

Part III - Administrative, Procedural, and Miscellaneous

Request for Comments Concerning the Treatment of Amounts Required to Be Capitalized in Certain Transactions to which § 1.263(a)-5 Applies

Notice 2004-18

On December 22, 2003, the Treasury Department and Internal Revenue Service issued final regulations (T.D. 9107; 69 FR 436) under § 263(a) of the Internal Revenue Code requiring capitalization of certain amounts that facilitate the creation or acquisition of an intangible asset and under § 167 providing a 15-year safe harbor amortization period for certain intangible assets described in § 263(a). The final regulations under § 263(a) also provide guidance on the treatment of amounts required to be capitalized under § 263(a) in certain acquisitions of a trade or business. For example, § 1.263(a)-5(g)(2) provides that amounts required to be capitalized by an acquirer in an acquisition, merger, or consolidation that is not described in § 368 are added to the basis of the acquired assets (in the case of a transaction that is treated as an acquisition of the assets of the target for federal income tax purposes) or the acquired stock (in the case of a transaction that is treated as an acquisition of the stock of the target for federal income tax purposes).

The final regulations under § 263(a) do not address the treatment of amounts required to be capitalized in certain other transactions to which the regulations apply (for example, amounts required to be capitalized in tax-free transactions, costs of a target in a taxable stock acquisition, and stock issuance costs). The preamble to the final regulations states that the Service and Treasury Department intend to issue separate guidance to address the treatment of these amounts and will consider at that time whether such amounts should be eligible for the 15-year safe harbor amortization period described in § 1.167(a)-3(b).

The Service and Treasury Department are aware that there is continuing controversy as to the proper treatment of certain costs that facilitate certain tax-free and taxable transactions and other restructurings and that are required to be capitalized under § 263(a) and § 1.263(a)-5. The Service and Treasury Department also are aware that, under current law, capitalized costs that facilitate tax-free and taxable transactions that are similar may be treated differently. For example, § 1.263(a)-5(g)(2) provides that the acquirer's capitalized transaction costs that facilitate a taxable asset acquisition increase the basis of the acquired assets. Some commentators, however, have expressed differing views as to how an acquirer's capitalized transaction costs that facilitate a tax-free asset acquisition are treated. In addition, the Service and Treasury Department are aware that, under current law, similar costs may be treated differently depending on which party incurs the costs. Commentators have suggested that capitalized transaction costs incurred by an acquirer and target to facilitate a tax-free stock acquisition may be treated differently.

To reduce the prospect of future controversy, the Service and Treasury Department intend to propose regulations to address the treatment of amounts that facilitate certain tax-free and taxable transactions and other restructurings and that are required to be capitalized under § 263(a) and § 1.263(a)-5. The Service and Treasury Department intend to develop a set of rules that are clear and administrable.

The Service and Treasury Department are considering the treatment of capitalized costs that facilitate the following transactions:

(1) Tax-free asset acquisitions and dispositions (for example, reorganizations under § 368(a)(1)(A), (C), (D), (G));

(2) Taxable asset acquisitions and dispositions (see § 1.263(a)-5(g) for the treatment of certain transaction costs in taxable asset acquisitions);

(3) Tax-free stock acquisitions and dispositions (for example, reorganizations under § 368(a)(1)(B));

(4) Taxable stock acquisitions and dispositions (see § 1.263(a)-5(g) for the treatment of certain transaction costs in taxable stock acquisitions);

(5) Tax-free distributions of stock (for example, distributions of stock to which § 305(a) or § 355(a) applies);

(6) Tax-free distributions of property (for example, distributions to which §§ 332 and 337 apply);

(7) Taxable distributions of property (for example, distributions to which §§ 331 and 336 apply and distributions of stock to which § 311 applies);

(8) Organizations of corporations, partnerships, and entities that are disregarded as separate from their owner (for example, transfers described in § 351 or § 721);

(9) Corporate recapitalizations (for example, reorganizations under § 368(a)(1)(E));

(10) Reincorporations of corporations in a different state (for example, in a reorganization under § 368(a)(1)(F)); and

(11) Issuances of stock.

There are specific issues raised by each of these types of transactions. The Service and Treasury Department previously have requested comments more generally on the treatment of capitalized costs that facilitate certain of these transactions. In this Notice,

the Service and Treasury Department request additional comments, including comments focusing on the following issues.

ISSUES ON WHICH COMMENTS ARE REQUESTED

(1) Treatment of capitalized costs. Section 263(a) and the regulations thereunder require that certain amounts that facilitate the transactions listed above be capitalized. The Service and Treasury Department request comments regarding whether the particular capitalized costs that facilitate transactions for which the Service and Treasury Department are considering guidance should (a) increase the basis of a particular asset or assets (and, if the basis of multiple assets should be increased, the methodology for allocating the costs among the assets), (b) be treated as giving rise to a new asset the basis of which may not be amortized, (c) be treated as giving rise to a new asset the basis of which may be amortizable, (d) reduce an amount realized, or (e) be treated as an adjustment to equity. To the extent that capitalized costs should be treated as giving rise to a new asset the basis of which may be amortizable, the Service and Treasury Department request comments regarding the appropriate amortizable useful life. For example, an appropriate amortizable useful life might be 15 years, a useful life consistent with that afforded to certain intangibles under § 1.167(a)-3(b) and § 197. Additionally, if such costs are treated as giving rise to a new, amortizable asset, the Service and Treasury Department also request comments as to the treatment of such costs if a specific event (e.g., a liquidation) occurs prior to the expiration of the amortization period.

(2) Consistent treatment of capitalized costs that facilitate similar taxable and tax-free transactions. The regulations promulgated under § 263(a) provide rules regarding the treatment of amounts that facilitate a taxable acquisition of stock and assets and a taxable disposition of assets. The Service and Treasury Department request comments regarding whether, as a policy matter, capitalized costs that facilitate a tax-free transaction should be treated in the same manner as the capitalized costs that facilitate a similar taxable transaction.

(3) Consistent treatment of all capitalized costs that facilitate a transaction. The Service and Treasury Department request comments regarding whether, as a policy matter, capitalized costs that facilitate a transaction, regardless of the type of cost and the party to the transaction that incurs such cost, should be treated similarly.

DATES: Written and electronic comments must be submitted by April 19, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (Notice 2004-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:LPD:PR (Notice 2004-18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue N.W., Washington, DC. Alternatively, taxpayers may send submissions electronically directly to the Service at:

Notice.comments@irscounsel.treas.gov All materials submitted will be available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT: Concerning submissions, Guy Traynor (202) 622-7180; concerning this notice, Andrew J. Keyso, (202) 622-4800 (not toll-free numbers).