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Part III

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, §§ 469, 1.469-4)

Revenue Procedure 2010-13

SECTION 1. PURPOSE

This revenue procedure requires taxpayers to report to the Internal Revenue Service their groupings and regroupings of activities and the addition of specific activities within their existing groupings of activities for purposes of section 469 of the Internal Revenue Code and § 1.469-4 of the Income Tax Regulations.

On August 4, 2008, Notice 2008-64, 2008 I.R.B. 31, (the Notice) was published in the Internal Revenue Bulletin. The Notice proposed a disclosure regime for taxpayer groupings under section 469 and solicited comments both on whether the proposal sufficiently balanced the need for disclosure with taxpayer burden, and on alternative approaches. In response, the Service received several comments suggesting ways in which the proposal could be improved. This revenue procedure reflects some of the changes suggested by the comments received. Specifically, the regime proposed in the Notice required taxpayers to make a disclosure whenever there is a disposition of an activity within a chosen grouping; this requirement has been removed. In addition, the Notice did not contain a relief provision for taxpayers that, in a given year, fail to make the required disclosure. Section 4.07 of this revenue procedure contains a relief

provision for taxpayers that can meet certain additional criteria to demonstrate their groupings of activities.

SECTION 2. BACKGROUND

.01 Section 469 generally provides that losses from and credits attributable to passive trade or business activities, to the extent they exceed, respectively, income from or the regular tax liability associated with all such passive activities, are disallowed for the taxable year and carried forward to the subsequent taxable year, subject to certain exceptions.

.02 Section 469(g)(1)(A) generally provides that if during the taxable year a taxpayer disposes of his entire interest in any passive activity (or former passive activity), and all gain or loss realized on such disposition is recognized, the excess of (i) any loss from such activity for such taxable year (determined after the application of section 469(b)), over (ii) any net income or gain for such taxable year from all other passive activities (determined after the application of section 469(b)), shall be treated as a loss which is not from a passive activity.

.03 Section 1.469-4 sets forth the rules for grouping a taxpayer's trade or business activities and rental activities for purposes of applying the passive activity loss and credit limitation rules of section 469.

.04 Section 1.469-4(c)(1) provides that one or more trade or business activities or rental activities may be treated as a single activity if the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469.

.05 Section 1.469-4(c)(2) provides guidelines for determining whether activities

constitute an appropriate economic unit and, therefore, may be treated as a single activity. Section 1.469-4(d) describes limitations on grouping certain activities. Section 1.469-4(d)(5) provides that a C corporation subject to section 469, an S corporation, or a partnership (a section 469 entity) must group its activities under the rules of § 1.469-4. Once a section 469 entity groups its activities, a shareholder or partner may group those activities with each other, with the activities conducted directly by the shareholder or partner, and with activities conducted through other section 469 entities, in accordance with the rules of this section. The shareholder or partner may not treat activities grouped together by a section 469 entity as separate activities.

.06 Section 1.469-4(e)(1) provides that except as provided in § 1.469-4(e)(2) and § 1.469-11 (providing three periods of time, all of which are now closed, in which a taxpayer could have regrouped its activities without having to establish that the original grouping was clearly inappropriate under § 1.469-4(e)(2)), once a taxpayer has grouped activities under § 1.469-4, the taxpayer generally may not regroup those activities in subsequent taxable years. Taxpayers must comply with disclosure requirements that the Commissioner may prescribe with respect to both their original groupings and the addition and disposition of specific activities within those existing groupings in subsequent taxable years.

.07 Section 1.469-4(e)(2) provides that if it is determined that a taxpayer's original grouping was clearly inappropriate or a material change in the facts and circumstances has occurred that makes the original grouping clearly inappropriate, the taxpayer must regroup the activities and must comply with the disclosure requirements that the Commissioner may prescribe.

.08 Section 1.469-4(f) provides that the Commissioner may regroup a taxpayer's activities if any of the activities resulting from the taxpayer's grouping is not an appropriate economic unit and a principal purpose of the taxpayer's grouping (or failure to regroup under paragraph (e) of § 1.469-4) is to circumvent the underlying purposes of section 469.

SECTION 3. SCOPE

This revenue procedure applies to all taxpayers to which the rules in § 1.469-4 apply. Special rules apply for groupings by partnerships and S corporations and are described in section 4.05 of this revenue procedure. This revenue procedure does not apply to the rental real estate activities (as defined in § 1.469-9(b)(3)) of a taxpayer in a year in which the taxpayer is a qualifying taxpayer (as defined in § 1.469-9(b)(6)) if it has made the election provided for in § 1.469-9(g).

SECTION 4. APPLICATION

.01 Disclosure Requirements for Taxpayer Groupings.

Sections 4.02 through 4.04 of this revenue procedure require taxpayers to report to the Service, as part of their annual income tax return, certain changes to the taxpayer's groupings that occur during the taxable year. Section 4.05 of this revenue procedure provides special rules for groupings by partnerships and S corporations. Section 4.06 of this revenue procedure governs the treatment of groupings existing prior to the effective date of this revenue procedure. Section 4.07 of this revenue procedure stipulates the consequences for failing to make the disclosures required by sections 4.02 through 4.04.

.02 Statement Required for New Groupings.

