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PASSIVE ACTIVITY LOSS RULES

IF YOU'RE ON CALL, YOU'RE OUT OF LUCK IN PASSIVE ACTIVITY CASES

Without proper documentation, "on call" time cannot be used to measure a taxpayer's level of participation in real estate activities for purposes of the passive activity loss rules.

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Back in the era of beepers, being "on call" evoked imagery of importance. Indeed, those people whose job required them to carry a beeper, along with those who did so voluntary, displayed the devices with a noticeable degree of smugness. The positive aspects of this status symbol aside, anyone who has been obligated to carry a beeper or its modern equivalent (e.g., BlackBerry, iPhone, and PalmPilot) understands that being constantly reachable is often more of a curse than a blessing. Many jobs mandate that a person respond to messages within a certain time, minimize travel so that one can be at the office quickly if necessary, avoid alcohol at all times to ensure constant preparedness to work, etc. Given this reality, it is understandable that many people who are perpetually "on call" feel that they are always working, continuously performing.

This concept is at the core of a recent Tax Court case, *Moss*, ¹ in which the taxpayer claimed that all the time he spent "on call" with respect to his rental real estate business should be counted in determining whether he met the necessary participation standards. This article analyzes this relatively obscure case and explains its significance for future taxpayers who find themselves embroiled, against their will, in a passive activity loss dispute with the IRS.

Overview of the relevant law

The following sections provide a summary of the relevant passive activity rules.

Passive activities and material participation.

To grasp the importance of *Moss*, one must first be familiar with the pertinent rules. A taxpayer generally may deduct the losses from *passive* trade or business activities in a particular year only to the extent that such losses do not exceed income from *passive* activities. ² This rule prevents the taxpayer from using passive losses to offset income from unrelated, non-passive activities. The disallowed losses, which are more accurately characterized as suspended losses, can be carried forward and treated as deductions from passive activities in subsequent tax years. ³ Moreover, in many instances, the remaining suspended losses can be taken in full when the taxpayer disposes of his or her entire interest in the passive activity in question. ⁴

The term "passive activity" is defined in the negative; It means any trade or business activity in which the taxpayer does not "materially participate." ⁵ To meet the "material participation" standard, the taxpayer must demonstrate that he or she is involved in the operations of the activity on a regular, continuous, and substantial basis. ⁶ The regulations contain additional guidance on this topic, stating that the taxpayer is treated as "materially participating" in an activity if he or she meets any one of the following seven tests. ⁷

- (1) The taxpayer participates in the activity for more than 500 hours during the year.
- (2) The taxpayer's participation in the activity during the year constitutes substantially all of the participation in such activity by all individuals for such year.
- (3) The taxpayer participates in the activity more than 100 hours during the relevant year, and his or her participation is not less than that of any other individual for such year.
- (4) The activity is a "significant participation activity" during the year, and the taxpayer's aggregate participation in all significant participation activities during such year exceeds 500 hours.

- (5) The taxpayer materially participated in the activity for any five tax years (consecutive or not) during the ten years immediately preceding the year at issue.
- (6) The activity is a "personal service activity," and the taxpayer materially participated in such activity for any three years (consecutive or not) before the year at issue.
- (7) Based on all of the facts and circumstances, taking into account the special rules found elsewhere in the regulations, the taxpayer participates in the activity on a regular, continuous, and substantial basis during such year.

In determining whether any of seven tests has been satisfied, the taxpayer is granted considerable latitude. For example, any work done by an individual who owns an interest at the time the work is done generally shall be treated as "participation" by the individual in the activity, regardless of the capacity in which the individual does the work. ⁸ In the case of any individual who is married, any participation by the spouse in the activity during the year (regardless of whether the spouse owns an interest in the activity and whether the spouses file a joint federal income tax return) is treated as participation by the individual. ⁹

Special rules applicable to real estate professionals.

