Better Late Than Never: IRS Radically Changes Aggregation Election Procedures in Passive Activity Cases

By Hale E. Sheppard

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Introduction

The tax code is best known for its strict rules, but it also features hundreds of taxpayer-favorable elections. The first step to evaluating and possibly taking advantage of these elections is being aware of their existence. Unfortunately, taxpayers and/or their advisors sometimes overlook an election or fail to follow the related procedures. A classic example is the so-called "aggregation election," under which taxpayers who qualify as real estate professionals can choose to combine all their interests in real estate endeavors for purposes of the passive activity rules in Code Sec. 469. If taxpayers make a timely aggregation election, they often meet the "material participation" test and are thus able to claim their real estate losses in the year that they actually occur. If not, the losses are largely suspended.

Taxpayers who neglect to follow the aggregation-election procedures have historically had two main options: seek a private letter ruling from the IRS granting permission to file a retroactive election or litigate the case on grounds that they made a "deemed election" or "substantially complied" with the election procedures. Both options have significant downsides for taxpayers. Times have changed, though. The IRS recently issued Rev. Proc. 2011-34,[1] which sets forth special procedures allowing certain taxpayers to make an expedited, inexpensive, late aggregation election.

This article examines the passive loss limitation rules, material participation standards, aggregation elections and the pros and cons of various methods for rectifying nonelection situations, including reliance on Rev. Proc. 2011-34.

Hale E. Sheppard, B.S., M.A., J.D., LL.M., LL.M.T., is a Shareholder in the Atlanta office of Chamberlain Hrdlicka specializing in tax audits, tax appeals, tax litigation, tax collection issues and international tax issues. Mr. Sheppard can be reached by phone at (404) 658-5441 or by e-mail at *hale.sheppard@chamberlainlaw.com.*

Overview of the Relevant Law

To grasp the importance of Rev. Proc. 2011-34, one must first understand the pertinent rules. An overview of the key rules is provided below.

Passive Activities

Taxpayers 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 taxpayers from using passive losses to offset income from unrelated, active endeavors. For instance, it precludes taxpayers from utilizing passive losses from

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one activity to counterbalance taxes on the salaries they receive from their full-time jobs.

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 taxpayers dispose of their entire interest in the passive activity in question.[4]

The Importance of Material Participation

The term "passive activity" is defined in the negative; it means any trade or business activity in which a taxpayer does not "materially participate."[5] To meet the "material participation" standard, a taxpayer must demonstrate that he 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 a taxpayer is treated as "materially participating" in an activity only if he meets one of the following seven tests:[7]

- The taxpayer participates in the activity more than 500 hours during the year.
- The taxpayer's participation in the activity during the year constitutes substantially all the participation in such activity by all individuals for such year.
- The taxpayer participates in the activity more than 100 hours during the relevant year, and his participation is not less than that of any other individual for such year.
- 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.
- The taxpayer materially participated in the activity for any five tax years (consecutive or not) during the 10 years immediately preceding the year at issue.
- 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.
- 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.

Special Rules Applicable to Real Estate Professionals

Unfortunately for those in the real estate arena, the default rule is that all rental activities are considered "passive."[8] Certain exceptions to this general rule exist. For example, a "real estate professional" may treat a rental real estate activity as nonpassive, thus taking advantage of the resulting losses the year in which they actually occur.[9] To qualify as a real estate professional, the following two criteria must be satisfied: (1) More than 50 percent of the services performed by the taxpayer during the year are performed in "real property trades or businesses" in which the taxpayer materially participates,[10] and (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.[11]

In this context, the term "real property trade or business" means any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing, or brokerage trade or business.[12] 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."[13]

Substantiating a Taxpayer's Level of Participation

The rules regarding the methods by which a taxpayer can prove to the IRS and/or the courts the number of hours 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

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> during such period, based on appointment books, calendars, or narrative summaries.[14]

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.[15]

In promulgating the passive activity loss regulations, the IRS understood that, except those service-professionals who spend their days 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."[16]

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Aggregation of Real Estate Activities

Despite the flexible substantiation rules described above, the reality is that taxpayers who are simultaneously engaged in multiple activities, such as owning and operating various rental properties, cannot meet the "material participation" standards for each *separate* activity. There are simply not enough hours in the day. This is particularly true in situations where taxpayers have a steady, salaried job, while simultaneously operating a real property business outside traditional office hours. Congress and the IRS took this reality into account upon introducing the so-called "aggregation election," the details of which follow.

