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## Termination Fee Is Capital Asset to Acquiring Corporation

In Legal Memorandum 201642035 ([https://www.irs.gov/pub/irs-wd/201642035.pdf?\\_ga=1.203403219.334448623.1476662568](https://www.irs.gov/pub/irs-wd/201642035.pdf?_ga=1.203403219.334448623.1476662568)), the IRS concluded that any gain attributable to the termination of an acquirer's rights to acquire a target's stock is treated as a gain from the sale of a capital asset under Section 1234A (section references are to the Internal Revenue Code of 1986, as amended). In the first of two situations described in the legal memorandum, the target terminates an agreement pursuant to which the acquirer will acquire the target and is forced to pay the acquirer a termination fee. The acquirer also incurred costs in the process of investigating and pursuing the transaction that the acquirer properly capitalized as costs of facilitating the proposed transaction under Treasury Regulations Section 1.263(a)-5(e). The amount of such costs was less than the termination fee. In the second situation, the facts are the same except the costs of facilitating the proposed transaction are in excess of the termination fee. The IRS concluded in both situations that the target's stock would be a capital asset in the acquirer's hands upon acquisition; therefore, any gain attributable to the termination of the acquirer's rights with respect to the target's stock is treated as a gain from the sale of a capital asset under Section 1234A. Further, the acquirer's amount realized from the receipt of the termination fee is reduced by the acquirer's capitalized facilitative costs, resulting in a capital loss in situation two that the acquirer may deduct under Section 165, subject to the limitations on capital losses in Sections 1211 and 1212.

## IRS Provides Advice on Protection of U.S.-Foreign Information Exchanges

In partially redacted legal advice (<https://www.irs.gov/pub/lanoa/am2016-004.pdf>), the IRS provided advice regarding the issue of when legal responsibilities to protect tax return information arise in the context of electronic data transmission through the Common Transmission System (CTS) which is a "global" transmission system being developed under the Organization for Economic Cooperation and Development (OECD) Forum on Tax Administration (FTA). Information that will be transmitted by the IRS to foreign tax administrations (outbound transmissions) through the CTS is return information under Section 6103 in the hands of the IRS, so the entire exchange process should be protected as required by Section 6103. (Section 6103 provides the general rule that returns and return information must be kept confidential and can be disclosed only as authorized under the Internal Revenue Code.) Furthermore, that information becomes treaty-protected information in the hands of the foreign country when the information is exchanged pursuant to a tax convention or other international agreement on taxes.

In the case of information provided to the IRS by foreign tax administrations (inbound transmissions) through the CTS, the IRS noted that the moment when legal protection arises is less certain. While there are two moments when legal protection could arise in an inbound transmission (i.e., the moment information is uploaded to the CTS by the foreign tax authority and the moment the United States downloads the information from the CTS), the IRS concluded that the most likely moment is when the United States downloads the information from the CTS. Further, if the IRS adopts the CTS, as a matter of convenience to the IRS, the IRS will continue to use the International Data Exchange

Service (IDES), which is a system funded, designed, and managed by the IRS, as a regional router in order to facilitate exchanges of information via the CTS. Therefore, with regard to inbound transmissions to the IRS, Section 6103 protection arises when the information is uploaded from the CTS to the IDES.

### AICPA Submits Comments on Proposed Changes to FBAR Rules

The American Institute of Certified Public Accountants submitted comments (<http://www.aicpa.org/advocacy/cpaadvocate/2016/pages/aicpa-comments-on-proposed-fbar-changes.aspx>) in response to the notice of proposed rulemaking that revises the regulations that implement provisions of the Bank Secrecy Act regarding FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR). The comments address the changes proposed to the filing exemptions, the reporting of 25 or more account and filing extensions.

### IRS Explains Letter Ruling Request Procedures for Late Entity Classification Elections

In an information letter (INFO 2016-0065, [https://www.irs.gov/pub/irs-wd/16-0065.pdf?\\_ga=1.179405287.236391105.1446132583](https://www.irs.gov/pub/irs-wd/16-0065.pdf?_ga=1.179405287.236391105.1446132583)), the IRS described the general procedures and user fees to request relief to make a late entity classification election.

### Guyana-U.S. FATCA Agreement Available

The text is available of the agreement (<https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Guyana-8-29-2016.pdf>) signed by Guyana and the United States to improve international tax compliance and implement the information reporting and withholding tax provisions of FATCA.



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### MOU on 2014 Israel-US FATCA Agreement Available

The text is available of the memorandum of understanding (<https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Understanding-Israel.pdf>) that clarifies the intergovernmental agreement between Israel and the United States to implement FATCA.

### US, Mexican Authorities Unveil Unilateral APA Program for Maquiladoras

The IRS announced (<https://content.govdelivery.com/accounts/USIRS/bulletins/16b57c5>) that U.S. taxpayers with maquiladora operations in Mexico will not be exposed to double taxation if they enter into a unilateral advance pricing agreement with the Large Taxpayer Division of Mexico's Servicio de Administración Tributaria under terms discussed in advance between the U.S. and Mexican competent authorities.

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