Unfortunately for those in the real estate arena, the default rule is that all rental activities are passive. ¹⁰ Certain exceptions to this general rule exist. For instance, a "real estate professional" may treat a rental real estate activity as non-passive, thus taking advantage of the resulting losses the year in which they actually occur. ¹¹ To qualify as a "real estate professional," the following two criteria must be satisfied:

- (1) More than 50% of the personal services performed by the taxpayer during the year are performed in real property trades or businesses in which the taxpayer materially participates. ¹²
- (2) The taxpayer performs more than 750 hours of services during the year in real property trades or businesses in which the taxpayer materially participates. ¹³

In this context, the term "real property trade or business" means any real property development, re-development, construction, re-construction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business. ¹⁴ The regulations emphasize that there is considerable flexibility in what constitutes a real property trade or business, explaining that this determination is based on "all the facts and circumstances [and] 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." ¹⁵

The law expressly allows a taxpayer to elect to treat *all* interests in rental real estate as one activity. ¹⁶ Making this so-called "aggregation election" normally benefits the taxpayer, as combining the time spent working on multiple properties makes meeting the participation standards easier. ¹⁷

Substantiating a taxpayer's participation in the activity.

The rules regarding the methods by which a taxpayer can prove to the IRS (and ultimately to the Tax Court in many instances) the number of hours he or she dedicated to a particular activity are remarkably flexible, much more so than in other tax contexts. Indeed, the regulations set the following loose standard:

The extent of an individual's participation in an activity may be established by any reasonable means. Contemporaneous daily time reports, logs, or similar documents are not required if the extent of such participation may be established by other reasonable means. Reasonable means for purposes of this paragraph may include but are not limited to the identification of services performed over a period of time and the approximate number of hours spent performing such services during such period, based on appointment books, calendars, or narrative summaries. ¹⁸

Various IRS documents echo this sentiment, including Publication 925 (Passive Activity and At-Risk Rules). It states the following concerning proof of participation:

You can use any reasonable method to prove your participation in an activity for the year. You do not have to keep contemporaneous daily time reports, logs, or similar documents if you can establish your participation some other way. For example, you can show the services you performed and the approximate number of hours spent by using an appointment book, calendar, or narrative summary. ¹⁹

The reason for these lax rules is, well, reality. In promulgating the passive activity loss regulations, the IRS understood that, barring those service professionals who spend their days (and often their entire lives) shackled to desks measuring their productivity and livelihood by the billable hour, most workers are not glued to the clock. The

regulations put a softer spin on it, explaining that the IRS "recognizes that, while lawyers and certain other professionals are accustomed to maintaining detailed records of how they spend their work days, most individuals do not customarily maintain such records." [20](#)

Flexibility has its limits, of course. The courts have held repeatedly that a taxpayer's "self-serving guesstimates" as to the amount of hours devoted to an activity, without more, will not suffice. [21](#)

Moss

The taxpayer in *Moss* worked as a technician at a nuclear power plant, where he planned maintenance activities, estimated job times and equipment needs, and assisted with regulatory compliance. The taxpayer was employed at the plant on a full-time basis during the year at issue, generally working eight-hour shifts, five days per week. Additionally, the taxpayer had to be available for a certain amount of "call out" time (*i.e.*, unscheduled overtime) and for "standby" time (*i.e.*, when an employee must await a call for emergency work outside regular working hours and must remain "fit for duty" during such period). The taxpayer worked a total of 1,900 hours at the plant during the relevant year. [22](#)

The taxpayer also owned various rental properties, consisting of three single-family homes and four apartments. The taxpayer, therefore, was accountable to at least seven different tenants. The taxpayer took certain actions concerning the rental properties when he was not working at the nuclear plant. Such actions included property maintenance and monitoring, eviction of non-paying tenants, rent collection, and preparation of properties for new tenants. The taxpayer maintained a calendar describing the actions taken and the dates on which they occurred; however, the calendar failed to indicate the actual time spent by the taxpayer on each action.

The Schedule E to the taxpayer's federal income tax return for 2007 reported a non-passive loss of approximately \$40,500 from the rental properties. Presumably, such loss served to offset to a certain degree the taxpayer's salary from the nuclear plant. The IRS disallowed the majority of such loss on grounds that it was "passive," and the taxpayer filed a petition with the Tax Court seeking judicial assistance in resolving the matter.

