

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 469, 1.469-9(g): Rules for certain rental real estate activities
(Also: Part 1, §§ 301.9100-1, 301.9100-3)

Rev. Proc. 2011-34

SECTION 1. PURPOSE

This revenue procedure provides guidance under § 1.469-9(g) of the Income Tax Regulations allowing certain taxpayers to make late elections to treat all interests in rental real estate as a single rental real estate activity.

SECTION 2. BACKGROUND

.01 Section 469 of the Internal Revenue Code generally imposes restrictions on the allowance of passive activity losses and credits in the case of individuals and certain other taxpayers.

.02 Under § 469(c)(2), the term "passive activity" generally includes any rental activity. Section 469(c)(7) provides a limited exception to this rule for taxpayers in a real property business. Specifically, § 469(c)(7)(A) provides that if a taxpayer meets the requirements of § 469(c)(7)(B), the taxpayer's rental real estate activity will no longer be presumptively passive. In general, § 469(c)(7)(A) provides that a taxpayer's interests in rental real estate are treated as separate activities for determining whether the taxpayer materially participates in each rental real estate activity unless the taxpayer elects to treat all of the taxpayer's interests in rental real estate as a single rental real estate activity.

.03 Section 1.469-9(g)(1) provides that a qualifying taxpayer may make an election to treat all of the taxpayer's interests in rental real estate as a single rental real estate activity.

.04 Section 1.469-9(g)(3) provides that a qualifying taxpayer makes the election

to treat all interests in rental real estate as a single rental real estate activity by filing a statement with the taxpayer's original income tax return for the taxable year. Section 1.469-9(g)(3) describes the information that must be contained in the statement.

.05 Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Code, except subtitles E, G, H, and I. Section 301.9100-1(b) defines the term "regulatory election" as including an election whose deadline is prescribed by a regulation published in the Internal Revenue Bulletin.

.06 Sections 301.9100-1 through 301.9100-3 provide the standards that the Commissioner will use to determine whether to grant an extension of time to make an election.

.07 Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

.08 Section 301.9100-3(a) provides that requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

.09 Section 301.9100-3(b)(1) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer meets one of the requirements in § 301.9100-3(b)(1)(i)-(v), which include that the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

SECTION 3. SCOPE

.01 This revenue procedure provides special procedures for relief for late § 1.469-9(g) elections.

.02 The procedures in this revenue procedure are in lieu of the letter ruling procedure that is used to obtain relief for a late § 1.469-9(g) election. Accordingly, user fees do not apply to corrective action under this revenue procedure.

.03 A taxpayer that is not eligible for relief under this revenue procedure may request relief by applying for a private letter ruling. The Service will not ordinarily issue a private letter ruling under § 1.469-9(g) if the period of limitations on assessment under

§ 6501(a) has lapsed for any taxable year that would be affected by the requested late election. Rev. Proc. 2011-1, 2011-1 I.R.B. 1 (or its successor) prescribes the procedural requirements for requesting a private letter ruling.

SECTION 4. APPLICATION

.01 Eligibility for relief. A taxpayer is eligible for an extension of time to file a § 1.469-9(g) election under Section 4.03 of this revenue procedure if the taxpayer represents on a statement that satisfies the procedural requirements of section 4.02 of this section and under penalties of perjury that it meets all of the following requirements:

- (1) the taxpayer failed to make an election under § 1.469-9(g) solely because the taxpayer failed to timely meet the requirements in §1.469-9(g);
- (2) the taxpayer filed consistently with having made an election under § 1.469-9(g) on any return that would have been affected if the taxpayer had timely made the election. The taxpayer must have filed all required federal income tax returns consistent with the requested aggregation for all of the years including and following the year the taxpayer intends the requested aggregation to be effective and no tax returns containing positions inconsistent with the requested aggregation may have been filed by or with respect to the taxpayer during any of the taxable years;
- (3) the taxpayer timely filed each return that would have been affected by the election if it had been timely made. The taxpayer will be treated as having timely filed a required tax or information return if the return is filed within 6 months after its due date, excluding extensions;
- (4) the taxpayer has reasonable cause for its failure to meet the requirements in § 1.469-9(g).

.02 Procedural requirements for requesting relief. The taxpayer must attach the statement required by § 1.469-9(g)(3) to an amended return for the most recent tax year and mail the amended return to the IRS service center where the taxpayer will file its current year tax return. The statement must contain the declaration required by § 1.469-9(g)(3), must explain the reason for the failure to file a timely election, and must include the representations required in section 4.01 of this revenue procedure. The statement must identify the taxable year for which it seeks to make the late election. Finally, the statement must state at the top of the document "FILED PURSUANT TO REV. PROC. 2011-34."

The declaration and representations required in sections 4.01 and 4.02 of this revenue procedure must be accompanied by a dated declaration, signed by the taxpayer which states: "Under penalties of perjury I (we) declare that I (we) have examined this election, including any accompanying documents, and, to the best of my (our) knowledge and belief, the election contains all the relevant facts relating to the

election, and such facts are true, correct, and complete.” The individual or individuals who sign must have personal knowledge of the facts and circumstances related to the election.

.03 Relief for late election under § 1.469-9(g). The Service will notify the taxpayer upon receipt of a completed application requesting relief under this revenue procedure that satisfies the procedural requirements under section 4.02 of this revenue procedure. Any taxpayer receiving relief under this revenue procedure is treated as having made a timely election to treat all interests in rental real estate as a single rental real estate activity as of the taxable year for which the late election was requested.

SECTION 5. AREAS NOT COVERED BY THIS REVENUE PROCEDURE

The granting of an extension of time to file an election under § 1.469-9(g) pursuant to this revenue procedure and the issuance of a notification described in section 4.03 do not constitute an express or implied determination concerning whether the taxpayer satisfies the eligibility requirements under section 4.01 of this revenue procedure, whether the taxpayer satisfies the requirements under § 469(c)(7)(B), or whether the taxpayer materially participates in any activity.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective on the date of publication of this revenue procedure in the Internal Revenue Bulletin. This revenue procedure also applies to all ruling requests pending in the national office on June 13, 2011, and to requests for relief received thereafter. The national office will decline to rule on all ruling requests currently pending as of June 13, 2011, and will refund the user fee.

SECTION 7. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2194.

The collection of information in this revenue procedure is in Section 4.02 of this revenue procedure. The information will help the IRS to determine whether a taxpayer has met the requirements of Section 4 of this revenue procedure and whether a taxpayer has reasonable cause for failing to make a timely election. The collection of information is required to make a late election pursuant to this revenue procedure. The information will be reported on a statement filed by the taxpayer with the applicable IRS Service Center. The time needed to complete and file the statement will vary depending on individual circumstances. The estimated burden for taxpayers filing the statement is

included in the estimates shown in the Paperwork Reduction Act of the annually published letter ruling revenue procedure.

The estimated total annual reporting burden for the taxable years in which this revenue procedure applies is **1,000** hours.

The estimated annual burden per respondent for the taxable years in which this revenue procedure applies varies from **15** minutes to **45** minutes, depending on individual circumstances, with an estimated average burden of **30** minutes. The estimated annual number of respondents for the taxable years in which this revenue procedure applies is **2000**.

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 control number.

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.

SECTION 8. DRAFTING INFORMATION

The principal authors of this revenue procedure are Michala P. Irons and Bryan A. Rimmke of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure contact Ms. Irons or Mr. Rimmke on (202) 622-3050 (not a toll free call).