A taxpayer shall file a written statement with its original income tax return for the first taxable year in which two or more trade or business activities or rental activities are originally grouped as a single activity. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the trade or business activities or rental activities that are being grouped as a single activity. In addition, any statement reporting a new grouping of two or more trade or business activities or rental activities as a single activity must contain a declaration that the grouped activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469.

.03 Statement Required for Addition of New Activities to Existing Groupings.

If a taxpayer adds a new trade or business activity or a rental activity to an existing grouping for a taxable year, the taxpayer shall file a written statement with the taxpayer's original income tax return for that taxable year. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the new trade or business activity or rental activity that is being added to the existing grouping, as well as the names, addresses, and employer identification numbers, if applicable, for the activity or activities within the existing grouping. In addition, the statement reporting an addition to an existing grouping must contain a declaration that the activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469.

.04 Statement Required for Regroupings.

Under § 1.469-4(e)(2), if it is determined that the taxpayer's original grouping was clearly inappropriate or a material change in the facts and circumstances has occurred

that makes the original grouping clearly inappropriate, the taxpayer must regroup the activities. If such a determination and regrouping is made, the taxpayer shall file a written statement with the taxpayer's original income tax return for the taxable year in which the trade or business activities or rental activities are regrouped. This statement must identify the names, addresses, and employer identification numbers, if applicable, for the trade or business or rental activities that are being regrouped. If two or more activities are regrouped into a single activity, the statement reporting a regrouping must also contain a declaration that the regrouped activities constitute an appropriate economic unit for the measurement of gain or loss for purposes of section 469. Furthermore, the statement reporting a regrouping must contain an explanation of why the taxpayer's original grouping was determined to be clearly inappropriate or the nature of the material change in the facts and circumstances that makes the original grouping clearly inappropriate.

.05 Special Rules for Groupings by Partnerships and S Corporations.

Under § 1.469-4(d)(5), a section 469 entity must group its activities under the rules of that section. However, partnerships and S corporations are not subject to the requirements of §§ 4.02, 4.03, and 4.04 of this revenue procedure. Instead, partnerships and S corporations must comply with the disclosure instructions for grouping activities provided for on Form 1065, U.S. Return of Partnership Income and Form 1120S, U.S. Income Tax Return for an S Corporation, respectively. Generally, compliance with the applicable form requires disclosing the entity's groupings to the partner or shareholder by separately stating the amounts of income and loss for each grouping conducted by the entity on attachments to the entity's annual Schedule K-1.

The partner or shareholder is not required to make a separate disclosure of the groupings disclosed by the entity under §§ 4.02, 4.03, and 4.04 of this revenue procedure unless the partner or shareholder (1) groups together any of the activities that the entity does not group together, (2) groups the entity's activities with activities conducted directly by the partner or shareholder, or (3) groups the entity's activities with activities conducted through other section 469 entities. Pursuant to § 1.469-4(d)(5)(i), a shareholder or partner may not treat activities grouped together by a section 469 entity as separate activities.

.06 Reporting of Pre-Existing Groupings Required only upon Change.

A taxpayer is not required to file a written statement reporting the grouping of the trade or business activities and rental activities that have been made prior to the effective date of this revenue procedure (pre-existing groupings) until the taxpayer makes a change to the grouping as described in sections 4.03 and 4.04 of this revenue procedure.

.07 Effect of Failure to Report.

Except as provided in § 4.05, if a taxpayer is engaged in two or more trade or business activities or rental activities and fails to report whether the activities have been grouped as a single activity in accordance with this revenue procedure, then each trade or business activity or rental activity will be treated as a separate activity for purposes of applying the passive activity loss and credit limitation rules of section 469.

Notwithstanding the previous sentence, a timely disclosure shall be deemed made by a taxpayer who has filed all affected income tax returns consistent with the claimed grouping of activities and makes the required disclosure on the income tax return for

the year in which the failure to disclose is first discovered by the taxpayer. If the failure to disclose is first discovered by the Service, however, the taxpayer must also have reasonable cause for not making the disclosures required by this revenue procedure. Although the default rule established by this section 4.07 will generally result in unreported activities being treated as separate activities, the Commissioner may still regroup a taxpayer's activities to prevent tax avoidance pursuant to § 1.469-4(f). This revenue procedure provides alternative relief for untimely filing of the disclosures required by this revenue procedure; therefore, relief for untimely disclosures under § 301.9100 of the Procedure and Administration Regulations is not available pursuant to § 301.9100-1(d)(2).

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning on or after January 25, 2010.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2156.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this revenue procedure are in section 4. This information is required to be submitted in order to disclose a taxpayer's grouping of activities. This information will be used to measure gain or loss for purposes of section

469. The collection of information is required to assist in compliance with tax obligations. The likely respondents are individuals and section 469 entities, including certain C corporations, S corporations, and partnerships.

The estimated total annual reporting burden for the taxable years in which this revenue procedure applies is 36,000 hours.

The estimated annual burden per respondent for the taxable years in which this revenue procedure applies varies from 10 minutes to 20 minutes, depending on individual circumstances, with an estimated average burden of 15 minutes. The estimated annual number of respondents for the taxable years in which this revenue procedure applies is 144,000.

The estimated annual frequency of responses is regular.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

The principal authors of this revenue procedure are Bryan A. Rimmke and Jonathan E. Cornwell of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Mr. Rimmke or Mr. Cornwell at (202) 622-3050 (not a toll-free call).