The Tax Court began its analysis in *Moss* with a general explanation of the passive activity loss rules, as well as a description of the special standards applicable to rental real estate activities and those qualifying as "real estate professionals." The court then acknowledged the flexibility granted to taxpayers in demonstrating hours of participation in a particular activity, but warned against after-the-fact, self-serving, "ballpark guesstimates" by taxpayers. Next, the court noted that the IRS had neglected to argue that the taxpayer failed to make a proper aggregation election to treat all the rental properties as one activity.

With the initial issues thus handled, the court turned its attention to the crucial question: Did the taxpayer meet the definition of "real estate professional" such that the losses associated with the rental real properties would not be *per se* passive? As noted above, certain criteria must be satisfied before a taxpayer can be considered a real estate professional. First, more than 50% of the personal services performed by the taxpayer during the relevant year must be in real property trades or businesses in which the taxpayer materially participates. [23](#) Second, the taxpayer must perform more than 750 hours of services during the year in real property trades or businesses in which the taxpayer materially participates. [24](#) The court in *Moss* needed only to tackle the latter to resolve the case in the IRS's favor.

The evidence presented by the taxpayer on this issue was scarce. He submitted a calendar, prepared throughout the year in question, describing his actions and the dates on which he performed them. He also offered a summary of the time spent on each action, which he prepared nearly three years later in preparation for trial. The summary indicated that the taxpayer devoted a total of 645.5 hours to his rental properties. Clearly, this figure falls short of the 750 hours required to meet one prong of the "real estate professional" definition. In an effort to compensate for this shortfall, the taxpayer argued that he was participating by being "on call" with respect to the rental properties whenever he was not working at the nuclear plant. In the words of the Tax Court, the taxpayer claimed that he "could have been called to perform work at the rental properties at any time that he was not working at the [nuclear] plant, and, therefore, such on call hours should count toward meeting the 750-hour service performance requirement."

The court rejected the taxpayer's novel argument. As grounds for its decision, it cited the applicable portions of the law and regulations, all of which expressly indicate that a taxpayer must "perform" the activities for the hours to factor into the analysis. The court recognized that the taxpayer conceivably could have been beckoned to perform services related to the rental properties at any time since he was essentially "on call" whenever he was not otherwise occupied at the nuclear plant. It pointed out, however, that such services "were never actually performed" by the taxpayer. Accordingly, the court held that the taxpayer's "on call" time for the rental properties was excluded from the 750-hour calculation. Since the taxpayer thus failed to meet one prong of the "real estate professional" test, and since satisfaction of both prongs is necessary to overcome the default rule of passivity, the court declined to analyze whether more than 50% of the personal services performed by the taxpayer during the

year related to real property trades or businesses in which the taxpayer materially participated. [25](#)

The court, along with disallowing the majority of the losses related to the rental properties, upheld the accuracy-related penalty against the taxpayer. [26](#) The Tax Court acknowledged that justifications for penalty waiver abound, including when taxpayers make a significant effort to determine the proper tax liability, make a reasonable mistake, or rely in good faith on erroneous advice from a qualified tax advisor. However, it ultimately determined that no such rationales existed in *Moss*. The taxpayer's primary contention was that he relied on the accountant who prepared the tax return in question, yet admitted that he did not provide such accountant with the precise number of hours spent on the rental properties. The Tax Court concluded that such pseudo-reliance did not rise to the level of reasonable cause and good faith.

Why *Moss* matters

Published decisions from tax cases are plentiful, which comes as no surprise given that tax issues may be addressed by four different judicial bodies: Tax Court, U.S. District Courts, Court of Federal Claims, and U.S. Bankruptcy Courts. These cases tend to involve convoluted facts, dense legal issues, and references to complex statutes and regulations. This results in many important cases, such as *Moss*, being overlooked or misunderstood. As explained below, *Moss* is significant for several reasons, despite the fact that it was a *pro se* case concerning relatively little money.

Unintended application of passive activity rules.

