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§ 1.469-9 Rules for certain rental real estate activities.

(a) *Scope and purpose.* This section provides guidance to taxpayers engaged in certain real property trades or businesses on applying section 469(c)(7) to their rental real estate activities.

(b) *Definitions.* The following definitions apply for purposes of this section:

(1) *Trade or business.* A *trade or business* is any trade or business determined by treating the types of activities in § 1.469-4(b)(1) (/cfr/text/26/1.469-4#b_1) as if they involved the conduct of a trade or business, and any interest in rental real estate, including any interest in rental real estate that gives rise to deductions under section 212.

(2) *Real property trade or business.* *Real property trade or business* is defined in section 469(c)(7)(C).

(3) *Rental real estate.* *Rental real estate* is any real property used by customers or held for use by customers in a rental activity within the meaning of § 1.469-1T(e)(3) (/cfr/text/26/1.469-1T#e_3). However, any rental real estate that the taxpayer grouped with a trade or business activity under § 1.469-4(d)(1)(i)(A) or (C) (/cfr/text/26/1.469-4#d_1_i_A) is not an interest in rental real estate for purposes of this section.

(4) *Personal services.* *Personal services* means any **work performed** by an **individual** in **connection with a trade or business**. However, personal services do not include any work performed by an individual in the individual's capacity as an investor as described in § 1.469-5T(f)(2)(ii) (/cfr/text/26/1.469-5T#f_2_ii).

(5) *Material participation.* *Material participation* has the same meaning as under § 1.469-5T (/cfr/text/26/1.469-5T). Paragraph (f) of this section contains rules applicable to limited partnership interests in rental real estate that a qualifying taxpayer elects to aggregate with other interests in rental real estate of that taxpayer.

(6) *Qualifying taxpayer.* A *qualifying taxpayer* is a taxpayer that owns at least one interest in rental real estate and meets the requirements of paragraph (c) of this section.

(c) Requirements for qualifying taxpayers—

(1) In general. A qualifying taxpayer must meet the requirements of section 469(c)(7)(B).

(2) Closely held C corporations. A closely held C corporation meets the requirements of paragraph (c)(1) of this section by satisfying the requirements of section 469(c)(7)(D)(i). For purposes of section 469(c)(7)(D)(i), gross receipts do not include items of portfolio income within the meaning of § 1.469-2T(c)(3) (/cfr/text/26/1.469-2T#c_3).

(3) Requirement of material participation in the real property trades or businesses. A taxpayer must materially participate in a real property trade or business in order for the personal services provided by the taxpayer in that real property trade or business to count towards meeting the requirements of paragraph (c)(1) of this section.

(4) Treatment of spouses. Spouses filing a joint return are qualifying taxpayers only if one spouse separately satisfies both requirements of section 469(c)(7)(B). In determining the real property trades or businesses in which a married taxpayer materially participates (but not for any other purpose under this paragraph (c)), work performed by the taxpayer's spouse in a trade or business is treated as work performed by the taxpayer under § 1.469-5T(f)(3) (/cfr/text/26/1.469-5T#f_3), regardless of whether the spouses file a joint return for the year.

(5) Employees in real property trades or businesses. For purposes of paragraph (c)(1) of this section, personal services performed during a taxable year as an employee generally will be treated as performed in a trade or business but will not be treated as performed in a real property trade or business, unless the taxpayer is a five-percent owner (within the meaning of section 416(i)(1)(B)) in the employer. If an employee is not a five-percent owner in the employer at all times during the taxable year, only the personal services performed by the employee during the period the employee is a five-percent owner in the employer will be treated as performed in a real property trade or business.

(d) General rule for determining real property trades or businesses—

(1) Facts and circumstances. The determination of a taxpayer's real property trades or businesses for purposes of paragraph (c) of this section is based on all of the relevant facts and circumstances. A taxpayer may use any reasonable method of applying the facts and circumstances in determining the real property trades or businesses in which the taxpayer provides personal services. Depending on the facts and circumstances, a real property trade or business consists either of one or more than one trade or business specifically described in section 469(c)(7)(C). A taxpayer's grouping of activities under § 1.469-4 (/cfr/text/26/1.469-4) does not control the determination of the taxpayer's real property trades or businesses under this paragraph (d).

