

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 2009-XX

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. To date, the IRS has not prescribed reporting requirements for taxpayer groupings under section 469 other than those provided for in § 1.469-9(g) (relating to the election available to certain real estate professionals). As a result, the IRS and taxpayers have had difficulty verifying taxpayers' historical groupings.

On August 4, 2008, Notice 2008-64 (the Notice) was published in the Internal Revenue Bulletin. The Notice proposed a disclosure regime for taxpayer groupings under section 469 and solicited comments on whether the proposal sufficiently balanced the need for disclosure with taxpayer burden, as well as 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 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 who, in a given year, fail to make the required disclosure. Section 4.07 of this revenue procedure contains a relief provision for taxpayers who can meet certain additional criteria to demonstrate their grouping of activities.

SECTION 2. BACKGROUND

.01 Section 469 generally provides that deductions from passive trade or business activities, to the extent they exceed income from all such passive activities (exclusive of portfolio income), may not be deducted against other income.

.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 this section) is to circumvent the underlying purposes of section 469.

SECTION 3. SCOPE

This revenue procedure applies to all taxpayers to whom the rules in § 1.469-4 apply. However, this revenue procedure does not apply to the rental real estate activities (as defined in § 1.469-9(b)(3)) of a taxpayer in the year in which such taxpayer is a qualifying taxpayer (as defined in section 469(c)(7)(B)) and has made the election provided for in § 1.469-9(g).

SECTION 4. APPLICATION

.01 Disclosure requirements for taxpayer groupings.

Sections 4.02 through 4.05 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 4.06 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 4.05.

.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.

Whenever a taxpayer adds a new trade or business activity or a rental activity to an existing grouping within a taxable year, the taxpayer shall file a written statement with the taxpayer's original income tax return for the taxable year in which the new trade or business activity or rental activity is added to the existing grouping. 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 Grouping by Section 469 Entities.

Corporations subject to section 469, S corporations, and partnerships (section 469 entities as defined in § 1.469-4(d)(5)(ii)) must make a disclosure to their partners or shareholders whenever a change described in sections 4.02 through 4.04 of this revenue procedure occurs with respect to the entity's groupings. The changes must be reported to the partners or shareholders on Schedule K-1 in the year the change occurs and must contain the information and statements required by sections 4.02 through 4.04 of this revenue procedure, whichever are applicable. The partners or shareholders are responsible for disclosing the information received from the section 469 entity to the Service on the taxpayer's original income tax return for the taxable year it is received,

along with any other changes to the taxpayer's groupings for that year. The section 469 entity is not required to disclose any such changes directly to the Service. Pursuant to § 1.469-4(d)(5), 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. However, 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 through 4.05 of this revenue procedure.

.07 Effect of Failure to Report.

Except as provided in § 1.469-4(d)(5), 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. However, taxpayers who can demonstrate to the satisfaction of the Commissioner: (1) that there was reasonable cause for not making a timely grouping disclosure as required by this revenue procedure, and (2) that the taxpayer's income tax returns were filed consistent with the claimed grouping of activities, shall be treated as having made

a timely disclosure of activity groupings. The disclosures required by this revenue procedure are not regulatory elections as defined in § 301.9100-1(b) and therefore relief for untimely disclosures under § 301.9100 is not available.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning on or after **[Insert date of publication in the Internal Revenue Bulletin]**.

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 **[INSERT NUMBER]**.

The burden for this requirement is reflected on the applicable income tax return required to be filed by the taxpayers subject to this revenue procedure.

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 39,000 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 author of this revenue procedure is Jonathan E. Cornwell of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Mr. Cornwell at (202) 622-3050 (not a toll free call).