

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

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CC-2001-042

August 21, 2001

Rite Aid Corp. v. United States,
Subject: No. 00-5098 (July 6, 2001)

Cancel Date: August 19, 2002

PURPOSE

The purpose of this Notice is to alert Chief Counsel attorneys to Service position on the Federal Circuit decision in Rite Aid Corp. v. United States, No. 00-5098 (July 6, 2001), concerning the validity of Treas. Reg. § 1.1502-20 (the loss disallowance rule, or, the LDR).

BACKGROUND

The LDR is a legislative regulation authorized by sections 337(d) and 1502. The LDR limits the amount of loss that a member of a consolidated group may deduct with respect to a disposition of subsidiary stock. The LDR generally provides that such loss is allowable only to the extent it exceeds the sum of three amounts: Positive Investment Adjustments (PIA), Extraordinary Gain Dispositions (EGD), and duplicated loss.

In Rite Aid Corp. v. United States, the Federal Circuit held that the duplicated loss component of the LDR was an invalid exercise of regulatory authority. The court stated that the Secretary's authority to promulgate consolidated return regulations is limited to

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addressing problems created from the filing of a consolidated return. The court reasoned that because the loss at issue would have been deductible if realized by a taxpayer filing a separate return, the disallowance of the loss by the duplicated loss factor of the LDR was not authorized by the statute.

The Service does not agree with the decision in Rite Aid. Accordingly, the Service has recommended, and the government has filed, a petition for rehearing en banc with the Federal Circuit.

POSITION

The Service's position continues to be that the LDR is a valid regulation. Chief Counsel attorneys are to continue working with examining agents to identify, develop and pursue LDR issues without regard to the Rite Aid decision until further direction from this office or further judicial resolution. Furthermore, the Rite Aid decision is not to be taken into account in developing or resolving any other issues. All cases raising an issue directly or indirectly related to Rite Aid should be coordinated with the Office of the Associate Chief Counsel (Corporate).

Questions regarding the LDR or this Notice should be directed to Theresa A. Abell, Alison G. Burns, or Sean P. Duffley of the Office of Associate Chief Counsel (Corporate), at (202) 622-8130.

_____/s/
Jasper L. Cummings, Jr.
Associate Chief Counsel
(Corporate)