So-called "tax shelters" flourished in the early 1980's, and Congress reacted by enacting laws designed to halt this type of activity. Legislative history from the Tax Reform Act of 1986 clarifies the motives of Congress in introducing the passive activity loss rules:

In recent years, it has become increasingly clear that taxpayers are losing faith in the Federal income tax system. This loss of confidence has resulted in large part from the interaction of two of the system's principal features: its high marginal rates . . . and the opportunities it provides for taxpayers to offset income from one source with tax shelter deductions and credits from another. *The prevalence of tax shelters* in recent years . . . has been well documented . . . *Extensive tax shelter activity* contributes to public concerns that the tax system is unfair, and to the belief that tax is paid only by the naive and unsophisticated. This, in turn, not only undermines compliance, but encourages *further expansion of the tax shelter market*, in many cases diverting investment capital from productive activities to those principally or exclusively serving tax avoidance goals. The committee believes that the most important sources of support for the Federal income tax system are the average citizens who simply report their income (typically consisting predominantly of items such as salaries, wages, pensions, interest, and dividends) and pay tax under the general rules. To the extent that these citizens feel that they are bearing a disproportionate burden with regard to the costs of government because of their unwillingness or inability to engage in tax-oriented investment activity, the tax system itself is threatened. Under these circumstances, the committee believes that decisive action is needed *to curb the expansion of tax sheltering* and to restore to the tax system the degree of equity that is a necessary precondition to a beneficial and widely desired reduction in rates. [27](#)

The facts in *Moss* are sparse, but certain things are apparent: The taxpayer worked on a full-time basis at a nuclear power plant, he spent a considerable amount of time when not at the plant in activities related to his rental properties, and he claimed a total of just \$40,490 in losses in connection with the properties. Those who work in the "tax shelter" arena likely would agree that the taxpayer in *Moss* bears little resemblance to the taxpayers at whom Congress was aiming, *i.e.*, those getting involved in real estate, oil and gas, film, cattle, and other ventures with the principal purpose of receiving non-economic and/or inflated losses in order to offset large amounts of income from unrelated sources. Nevertheless, the rules and regulations are broad enough to apply in cases like *Moss*, even if doing does not seem to foster congressional intent. *Moss* thus sends an important message to other taxpayers that they, too, may be caught in the passive activity web despite no intention of "tax sheltering."

Key issues not raised in *Moss*.

A case is often interesting not so much for what was said, but rather for what was not said. Courts may raise items on their own; however, the responsibility of presenting evidence and broaching legal arguments generally falls on the parties. Accordingly, the scope of a court's opinion is guided by the effectiveness of the litigants. Two major arguments, both favorable to the IRS, did not appear in *Moss*.

First, the IRS did not question whether the time that the taxpayer spent traveling to and from his rental properties should be included in the total. The taxpayer took the position that he reached the 750-hour prong of the "real estate professional" test by adding the following amounts: hours actually working on the properties, hours traveling

to and from the properties, and hours "on call." While the IRS attacked the "on call" component in *Moss*, it apparently neglected to challenge the other two. Passing on the work hours is understandable, but inaction by the IRS on the travel issue is somewhat confounding given that the Tax Court has ruled several times that travel time should not count in this context. ²⁸ Furthermore, the IRS's own Passive Activity Loss Audit Technique Guide encourages personnel to pounce on this issue. The following guidance is found in a segment of the chapter on material participation named "non-qualifying time:"

Travel time generally should not be considered in computing the hourly tests for material participation, particularly if other factors indicate the taxpayer is not participating in the activity on a regular, continuous and substantial basis. Legislative history provides that "services must be integral to operations." It is somewhat difficult to construe that travel constitutes "services" or "participation" as contemplated by Congress or the Regulations. More importantly, travel is not integral to operations in most cases. ²⁹

Second, the IRS did not challenge the consolidated treatment of the rental properties by the taxpayer, which is a fundamental issue. If a taxpayer demonstrates that he or she is a "real estate professional," then the general rule is that the relevant participation tests "shall be applied as if each interest of the taxpayer in rental real estate were a *separate* activity." ³⁰ In other words, the taxpayer normally is forced to meet the tests (*i.e.*, 750 total hours devoted to rental property, more than 50% of services performed related to rental property, material participation, etc.) for each particular rental property. This is a daunting proposition in the best of cases, and an impossibility in most. Fortunately, a taxpayer has the ability to make a choice, a so-called "aggregation election," to treat all his or her interests in rental real estate as one activity. ³¹ Provided that a taxpayer makes an election by attaching a proper statement to an original (not amended) federal income tax return, the election remains in effect forever. The regulations emphasize that the aggregation 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." ³²

