

Mylan's Litigation Costs Are Tax Deductible, 3rd Circ. Rules

By Adam Lidgett

Law360 (July 27, 2023, 4:55 PM EDT) -- The Third Circuit on Thursday backed a finding that generic-drug maker Mylan was not on the hook for \$50 million in taxes the Internal Revenue Service said it should pay over deducted patent litigation fees.

A three-judge panel handed Mylan — since absorbed by Viatrix — a win in the IRS' appeal challenging a U.S. Tax Court ruling that Mylan could deduct the costs of defending itself against patent infringement lawsuits as it tried to secure expedited approval from the U.S. Food and Drug Administration to make generic versions of name-brand drugs.

The panel said that the Tax Court gave "sound reasons" behind its decision and that the federal government "contends ... that litigation is a choice," but found "several flaws" with that argument.

The opinion said there was a "plausible scenario of a generic manufacturer receiving FDA-approval of an [abbreviated new drug application] even when the manufacturer loses the patent case it is called on to defend."

The IRS asked the appeals court to review an April 2021 Tax Court ruling that relied partly on a Third Circuit ruling from 1954 in *Urquhart v. Commissioner*, which said defense costs incurred in patent litigation are immediately deductible.

The agency argued the Tax Court wrongly failed to recognize that the expedited certification process created by the Drug Price Competition and Patent Term Restoration Act of 1984 — also known as the Hatch-Waxman Act — resulted in Mylan's acquisition of an intangible asset in the form of FDA certification. Such assets must be capitalized over several years rather than immediately deducted, the agency said.

Viatrix said in a statement Thursday it was happy with the Third Circuit's ruling.

"This positive decision affirms what the U.S. Tax Court recognized two years ago, which is that the costs to defend patent infringement lawsuits related to abbreviated new drug applications for generic drugs are deductible for U.S. federal income tax purposes," the company said.



Mylan is not on the hook for \$50 million in taxes the IRS said it should pay over deducted patent litigation fees, the Third Circuit said Thursday. (Dhiraj Singh/Bloomberg via Getty Images)

The federal government declined to comment Thursday.

U.S. Circuit Judges Kent A. Jordan, Jane R. Roth and Peter J. Phipps sat on the panel for the Third Circuit.

Mylan is represented by Gregory G. Garre, Jean A. Pawlow and Eric J. Konopka of Latham & Watkins LLP, and William F. Nelson, Bryan M. Killian and James G. Steele III of Morgan Lewis & Bockius LLP.

The government is represented by David A. Hubbert, Arthur T. Catterall and Clint A. Carpenter of the U.S. Department of Justice's Tax Division.

The cases are Mylan Inc. v. Commissioner, case numbers 22-1193, 22-1194 and 22-1195, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Anna Scott Farrell. Editing by Adam LoBelia.

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