

Disputes Still Scrappy Over Takeover Costs

by Robert W. Wood • San Francisco

Many practitioners who do not do tax controversy work may be surprised to peruse the list of docketed Tax Court cases. While much of the law regarding deductibility of takeover expenses has now been settled (or at least sort of), disputes continue to proliferate in this area. And of course, many disputes are resolved at the audit or appeals stage and never reach the halls of Tax Court.

However, the recent docketed case of *Square D Co., et al. v. Commissioner*, T.C. Docket No. 6067-97 (filed March 28, 1997), is illustrative of the kinds of disputes that never seem to go away. The Tax Court case involves Square D's challenge to the disallowance of business expenses claimed for fees paid to investment bankers, lawyers, accountants and other consultants who assisted in an unsuccessful defense against a hostile takeover in 1991. Predictably, the IRS treated the fees as capital expenditures under Section 263. It would appear, although the case has yet to be fully fleshed out, that it involves that old "when does a hostile takeover turn friendly?" debate (ugh!).

One would have thought that just about everything that could be said about the hostile-to-friendly doctrine would have been said already. After all, in *A.E. Staley Manufacturing Co. & Subsidiaries v. Commissioner*, 119 F.3d 482 (7th Cir. 1997), the Seventh Circuit Court of Appeals held that investment banker fees incurred in connection with a

failed attempt to defeat a hostile takeover were deductible. (See Muntean, "A.E. Staley Holds Defense Costs Deductible," Vol. 6, No. 1 *M&A Tax Report* (Aug. 1997), p. 6; and Lipton, "Another View of Staley," Vol. 6, No. 2 *M&A Tax Report* (Sept. 1997), p. 1.) In any event, the Tax Court seems continually faced with these factual disputes.

The case also involves Square D defending deductions for \$7.5 million in compensation paid to 11 executives under employment agreements. The IRS has asserted that the payments were nondeductible golden parachute payments under Section 280G. For coverage of the golden parachute payments rules of Section 280G, see Wood, "Severance Payments and Other Golden and Quasi-Golden Parachutes," Vol. 4, No. 9 *M&A Tax Report* (April 1996), p. 5. ■

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