The taxpayer in *Moss* had four rental properties and, even if one were to take into account all the time spent working, traveling, and being "on call," he would have invested approximately 750 total hours. Thus, without the assistance of an aggregation election, meeting even one prong of the "real estate professional" test would have been unfeasible. However, the Tax Court pointed out that the IRS failed to contend that the taxpayers did not have an aggregation election in effect. It construed such silence as a concession that the taxpayer had properly aggregated the properties. If the IRS had successfully challenged the aggregation issue, the court likely would have dispensed with *Moss* without ever having to reach the "on call" issue.

Moss is precedential despite its size.

Moss matters because it represents judicial precedent that can, and surely will, be cited in future tax disputes. This is often not true with passive activity loss limitation cases, which, by their very nature, tend to be fact-based and focused on established legal principles.

The Tax Court issues three main types of opinions: summary, memorandum, and reported. The first type, summary opinions, are limited to cases in which the amount of tax at issue is \$50,000 or less and the taxpayer elects to have the dispute treated as a "small tax case" and placed on the Tax Court's "S" calendar. ³³ Characterization as a small case has advantages and disadvantages. On the positive side, small cases are conducted "as informally as possible," and the Tax Court will admit and consider any evidence presented by the taxpayer that has probative value. ³⁴ Moreover, since neither legal briefs nor oral arguments are ordinarily required, and since the taxpayer may participate without legal representation, small tax cases tend to be simpler and less expensive. ³⁵ On the downside, decisions by the Tax Court in "S" cases cannot be appealed to another court and they cannot be cited as legal precedent in future cases. ³⁶ Memorandum opinions, the second type, are issued by the Tax Court in fact-intensive situations, cases involving well-established legal concepts, or where the dispute is not sufficiently developed at trial to merit precedential treatment. If there is any doubt about the relevance of these decisions, the court has held that "[i]t is well established that the Tax Court does not consider its Memorandum Opinions to be binding precedent" ³⁷ and further that "we consider neither revenue rulings nor Memorandum Opinions of this Court to be controlling precedent." ³⁸ Reported decisions, the third type, possess increased relevance. The Tax Court normally issues reported decisions (which may be a "division" opinion by one judge or a "reviewed" opinion by all the judges) in cases in which the litigants have raised issues of first impression or presented such a well-developed case that it should serve as guidance for future cases.

The proposed tax deficiency in *Moss* was small, \$8,070, and the corresponding penalty rose to just \$1,614. Moreover, the record indicates that the case was not well developed at trial. The docket sheet indicates that the taxpayer filed neither a pre-trial memo nor a post-trial memo. The Tax Court decision, for its part, is devoid of references to any witnesses who testified on the taxpayer's behalf. Regardless of the minor amounts at issue and the lack of case development, *Moss* became a reported decision. Though not expressly stated in the decision, logic

dictates that *Moss* was deemed precedential because it addressed a novel issue, *i.e.*, the proper treatment of "on call" time for purposes of the passive activity loss limitation rules. Reasons aside, *Moss*, as a reported decision, surely will be cited by both taxpayers and the IRS in future disputes.

Similar activity, similar treatment.

As mentioned above, *Moss* presumably was classified as a reported/precedential decision based on its uniqueness; the Tax Court had not previously analyzed the specific issue of whether "on call" time could be counted in determining whether certain passive activity tests have been met. The Tax Court, however, addressed a similar issue a few years ago, rendering a similar result in a non-precedential summary opinion, *Monroe*. [39](#)

The taxpayer in *Monroe* worked for the Ohio Department of Taxation (ODT), where he was a supervisor. Setting aside vacation and sick days, the taxpayer worked 1,834 for the ODT during the period in question. Over the years, the taxpayer bought, renovated, and then rented various residential properties. He held five real properties at the relevant time. The taxpayer was solely responsible for managing and maintaining the rental properties. His duties included meeting with prospective tenants, preparing and negotiating leases, collecting rent, pursuing eviction proceedings, making repairs, arranging for repairs to be made by third-parties, reviewing financial statements, making periodic payments to creditors, and developing and maintaining a bookkeeping system for the properties.

