverable over time, or may never be recoverable. The structure of the transaction and the taxpayer's role in the transaction (e.g., acquirer or target) determine how the capitalized costs are treated.</p> <p>Treas. Reg. 1.263(a)-5(g) provides guidance regarding the treatment of costs that facilitate certain types of transactions; however, not all transactions described in Treas. Reg. 1.263(a)-5(a) are addressed and guidance is reserved for certain types of transactions.</p>	<ul style="list-style-type: none">▪ Treas. Reg. 1.263(a)-5▪ Treas. Reg. 1.263(a)-5(g)▪ Treas. Reg. 1.263(a)-5(g)(2)(i) & (g)(ii)(A)▪ Treas. Reg. 1.263(a)-5(g)(4)

Step 3: Treatment of Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

Step 3

Considerations		Resources
Costs that facilitate the following types of transactions are treated as follows:		<ul style="list-style-type: none"> ▪ Treas. Reg. 1.263(a)-5 ▪ Treas. Reg. 1.263(a)-5(g) ▪ Treas. Reg. 1.263(a)-5(g)(2)(i) & (g)(ii)(A) ▪ Treas. Reg. 1.263(a)-5(g)(4)
Transaction	Treatment of Facilitative Costs	
Taxable acquisition of assets by the taxpayer	Increases the basis of assets acquired	
Taxable acquisition of stock by the taxpayer	Increases the basis of stock acquired	
Taxable sale of assets by the taxpayer	Reduces amount realized on asset sale	
Borrowing by the taxpayer	Generally, amortized over the loan term	

Step 3: Treatment of Facilitative Costs (cont'd)

Examining a Transaction Costs Issue

[Step 3](#)

Considerations	Resources
<p>Treas. Reg. 1.263(a)-5(g) is reserved regarding the treatment of costs that facilitate the following:</p> <ul style="list-style-type: none"> ▪ Acquiring the stock of the taxpayer in a taxable transaction; ▪ Acquiring stock or assets in a tax-free transaction (e.g., a statutory merger); ▪ Issuing stock (i.e., raising capital). <p>Additionally, Treas. Reg. 1.263(a)-5(g) does not mention the following types of transactions:</p> <ul style="list-style-type: none"> ▪ Tax-free divisive transactions (e.g., spin-offs); ▪ IRC 351 or 721 transfers; ▪ Recapitalizations under IRC 368(a)(1)(E). <p>Where the regulations do not provide guidance regarding the treatment of costs that facilitate certain types of transactions, other authorities govern the treatment of those costs. For example, costs that facilitate a stock issuance must be capitalized. See Treas. Reg. 1.263(a)-5(a)(8). Under current law, the capitalized costs are considered nondeductible capital outlays which reduce the inflow of capital and may not be deducted when incurred or upon dissolution. See <i>McCrary v. United States</i> - 651 F.2d 828 (1981).</p>	<ul style="list-style-type: none"> ▪ IRC 351 ▪ IRC 368(a)(1)(E) ▪ IRC 721 ▪ Treas. Reg. 1.263(a)-5(a)(8) ▪ Treas. Reg. 1.263(a)-5(g) ▪ Treas. Reg. 1.263(a)-5(g)(1) ▪ Treas. Reg. 1.263(a)-5(g)(2)(ii)(B) ▪ Treas. Reg. 1.263(a)-5(g)(3) ▪ <i>McCrary v. United States</i> - 651 F.2d 828 (1981) ▪ TAM 200532048 ▪ TAM 200503026

Definitions

Examining a Transaction Costs Issue

Description

- Bright-Line Date - Earlier of the date on which the parties to the transaction agree in writing to the material terms of the transaction, or the date the taxpayer's board of directors (or similar governing body) approves the terms of the transaction.
- Capitalizable - Must be capitalized.
- Covered Transaction - One of the types of transactions described in Treas. Reg. 1.263(a)-5(e)(3).
- Facilitative Cost - Cost incurred in investigating or otherwise pursuing the transaction.
- Inherently Facilitative Cost - Cost incurred for certain types of activities (i.e., services performed) in the process of investigating or otherwise pursuing the transaction. An inherently facilitative cost facilitates the transaction, regardless of when the related services are performed.
- Success-Based Fee - Fee that becomes due and payable upon the successful completion of the transaction.
- Transaction Cost - Cost incurred in connection with a transaction.

