

Reg. Section 1.469-9(e)(3)(i)

Rules for certain rental real estate activities

(a) Scope and purpose. This section provides guidance to taxpayers engaged in certain real property trades or businesses on applying section 469(c)(7) to their rental real estate activities.

(b) Definitions. The following definitions apply for purposes of this section:

(1) Trade or business. A trade or business is any trade or business determined by treating the types of activities in §1.469-4(b)(1) as if they involved the conduct of a trade or business, and any interest in rental real estate, including any interest in rental real estate that gives rise to deductions under section 212.

(2) Real property trade or business. Real property trade or business is defined in section 469(c)(7)(C).

(3) Rental real estate. Rental real estate is any real property used by customers or held for use by customers in a rental activity within the meaning of §1.469-1T(e)(3). However, any rental real estate that the taxpayer grouped with a trade or business activity under §1.469-4(d)(1)(i)(A) or (C) is not an interest in rental real estate for purposes of this section.

(4) Personal services. Personal services means any work performed by an individual in connection with a trade or business. However, personal services do not include any work performed by an individual in the individual's capacity as an investor as described in §1.469-5T(f)(2)(ii).

(5) Material participation. Material participation has the same meaning as under §1.469-5T. Paragraph (f) of this section contains rules applicable to limited partnership interests in rental real estate that a qualifying taxpayer elects to aggregate with other interests in rental real estate of that taxpayer.

(6) Qualifying taxpayer. A qualifying taxpayer is a taxpayer that owns at least one interest in rental real estate and meets the requirements of paragraph (c) of this section.

(c) Requirements for qualifying taxpayers.

(1) In general. A qualifying taxpayer must meet the requirements of section 469(c)(7)(B).

(2) Closely held C corporations. A closely held C corporation meets the requirements of paragraph (c)(1) of this section by satisfying the requirements of section 469(c)(7)(D)(i). For purposes of section 469(c)(7)(D)(i), gross receipts do not include items of portfolio income within the meaning of §1.469-2T(c)(3).

(3) Requirement of material participation in the real property trades or businesses. A taxpayer must materially participate in a real property trade or business in order for the personal services provided by the taxpayer in that real property trade or business to count towards meeting the requirements of paragraph (c)(1) of this section.

(4) Treatment of spouses. Spouses filing a joint return are qualifying taxpayers only if one spouse separately satisfies both requirements of section 469(c)(7)(B). In determining the real property trades or businesses in which a married taxpayer materially participates (but not for any other purpose under this paragraph (c)), work performed by the taxpayer's spouse in a trade or business is treated as work performed by the taxpayer under §1.469-5T(f)(3), regardless of whether the spouses file a joint return for the year.

(5) Employees in real property trades or businesses. For purposes of paragraph (c)(1) of this section, personal services performed during a taxable year as an employee generally will be treated as performed in a trade or business but will not be treated as performed in a real property trade or business, unless the taxpayer is a five-percent owner (within the meaning of section 416(i)(1)(B)) in the employer. If an employee is not a five-percent owner in the employer at all times during the taxable year, only the personal services performed by the employee during the period the employee is a five-percent owner in the employer will be treated as performed in a real property trade or business.

(d) General rule for determining real property trades or businesses.

(1) Facts and circumstances. The determination of a taxpayer's real property trades or businesses for purposes of paragraph (c) of this section is based on all of the relevant facts and circumstances. A taxpayer may use any reasonable method of applying the facts and circumstances in determining the real property trades or businesses in which the taxpayer provides personal services. Depending on the facts and circumstances, a real property trade or business consists either of one or more than one trade or business specifically described in section 469(c)(7)(C). A taxpayer's grouping of activities under §1.469-4 does not control the determination of the taxpayer's real property trades or businesses under this paragraph (d).

(2) Consistency requirement. Once a taxpayer determines the real property trades or businesses in which personal services are provided for purposes of paragraph (c) of this section, the taxpayer may not redetermine those real property trades or businesses in subsequent taxable years unless the original determination was clearly inappropriate or there has been a material change in the facts and circumstances that makes the original determination clearly inappropriate.

(e) Treatment of rental real estate activities of a qualifying taxpayer.

(1) In general. Section 469(c)(2) does not apply to any rental real estate activity of a taxpayer for a taxable year in which the taxpayer is a qualifying taxpayer under paragraph (c) of this section. Instead, a rental real estate activity of a qualifying taxpayer is a passive activity under section 469 for the taxable year unless the taxpayer materially participates in the activity. Each interest in rental real estate of a qualifying taxpayer will be treated as a separate rental real estate activity, unless the taxpayer makes an election under paragraph (g) of this section to treat all interests in rental real estate as a single rental real estate activity. Each separate rental real estate activity, or the single combined rental real estate activity if the taxpayer makes an election under paragraph (g), will be an activity of the taxpayer for all purposes of section 469, including the former passive activity rules under section 469(f) and the disposition rules under section 469(g). However, section 469

will continue to be applied separately with respect to each publicly traded partnership, as required under section 469(k), notwithstanding the rules of this section.

(2) Treatment as a former passive activity. For any taxable year in which a qualifying taxpayer materially participates in a rental real estate activity, that rental real estate activity will be treated as a former passive activity under section 469(f) if disallowed deductions or credits are allocated to the activity under §1.469-1(f)(4).

(3) Grouping rental real estate activities with other activities.



(i) In general. For purposes of this section, a qualifying taxpayer may not group a rental real estate activity with any other activity of the taxpayer. For example, if a qualifying taxpayer develops real property, constructs buildings, and owns an interest in rental real estate, the taxpayer's interest in rental real estate may not be grouped with the taxpayer's development activity or construction activity. Thus, only the participation of the taxpayer with respect to the rental real estate may be used to determine if the taxpayer materially participates in the rental real estate activity under §1.469-5T.

(ii) Special rule for certain management activities. A qualifying taxpayer may participate in a rental real estate activity through participation, within the meaning of §§1.469-5(f) and 5T(f), in an activity involving the management of rental real estate (even if this management activity is conducted through a separate entity). In determining whether the taxpayer materially participates in the rental real estate activity, however, work the taxpayer performs in the management activity is taken into account only to the extent it is performed in managing the taxpayer's own rental real estate interests.

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