(2) Consistency requirement. Once a taxpayer determines the real property trades or businesses in which personal services are provided for purposes of paragraph (c) of this section, the taxpayer may not redetermine those real property trades or businesses in subsequent taxable years unless the original determination was clearly inappropriate or there has been a material change in the facts and circumstances that makes the original determination clearly inappropriate.

(e) Treatment of rental real estate activities of a qualifying taxpayer—

(1) In general. Section 469(c)(2) does not apply to any rental real estate activity of a taxpayer for a taxable year in which the taxpayer is a qualifying taxpayer under paragraph (c) of this

section. Instead, a rental real estate activity of a qualifying taxpayer is a passive activity under section 469 for the taxable year unless the taxpayer materially participates in the activity. Each interest in rental real estate of a qualifying taxpayer will be treated as a separate rental real estate activity, unless the taxpayer makes an election under paragraph (g) of this section to treat all interests in rental real estate as a single rental real estate activity. Each separate rental real estate activity, or the single combined rental real estate activity if the taxpayer makes an election under paragraph (g), will be an activity of the taxpayer for all purposes of section 469, including the former passive activity rules under section 469(f) and the disposition rules under section 469(g). However, section 469 will continue to be applied separately with respect to each publicly traded partnership, as required under section 469(k), notwithstanding the rules of this section.

(2) Treatment as a former passive activity. For any taxable year in which a qualifying taxpayer materially participates in a rental real estate activity, that rental real estate activity will be treated as a former passive activity under section 469(f) if disallowed deductions or credits are allocated to the activity under § 1.469-1(f)(4) (/cfr/text/26/1.469-1#f_4).

(3) Grouping rental real estate activities with other activities—

(i) In general. For purposes of this section, a qualifying taxpayer may not group a rental real estate activity with any other activity of the taxpayer. For example, if a qualifying taxpayer develops real property, constructs buildings, and owns an interest in rental real estate, the taxpayer's interest in rental real estate may not be grouped with the taxpayer's development activity or construction activity. Thus, only the participation of the taxpayer with respect to the rental real estate may be used to determine if the taxpayer materially participates in the rental real estate activity under § 1.469-5T (/cfr/text/26/1.469-5T).

(ii) Special rule for certain management activities. A qualifying taxpayer may participate in a rental real estate activity through participation, within the meaning of §§ 1.469-5(f) (/cfr/text/26/1.469-5#f) and 5T(f), in an activity involving the management of rental real estate (even if this management activity is conducted through a separate entity). In determining whether the taxpayer materially participates in the rental real estate activity, however, work the taxpayer performs in the management activity is taken into account only to the extent it is performed in managing the taxpayer's own rental real estate interests.

(4) Example. The following example illustrates the application of this paragraph (e).

Example.

(i) Taxpayer *B* owns interests in three rental buildings, *U*, *V* and *W*. In 1995, *B* has \$30,000 of disallowed passive losses allocable to Building *U* and \$10,000 of disallowed passive losses allocable to Building *V* under § 1.469-1(f)(4) (/cfr/text/26/1.469-1#f_4). In 1996, *B* has \$5,000 of net income from Building *U*, \$5,000 of net losses from Building *V*, and \$10,000 of net income from Building *W*. Also in 1996, *B* is a qualifying taxpayer within the meaning of paragraph (c) of this section. Each building is treated as a separate activity of *B* under paragraph (e)(1) of this section, unless *B* makes the election under paragraph (g) to treat the three buildings as a single rental real estate activity. If the buildings are treated as separate activities, material participation is determined separately with respect to each building. If *B* makes the election under paragraph (g) to treat the buildings as a single activity, all participation relating to the buildings is aggregated in determining whether *B* materially participates in the combined activity.

