

Inadvertent Waivers of Loss Carryovers

A selling group's election to compute the allowable loss or the basis reduction required on a disposition or deconsolidation of subsidiary stock by applying the provisions of § 1.1502-20 without regard to the duplicated loss factor of the loss disallowance formula, or by applying the provisions of § 1.337(d)-2T, may result in a reduction of the amount of losses treated as reattributed to the selling group pursuant to an election described in § 1.1502-20(g). To the extent that losses treated as reattributed to the selling group are reduced, the losses of a subsidiary are increased. In this case, if the acquiring group made an election to waive certain loss carryovers of the subsidiary by identifying those losses that were deemed not to expire, it may have inadvertently waived those losses that are treated as losses of the subsidiary as a result of the election by the selling group. The IRS and Treasury Department believe that such acquiring groups should be permitted to make certain amendments of such waivers.

Accordingly, these regulations permit acquiring groups to amend an election made pursuant to § 1.1502-32(b)(4) where the group of which the subsidiary was a member immediately before the acquisition (the prior group) elected to determine the amount of the allowable loss or the basis reduction required with respect to the stock of the subsidiary or a higher-tier corporation of the subsidiary by applying § 1.1502-20 without regard to the duplicated loss factor of the loss disallowance formula, or by applying the provisions of § 1.337(d)-2T, the subsidiary's loss carryovers are increased by such election by the prior group, and the acquiring group made an election pursuant to § 1.1502-32(b)(4) by identifying those losses that would be deemed not to expire. In this case, pursuant to these regulations, the acquiring group may amend its election made pursuant to § 1.1502-32(b)(4) to provide that all or a portion of the loss carryovers of the subsidiary that are treated as loss carryovers of the subsidiary as a result of the prior group's election are deemed not to expire.

The regulations contained in this document only permit acquiring groups to reduce the amount of loss carryovers deemed to expire, or increase the amount of loss carryovers deemed not to expire, as a result of an election under § 1.1502-32(b)(4). The regulations, however, do not permit acquiring groups to increase the amount of loss carryovers deemed to expire, or reduce

the amount of loss carryovers deemed not to expire, as a result of such an election. The regulations, therefore, permit increases, but not decreases, of the amount of loss carryovers available to acquiring groups.

Limited Extension of Time To Apply Alternative Regime

In addition to the provisions described above, the regulations include a limited extension of time for selling groups to make an election to compute the allowable loss or the basis reduction required on a disposition or deconsolidation of subsidiary stock by applying the provisions of § 1.1502-20 without regard to the duplicated loss factor of the loss disallowance formula, or by applying the provisions of § 1.337(d)-2T, if the acquiring group is otherwise eligible to amend an election under § 1.1502-32(b)(4) pursuant to these regulations, but the time period during which the selling group could make its election has or has almost expired.

Additional Adjustments

In promulgating § 1.1502-20T and related provisions, the IRS and Treasury have attempted to ameliorate where possible the situation of groups that relied on the provisions of § 1.1502-20 in prior periods. The IRS and Treasury recognize that the loss disallowance rule in § 1.1502-20 affected the manner in which some transactions were structured. For example, some groups caused subsidiaries to sell their assets rather than engage in stock sales subject to loss disallowance under § 1.1502-20. Alternatively, groups may have engaged in deemed asset sales under § 338(h)(10). The IRS and Treasury believe that transactions cast in the form of actual or deemed asset sales should not be undone, notwithstanding the possible role of § 1.1502-20 in their planning. However, as was the case with the relief provided earlier in § 1.1502-20T and its related amendments, the IRS and Treasury have concluded that relief is appropriate and administrable in the situation that is the subject of these temporary regulations.

Special Analyses

In light of the Federal Circuit's decision in *Rite Aid Corp. v. United States*, 255 F.3d 1357 (Fed. Cir. 2001), these temporary regulations are necessary to provide taxpayers with immediate guidance regarding the amendment of certain elections to waive the loss carryovers of an acquired subsidiary. Without such immediate guidance, taxpayers may not be able to avail themselves of the relief provided

for in these regulations. Accordingly, good cause is found for dispensing with notice and public procedure pursuant to 5 U.S.C. 553(b)(B) and with a delayed effective date pursuant to 5 U.S.C. 553(d)(1) and (3). For applicability of the Regulatory Flexibility Act, please refer to the cross-reference notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**. Pursuant to § 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on their impact.

Drafting Information

The principal author of these regulations is Jeffrey B. Fienberg, Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.1502-20T also issued under 26 U.S.C. 1502. * * *
Section 1.1502-32T also issued under 26 U.S.C. 1502. * * *

■ **Par. 2.** In § 1.1502-20T paragraph (i)(5) is redesignated as paragraph (i)(6).

■ **Par. 3.** Section 1.1502-20T is amended by adding paragraphs (i)(3)(viii) and (i)(5) to read as follows:

§ 1.1502-20T—Disposition or deconsolidation of subsidiary stock (temporary).

* * * * *

(i) * * *

(3) * * *

(viii) *Apportionment of section 382 limitation in the case of an amendment of an election made pursuant to § 1.1502-32(b)(4).* (A) *In general.* If, in connection with a disposition or deconsolidation of subsidiary stock, the subsidiary the stock of which was disposed of or deconsolidated became a member of another consolidated group (the acquiring group), and, pursuant to § 1.1502-32T(b)(4)(vii), the acquiring group amends an election made pursuant to § 1.1502-32(b)(4) to treat all or a portion of the loss carryovers of