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## Technical Advice Memorandum 9505002

September 20, 1994

### ISSUE

Is the taxpayers' activity of providing a condominium for use by customers a rental activity for purposes of *section 469 of the Internal Revenue Code*, and are the taxpayers eligible for the \$25,000 offset for rental real estate activities under *section 469(i)* with respect to this activity?

### FACTS

The taxpayers, A and B, are husband and wife. A and B own a c interest in a condominium in City, a beach resort area. The ownership gives the taxpayers the right to use the property d weeks a year. The specific weeks allocated to the taxpayers change on an annual basis. The property is an ocean front resort-type condominium that offers various amenities, such as an on-site pool and off-site tennis and golf memberships. The taxpayers pay for use of the amenities through association dues.

For the e and f tax years, A and B rented the condominium to third parties for an average period of g days. Significant services were not provided by the taxpayers or on their behalf in this activity. For example, the cleaning of the unit was provided by the condominium association, but this cleaning occurred only once a week. The cleaning services were paid for by the taxpayers through association dues.

A and B did not materially participate in the condominium activity during the tax years in question, but it is represented that they did actively participate in the activity during these years. The taxpayers incurred losses of \$h in e and \$i in f from the condominium activity.

### LAW AND ANALYSIS

*Section 469(a) of the Code* disallows deductions for passive activity losses for the taxable year for individuals, estates, trusts, closely-held C corporations, and personal service corporations. *Section 469(c)* defines the term passive activity as any activity that involves the conduct of any trade or business in which the taxpayer does not materially participate and any rental activity.

*Section 469(j)(8) of the Code* defines rental activity as any activity where payments are principally for the use of tangible property.

Section 1.469-1T(e)(1)(ii) of the temporary Income Tax Regulations provides in general that a rental activity (within the meaning of paragraph (e)(3) of this section) is a passive activity without regard to whether or to what extent the taxpayer participates in the activity.

Section 1.469-1T(e)(3)(i) of the temporary regulations provides, in general, that an activity is a rental activity for a taxable year if (A) during the 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 the taxable year represents amounts paid principally for the use of the 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).

Section 1.469-1T(e)(3)(ii)(A) of the temporary regulations provides that an activity involving the use of tangible property is not a rental activity for a taxable year if for the taxable year the average period of customer use for the property is seven days or less.

*Section 469(i) of the Code* provides that, in the case of any natural person, *section 469(a)* shall not apply to that portion of the passive activity loss or the deduction equivalent (within the meaning of *section 469(j)(5)*) of the passive activity credit for any taxable year which is attributable to all rental real estate activities with respect to which the individual actively participated in the taxable year (and if any portion of the loss or credit arose in another taxable year, for the other taxable year).

If a taxpayer's activity meets any of the tests under section 1.469-1T(e)(3)(ii) of the temporary regulations, then the taxpayer's activity is deemed a trade or business activity and is not a rental activity. Accordingly, the taxpayer would not be eligible for the \$25,000 offset under *section 469(i) of the Code* with respect to a real estate activity that is deemed a trade or business activity, because the taxpayer's activity would not be a rental real estate activity.

## CONCLUSION

In this case, the taxpayers were involved in an activity of providing a condominium for use by customers for an average period of seven days or less. The taxpayers did not provide any significant services in their condominium activity. However, section 1.469-1T(e)(3)(ii)(A) of the temporary regulations does not require taxpayers to provide significant services in an activity for it to be deemed a trade or business activity, if the activity involves the use of tangible property by customers for an average period of seven days or less.

Based on the facts as submitted, we conclude that the taxpayers' activity of providing a condominium for use by customers is not a rental activity for purposes of *section 469 of the Code* and, therefore, the taxpayers are not eligible for the \$25,000 offset for rental real estate activities under *section 469(i)* with respect to that activity.

A copy of this technical advice memorandum is to be given to the taxpayer. *Section 6110(j)(3) of the Code* provides that it may not be used or cited as precedent.