(ii) Effective beginning in 1996, *B* makes the election under paragraph (g) to treat the three buildings

as a single rental real estate activity. *B* works full-time managing the three buildings and thus materially participates in the combined activity in 1996 (even if *B* conducts this management function through a separate entity, including a closely held C corporation). Accordingly, the combined activity is not a passive activity of *B* in 1996. Moreover, as a result of the election under paragraph (g), disallowed passive losses of \$40,000 (\$30,000 \$10,000) are allocated to the combined activity. *B*'s net income from the activity for 1996 is \$10,000 (\$5,000–\$5,000 \$10,000). This net income is nonpassive income for purposes of section 469. However, under section 469(f), the net income from a former passive activity may be offset with the disallowed passive losses from the same activity. Because Buildings *U*, *V* and *W* are treated as one activity for all purposes of section 469 due to the election under paragraph (g), and this activity is a former passive activity under section 469(f), *B* may offset the \$10,000 of net income from the buildings with an equal amount of disallowed passive losses allocable to the buildings, regardless of which buildings produced the income or losses. As a result, *B* has \$30,000 (\$40,000–\$10,000) of disallowed passive losses remaining from the buildings after 1996.

(f) Limited partnership interests in rental real estate activities—

(1) In general. If a taxpayer elects under paragraph (g) of this section to treat all interests in rental real estate as a single rental real estate activity, and at least one interest in rental real estate is held by the taxpayer as a limited partnership interest (within the meaning of § 1.469-5T(e)(3) (/cfr/text/26/1.469-5T#e_3)), the combined rental real estate activity will be treated as a limited partnership interest of the taxpayer for purposes of determining material participation. Accordingly, the taxpayer will not be treated under this section as materially participating in the combined rental real estate activity unless the taxpayer materially participates in the activity under the tests listed in § 1.469-5T(e)(2) (/cfr/text/26/1.469-5T#e_2) (dealing with the tests for determining the material participation of a limited partner).

(2) De minimis exception. If a qualifying taxpayer elects under paragraph (g) of this section to treat all interests in rental real estate as a single rental real estate activity, and the taxpayer's share of gross rental income from all of the taxpayer's limited partnership interests in rental real estate is less than ten percent of the taxpayer's share of gross rental income from all of the taxpayer's interests in rental real estate for the taxable year, paragraph (f)(1) of this section does not apply. Thus the taxpayer may determine material participation under any of the tests listed in § 1.469-5T(a) (/cfr/text/26/1.469-5T#a) that apply to rental real estate activities.

(g) Election to treat all interests in rental real estate as a single rental real estate activity—

(1) In general. 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. This election is binding for the taxable year in which it is made and for all future years in which the taxpayer is a qualifying taxpayer under paragraph (c) of this section, even if there are intervening years in which the taxpayer is not a qualifying taxpayer. The election may be made in any year in which the taxpayer is a qualifying taxpayer, and the failure to make the election in one year does not preclude the taxpayer from making the election in a subsequent year. In years in which the taxpayer is not a qualifying taxpayer, the election will not have effect and the taxpayer's activities will be those determined under § 1.469-4 (/cfr/text/26/1.469-4). If there is a material change in the taxpayer's facts and circumstances, the taxpayer may revoke the election using the procedure described in paragraph (g)(3) of this section.

(2) Certain changes not material. The fact that an election is less advantageous to the taxpayer in a particular taxable year is not, of itself, a material change in the taxpayer's facts and

circumstances. Similarly, a break in the taxpayer's status as a qualifying taxpayer is not, of itself, a material change in the taxpayer's facts and circumstances.

(3) Filing a statement to make or revoke the election. 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. This statement must contain a declaration that the taxpayer is a qualifying taxpayer for the taxable year and is making the election pursuant to section 469(c)(7)(A). The taxpayer may make this election for any taxable year in which section 469(c)(7) is applicable. A taxpayer may revoke the election only in the taxable year in which a material change in the taxpayer's facts and circumstances occurs or in a subsequent year in which the facts and circumstances remain materially changed from those in the taxable year for which the election was made. To revoke the election, the taxpayer must file a statement with the taxpayer's original income tax return for the year of revocation. This statement must contain a declaration that the taxpayer is revoking the election under section 469(c)(7)(A) and an explanation of the nature of the material change.

