

Reg. Section 1.469-1T(e)(3)(ii)

General rules (temporary).

(e) Definition of “passive activity”—

(1) In general. Except as otherwise provided in this paragraph (e), an activity is a passive activity of the taxpayer for a taxable year if and only if the activity--

- (i) Is a trade or business activity (within the meaning of paragraph (e)(2) of this section) in which the taxpayer does not materially participate for such taxable year; or
- (ii) Is a rental activity (within the meaning of paragraph (e) (3) of this section), without regard to whether or to what extent the taxpayer participates in such activity.

(2) Trade or business activity. See § 1.469-1(e)(2) for rules relating to this paragraph.

(3) Rental activity—

(i) In general. Except as otherwise provided in this paragraph (e)(3), an activity is a rental activity for a taxable year if--

- (A) During such taxable year, tangible property held in connection with the activity is used by customers or held for use by customers; and
- (B) The gross income attributable to the conduct of the activity during such taxable year represents (or, in the case of an activity in which property is held for use by customers, the expected gross income from the conduct of the activity will represent) amounts paid or to be paid principally for the use of such tangible property (without regard to whether the use of the property by customers is pursuant to a lease or pursuant to a service contract or other arrangement that is not denominated a lease).



(ii) Exceptions. For purposes of this paragraph (e)(3), an activity involving the use of tangible property is not a rental activity for a taxable year if for such taxable year—

- (A) The average period of customer use for such property is seven days or less;

- (B) The average period of customer use for such property is 30 days or less, and significant personal services (within the meaning of paragraph (e)(3)(iv) of this section) are provided by or on behalf of the owner of the property in connection with making the property available for use by customers;
- (C) Extraordinary personal services (within the meaning of paragraph (e)(3)(v) of this section) are provided by or on behalf of the owner of the property in connection with making such property available for use by customers (without regard to the average period of customer use);
- (D) The rental of such property is treated as incidental to a nonrental activity of the taxpayer under paragraph (e)(3)(vi) of this section;
- (E) The taxpayer customarily makes the property available during defined business hours for nonexclusive use by various customers; or
- (F) The provision of the property for use in an activity conducted by a partnership, S corporation, or joint venture in which the taxpayer owns an interest is not a rental activity under paragraph (e)(3)(vii) of this section.

(iii) Average period of customer use. See § 1.469-1(e)(3)(iii) for rules relating to this paragraph.

(iv) Significant personal services—

- (A) In general. For purposes of paragraph (e)(3)(ii)(B) of this section, personal services include only services performed by individuals, and do not include excluded services (within the meaning of paragraph (e)(3)(iv)(B) of this section). In determining whether personal services provided in connection with making property available for use by customers are significant, all of the relevant facts and circumstances shall be taken into account. Relevant facts and circumstances include the frequency with which such services are provided, the type and amount of labor required to perform such services, and the value of such services relative to the amount charged for the use of the property.
- (B) Excluded services. For purposes of paragraph (e)(3)(iv)(A) of this section, the term “excluded services” means, with respect to any property made available for use by customers--
 - (1) Services necessary to permit the lawful use of the property;
 - (2) Services performed in connection with the construction of improvements to the property, or in connection with the performance of repairs that extend the property's useful life

for a period substantially longer than the average period for which such property is used by customers; and

(3) Services, provided in connection with the use of any improved real property, that are similar to those commonly provided in connection with long-term rentals of high-grade commercial or residential real property (e.g., cleaning and maintenance of common areas, routine repairs, trash collection, elevator service, and security at entrances or perimeters).

(v) Extraordinary personal services. For purposes of paragraph (e)(3)(ii)(C) of this section, extraordinary personal services are provided in connection with making property available for use by customers only if the services provided in connection with the use of the property are performed by individuals, and the use by customers of the property is incidental to their receipt of such services. For example, the use by patients of a hospital's boarding facilities generally is incidental to their receipt of the personal services provided by the hospital's medical and nursing staff. Similarly, the use by students of a boarding school's dormitories generally is incidental to their receipt of the personal services provided by the school's teaching staff.

(vi) Rental of property incidental to a nonrental activity of the taxpayer—

(A) In general. For purposes of paragraph (e)(3)(ii)(D) of this section, the rental of property shall be treated as incidental to a nonrental activity of the taxpayer only to the extent provided in this paragraph (e)(3)(vi).

(B) Property held for investment. The rental of property during a taxable year shall be treated as incidental to an activity of holding such property for investment if and only if—

(1) The principal purpose for holding the property during such taxable year is to realize gain from the appreciation of the property (without regard to whether it is expected that such gain will be realized from the sale or exchange of the property in its current state of development); and

(2) The gross rental income from the property for such taxable year is less than two percent of the lesser of—

i. The unadjusted basis of such property; and

ii. The fair market value of such property.

(C) Property used in a trade or business. The rental of property during a taxable year shall be treated as incidental to a trade or business

activity (within the meaning of paragraph (e)(2) of this section) if and only if—

- (1) The taxpayer owns an interest in such trade or business activity during the taxable year;
 - (2) The property was predominantly used in such trade or business activity during the taxable year or during at least two of the five taxable years that immediately precede the taxable year; and
 - (3) The gross rental income from such property for the taxable year is less than two percent of the lesser of--
 - i. The unadjusted basis of such property; and
 - ii. The fair market value of such property.
- (D) Lodging for convenience of employer. See § 1.469-1(e)(3)(vi)(D) for rules relating to this paragraph.
- (E) Unadjusted basis. See § 1.469-1(e)(3)(vi)(E) for rules relating to this paragraph.
- (vii) Property made available for use in a nonrental activity conducted by a partnership, S corporation, or joint venture in which the taxpayer owns an interest. If the taxpayer owns an interest in a partnership, S corporation, or joint venture conducting an activity other than a rental activity, and the taxpayer provides property for use in the activity in the taxpayer's capacity as an owner of an interest in such partnership, S corporation, or joint venture, the provision of such property is not a rental activity. Thus, if a partner contributes the use of property to a partnership, none of the partner's distributive share of partnership income is income from a rental activity unless the partnership is engaged in a rental activity. In addition, a partner's gross income attributable to a payment described in section 707(c) is not income from a rental activity under any circumstances (see § 1.469-2T (e)(2)). The determination of whether property used in an activity is provided by the taxpayer in the taxpayer's capacity as an owner of an interest in a partnership, S corporation, or joint venture shall be made on the basis of all of the facts and circumstances.

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