Other Considerations / Impact to Audit

Examining a Transaction Costs Issue	
Considerations	Resources
<ul style="list-style-type: none"> ▪ A “transaction” might consist of multiple steps and each step may be a separate transaction in and of itself. Lump-sum transaction costs that a taxpayer incurs should be allocated amongst the various transactions. After the transaction costs are allocated to the transactions, steps 2 and 3 of the process described in this practice unit may be applied to determine whether the costs facilitate the transaction and if so, how to treat the facilitative costs. 	
<ul style="list-style-type: none"> ▪ An examination adjustment to capitalize transaction costs under Treas. Reg. 1.263(a)-5 that were deducted by the taxpayer may be a Service-imposed change in accounting method. If the taxpayer also incurred and deducted transaction costs in prior tax years, an IRC 481(a) adjustment may be needed to include the costs deducted in prior tax years in income in the earliest year under examination. 	<ul style="list-style-type: none"> ▪ IRC 481(a) ▪ Treas. Reg. 1.263(a)-5 ▪ Issue Snapshot - <i>Involuntary (Service-Initiated) Method Change Issues</i>

Index of Referenced Resources

Examining a Transaction Costs Issue
IRC 162
IRC 195
IRC 263(a)
IRC 267(b)
IRC 338
IRC 351
IRC 354
IRC 355
IRC 356
IRC 368(a)
IRC 481(a)
IRC 707(b)
IRC 721
Treas. Reg. 1.263(a)-1
Treas. Reg. 1.263(a)-2
Treas. Reg. 1.263(a)-4
Treas. Reg. 1.263(a)-5

Index of Referenced Resources (cont'd)

Examining a Transaction Costs Issue

Treas. Reg. 1.446-5

Treas. Reg. 301.9100

McCrary Corp. v. United States - 651 F.2d 828 (1981)

Specialty Restaurants Corporation & Subsidiaries v. Commissioner - T.C. Memo 1992-221

Square D Co. v. Commissioner - 121 T.C. 168 (2003)

Rev. Proc. 2011-29

PLR 200830009

PLR 200837005

PLR 200907018

PLR 200945007

PLR 200953014

PLR 201518012

PLR 201606003

PLR 201622002

CCA 201234027

CCA 201624021

TAM 200503026

Index of Referenced Resources (cont'd)

Examining a Transaction Costs Issue
TAM 200532048
TAM 201002036
LB&I Directive - <i>Examination of Success-Based Fees in the Acquisition of Businesses (7/28/11)</i>
LB&I Directive - <i>Examination of Milestone Payments in the Acquisition of Businesses (4/29/13)</i>
LB&I Directive - <i>Updated Guidance on the Examination of Milestone Payments in the Acquisition of Businesses (1/27/14)</i>
SEC Website
Capital IQ
Bloomberg

Training and Additional Resources

Examining a Transaction Costs Issue	
Type of Resource	Description(s)
Centra/Saba Meeting Sessions	<ul style="list-style-type: none"> ▪ <i>Treatment of Transaction Costs Under Treas. Reg. 1.263(a)-5: The Basics</i> - 2013 Centra ▪ <i>Transaction Costs Under Treas. Reg. 1.263-5(f): Success-Based Fees</i> - 2013 Centra
Issue Toolkit	<ul style="list-style-type: none"> ▪ Flow Chart - Final INDOPCO Regulations Treas. Reg. 1.263(a)-5 ▪ Issue Snapshot - <i>Capitalization of Acquisition-Related Costs Under Treas. Reg. 1.263(a)-5(e)(1): The “Bright-Line Date” Rule</i> ▪ Issue Snapshot - <i>Indirect Payments of Facilitative Costs - Which Legal Entity Takes the Costs into Account?</i> ▪ Issue Snapshot - <i>Involuntary (Service-Initiated) Method Change Issues</i> ▪ Job Aid - Covered Transactions Under Treas. Reg. 1.263(a)-5(e)(3) ▪ Job Aid - Success-Based Fees Frequently Asked Questions ▪ Job Aid - Significant Guidance – Intangibles Law - Treas. Reg. 1.263(a)-5
Other Training Materials	<ul style="list-style-type: none"> ▪ <i>Transaction Costs and Treas. Reg. 1.263(a)-5</i> PPT - 2011-10 ▪ <i>Best Practices for Working a Transaction Costs Issue (Part I)</i> PPT - 2015-02 ▪ <i>Best Practices for Working a Transaction Costs Issue (Part II)</i> PPT - 2015-04

Glossary of Terms and Acronyms

Term/Acronym	Definition
CCA	Chief Counsel Advisory
IPO	Initial Public Offering
IRC	Internal Revenue Code
PLR	Private Letter Ruling
SEC	Securities and Exchange Commission
TAM	Technical Advice Memorandum
Treas. Reg.	Treasury Regulation

Index of Related Practice Units

Associated UIL(s)	Related Practice Unit	DCN
	None at this time	