The taxpayer kept detailed activity logs, updated on a weekly basis, reflecting the time that he spent performing services in connection with the rental properties. For the year in question, the log indicated that the taxpayer spent a total of 2,440 hours performing services, 1,440 hours of which were described as "phone-in office hours 360 days a year."

The taxpayer's federal income tax return contained a Schedule E showing a non-passive loss on the rental properties of approximately \$17,000. The IRS issued a deficiency notice disallowing the loss as "passive." The sole issue at trial was the amount of hours that the taxpayer devoted to the rental properties.

At trial, the taxpayer said that the tenants (and others involved with the properties) could reach him by phone 24 hours per day. However, in calculating the extent of his participation, the taxpayer explained that he counted only four hours per day, from 6 p.m. to 10 p.m. Multiplying four hours per day by 360 days per year yielded a total of 1,440 "phone-in office hours."

The IRS argued that these 1,440 hours should not be counted because they represented time that the taxpayer was "merely available" for telephone calls, not the time he "actually spent providing personal services in connection with [the] rental real estate activity." The Tax Court agreed with this reasoning, observing that the disputed hours represented time that the taxpayer "was available to take telephone calls, rather than the number of hours that he was actually involved in telephone conversations." The court also pointed out that, at trial, the taxpayer was unable to approximate the number of hours that he actually spent on the calls.

The Tax Court cited to the regulation confirming that taxpayers can demonstrate their level of participation in an activity "by any reasonable means," but noted that merely allocating four hours per day, without proving the amount of time actually spent on calls, was unreasonable. The court made two additional findings to strengthen its conclusion. It first questioned the credibility of the taxpayer's testimony, stating that it was "highly unlikely" that he spent four hours daily on business-related calls. It also explained that allowing the taxpayer's allocation method to stand would lead to duplication of hours. Apparently, the activity logs kept by the taxpayer showed that he was engaged in other activities related to his properties during the four-hour period, 6 p.m. to 10 p.m. The court reasoned that crediting time for both the "phone-in office hours" and the actual services would lead to double-counting the same hours. According to the court, it accepted the notion that a taxpayer can do more than one thing at the same time, "but any hour within which multiple tasks were performed should only be counted once."

Taking away the 1,440 hours of "phone-in office hours" left the taxpayer with 1,000 total hours devoted to the rental real estate activity. Thus, while the taxpayer may have met one prong of the "real estate professional" test by working more than 750 hours, it was impossible for him to meet the other prong. He could not demonstrate that he spent more than 50 percent of his time performing services related to the rental properties when he already worked 1,834 hours per year at his full-time job with the ODT. Consequently, the Tax Court upheld the IRS's claim that the losses should be disallowed as "passive."

Conclusion—Let the spin begin!

As a reported decision, *Moss* will be referenced, relied on, and perhaps twisted in future cases. Ours is an adversarial system rooted in strong advocacy on both sides, which means that the IRS may attempt to persuade taxpayers, tax advisors, and possibly even the courts that *Moss* stands for the broad proposition that "on call" time is always excluded when measuring levels of participation. That would be inaccurate, though. *Moss*, in conjunction with

Monroe, teaches the following lessons:

- (1) The passive activity loss rules apply to many unsuspecting taxpayers who had no intention of "tax sheltering," as this concept is widely understood.
- (2) In determining whether a taxpayer meets the special rules applicable to "real estate professionals," only the time the taxpayer actually spends performing services may be counted.
- (3) The fact that a taxpayer is "on call" and thus available to field inquiries from tenants, take actions related to the rental properties, etc. does not, alone, constitute performing services.
- (4) The regulations permit a taxpayer to establish the extent of his or her participation in an activity "by any reasonable means," but simply allocating an arbitrary portion of the total "on call" time to performing services is not reasonable.
- (5) A taxpayer may include "on call" time in the calculations, provided that he or she spent such time actually participating in calls or performing services in response to calls.