(h) Interests in rental real estate held by certain passthrough entities—

(1) General rule. Except as provided in paragraph (h)(2) of this section, a qualifying taxpayer's interest in rental real estate held by a partnership or an S corporation (passthrough entity) is treated as a single interest in rental real estate if the passthrough entity grouped its rental real estate as one rental activity under § 1.469-4(d)(5) (/cfr/text/26/1.469-4#d_5). If the passthrough entity grouped its rental real estate into separate rental activities under § 1.469-4(d)(5) (/cfr/text/26/1.469-4#d_5), each rental real estate activity of the passthrough entity will be treated as a separate interest in rental real estate of the qualifying taxpayer. However, the qualifying taxpayer may elect under paragraph (g) of this section to treat all interests in rental real estate, including the rental real estate interests held through passthrough entities, as a single rental real estate activity.

(2) Special rule if a qualifying taxpayer holds a fifty-percent or greater interest in a passthrough entity. If a qualifying taxpayer owns, directly or indirectly, a fifty-percent or greater interest in the capital, profits, or losses of a passthrough entity for a taxable year, each interest in rental real estate held by the passthrough entity will be treated as a separate interest in rental real estate of the qualifying taxpayer, regardless of the passthrough entity's grouping of activities under § 1.469-4(d)(5) (/cfr/text/26/1.469-4#d_5). However, the qualifying taxpayer may elect under paragraph (g) of this section to treat all interests in rental real estate, including the rental real estate interests held through passthrough entities, as a single rental real estate activity.

(3) Special rule for interests held in tiered passthrough entities. If a passthrough entity owns a fifty-percent or greater interest in the capital, profits, or losses of another passthrough entity for a taxable year, each interest in rental real estate held by the lower-tier entity will be treated as a separate interest in rental real estate of the upper-tier entity, regardless of the lower-tier entity's grouping of activities under § 1.469-4(d)(5) (/cfr/text/26/1.469-4#d_5).

(i) [Reserved]

(j) \$25,000 offset for rental real estate activities of qualifying taxpayers—

(1) In general. A qualifying taxpayer's passive losses and credits from rental real estate activities (including prior-year disallowed passive activity losses and credits from rental real estate activities in which the taxpayer materially participates) are allowed to the extent permitted

under section 469(i). The amount of losses or credits allowable under section 469(i) is determined after the rules of this section are applied. However, losses allowable by reason of this section are not taken into account in determining adjusted gross income for purposes of section 469(i)(3).

(2) Example. The following example illustrates the application of this paragraph (j).

Example.

(i) Taxpayer A owns building X and building Y, both interests in rental real estate. In 1995, A is a qualifying taxpayer within the meaning of paragraph (c) of this section. A does not elect to treat X and Y as one activity under section 469(c)(7)(A) and paragraph (g) of this section. As a result, X and Y are treated as separate activities pursuant to section 469(c)(7)(A)(ii). A materially participates in X which has \$100,000 of passive losses disallowed from prior years and produces \$20,000 of losses in 1995. A does not materially participate in Y which produces \$40,000 of income in 1995. A also has \$50,000 of income from other nonpassive sources in 1995. A otherwise meets the requirements of section 469(i).

(ii) Because X is not a passive activity in 1995, the \$20,000 of losses produced by X in 1995 are nonpassive losses that may be used by A to offset part of the \$50,000 of nonpassive income. Accordingly, A is left with \$30,000 (\$50,000-\$20,000) of nonpassive income. In addition, A may use the prior year disallowed passive losses of X to offset any income from X and passive income from other sources. Therefore, A may offset the \$40,000 of passive income from Y with \$40,000 of passive losses from X.

(iii) Because A has \$60,000 (\$100,000-\$40,000) of passive losses remaining from X and meets all of the requirements of section 469(i), A may offset up to \$25,000 of nonpassive income with passive losses from X pursuant to section 469(i). As a result, A has \$5,000 (\$30,000-\$25,000) of nonpassive income remaining and disallowed passive losses from X of \$35,000 (\$60,000-\$25,000) in 1995.

[T.D. 8645, 60 FR 66499, Dec. 22, 1995]

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