In this modern world in which seemingly everyone is "on call," gleaming the true lessons from *Moss* and favorably applying them will be critical for other taxpayers when the IRS challenges their activities in the future.

[1](#)

135 TC No 18 , Tax Ct Rep (CCH) 58336, Tax Ct Rep Dec (RIA) 135.18, 2010 WL 3633505 .

[2](#)

Sections 469(a)(1)(A) and (d)(1).

[3](#)

Section 469(b) .

[4](#)

Section 469(g) .

[5](#)

Section 469(c)(1) .

[6](#)

Section 469(h)(1) .

[7](#)

Temp. Reg. 1.469-5T(a) .

[8](#)

Reg.1.469-5(f)(1).

[9](#)

Temp. Reg. 1.469-5T(f)(3) .

[10](#)

Section 469(c)(2) .

[11](#)

Section 469(c)(7) .

[12](#)

Section 469(c)(7)(B)(i) .

[13](#)

Section 469(c)(7)(B)(ii) .

[14](#)

Section 469(c)(7)(C) .

[15](#)

Temp. Reg. 1.469-5T(d)(1) .
[16](#)

Section 469(c)(7)(A) ; Reg. 1.469-9(g)(1) .
[17](#)

Reg. 1.469-9(g)(1) .
[18](#)

Temp. Reg. 1.469-5T(f)(4) .
[19](#)

IRS Publication 925 (Passive Activity and At-Risk Rules) (2006), pg. 5; See also IRS Passive Activity Loss Audit Technique Guide, Training 3149-115 (02-2005), Catalog Number 83479V, pg. 4-8.
[20](#)

TD 8175 , 2/25/88.
[21](#)

See, e.g., Scheiner, TC Memo 1996-554 , RIA TC Memo ¶96554 , 72 CCH TCM 1532 ; Carlstedt, TC Memo 1997-33 , RIA TC Memo ¶97033 , 73 CCH TCM 1790 .
[22](#)

The Tax Court noted that the 1,900 hours were comprised of regular hours and "call out" hours, not "standby hours."
[23](#)

Section 469(c)(7)(B)(i) .
[24](#)

Section 469(c)(7)(B)(ii) .
[25](#)

If the Tax Court had addressed this issue, it presumably would have ruled in favor of the IRS, given that the taxpayer worked 1,900 per year in his full-time job at the nuclear plant.
[26](#)

The Court allowed the taxpayers to claim a loss of \$9,172 for their rental real estate activities because they met the exception in Section 469(i) by "actively participating" in the activity.
[27](#)

S. Rep't No. 99-313, 99th Cong., 2d Session. 713-714 (1986) (Emphasis added).
[28](#)

Goshorn, TC Memo 1993-578 , RIA TC Memo ¶93578 , 66 CCH TCM 1499 , Trukowsky, TC Summary Opinion 2003-120 ; Touns, TC Memo 1993-359 , RIA TC Memo ¶93359 , 66 CCH TCM 370 .
[29](#)

IRS Passive Activity Loss Audit Technique Guide. Catalog No. 83479V (02-2005), pp.. 4-9.
[30](#)

Section 469(c)(7)(A)(ii) (Emphasis added); Reg. 1.469-1(e)(1) .
[31](#)

Section 469(c)(7)(A) ; Reg. 1.469-9(g) .
[32](#)

Reg. 1.469-9(g)(1) .
[33](#)

[34](#) Section 7463(f)(2) ; Tax Court Rule 170. The Tax Court must concur with the taxpayer's election.

[35](#) Tax Court Rule 174(b).

[36](#) Tax Court Rules 172 and 174(b).

[37](#) Section 7463(b) .

[38](#) Stratmore, TC Memo 1984-547 , PH TCM ¶184547 , 48 CCH TCM 1369 ..

[39](#) Nico, 67 TC 647 (1977).

TC Summary Opinion 2002-79 . This opinion was not cited in *Moss*.