Code Sec. 469(c), which allows certain taxpayers to make an aggregation election, was enacted in 1993. The legislative history to this provision acknowledges both the harsh general rule and the taxpayer-favorable exception:

> Whether a taxpayer materially participates in his rental real estate activities is determined as if *each* interest of the taxpayer in rental real estate is a *separate* activity, *unless* the taxpayer *elects* to treat all interests in rental real estate as one activity.[17]

Reflecting the legislative history, Code Sec. 469(c)(7)(A) expressly allows certain taxpayers to "elect to treat *all* interests in rental real estate as one activity."[18] The regulations provide additional guidance on this rule, stating the following:

> 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 [Treas. Reg. § 1.469-9(g)] to treat all interests in rental real estate as a single rental real estate activity.[19]

> 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 [and] 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. 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.[20]

One of the key issues is which taxpayers are entitled to make the beneficial aggregation election. The preceding regulations limit this to "qualifying taxpayers." After an analysis of the applicable regulations and tax provisions, one discovers that "qualifying taxpayers" are those who meet the two-prong test to be considered "real estate professionals."[21] Thus, only those taxpayers who materially participate in real property trades or business for more than 750 hours per year, and who devote more than 50 percent of their working time during a year to such endeavors, will be deemed "qualifying taxpayers" for purposes of making the aggregation election.

Another key issue, of course, is just how a taxpayer makes the election that will allow him to aggregate certain real estate activities, such that he can meet the "material participation" standard and the "real estate professional" test, and ultimately claim all resulting losses as nonpassive. The regulations contain the following instructions:

> 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 [*i.e.*, Form 1040] 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).[22]

Failure to Make an Aggregation Election–Previous Options

The preceding rules concerning how, when, and why to make an aggregation election seem straightforward enough, and they are if a taxpayer and/or his advisor are aware of such rules. However, given the complexity of all things tax, these rules have often been overlooked, causing tremendous financial damage to taxpayers. Until the recent issuance of Rev. Proc. 2011-34[23] by the IRS, a taxpayer had two main options when he discovered the failure to make a proper aggregation election, the use of which was largely determined by when such failure was detected.

Option One: Discovery of Election Problem Before IRS Scrutiny

If the taxpayer learned (with great distress) that he had not made a timely aggregation election by attaching the required statement to his original Form 1040 for the first year that he intended to combine real estate activities, the taxpayer could submit a request for a private letter ruling (LTR) granting him an extension to make the aggregation election. In practical terms, by filing the LTR request, the taxpayer was seeking permission from the IRS to make a retroactive election based on Reg. §301.9100. This is commonly known as seeking "9100 relief."

General Background on LTRs

In formulating the standards for granting 9100 relief, the IRS identified two policies that must be balanced. The first policy is promoting efficient tax administration by allowing limited time periods for taxpayers to choose among alterative tax treatments and encouraging prompt tax reporting. The second policy is "permitting taxpayers that are in reasonable compliance with the tax laws to minimize their tax liability by collecting from them only the amount of tax they would have paid if they had been fully informed and well advised."[24]

The term "regulatory election" means an election whose due date is set by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.[25] The due date for making an aggregation election is established in Reg. §1.469-9(g); therefore, it is a "regulatory election." The regulations indicate that the IRS will grant a request for 9100 relief concerning a regulation election if and when a taxpayer provides sufficient evidence to establish to the satisfaction of the IRS that the following two factors have been met: the taxpayer acted reasonably and in good faith, and the interests of the U.S. government will not be prejudiced by granting the extension.[26] These two factors are examined below.

First Factor–The Taxpayer Acted Reasonably and in Good Faith

With respect to the first factor, the regulations state that a taxpayer generally is deemed to have acted reasonably and in good faith if one of the following is true:

- The taxpayer requests 9100 relief before the IRS discovered the failure to make the election;
- The taxpayer failed to make the election because of intervening events beyond the taxpayer's control;
- The taxpayer failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the need to make the election;
- The taxpayer reasonably relied on the written advice of the IRS; or
- 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.[27]

Notwithstanding the general rules described above, the IRS will conclude that a taxpayer did *not* act reasonably and in good faith if any of the following is true: The taxpayer seeks to alter a return position for which an accuracy-related penalty has been or could be asserted under Code Sec. 6662 at the time the taxpayer requests 9100 relief; the taxpayer was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or the taxpayer uses "hindsight" in requesting relief—that is, specific facts have changed since the due date for making the election that now make the election advantageous to the taxpayer.[28]

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Second Factor—The Government's Interests Will Not Be Prejudiced

With respect to the second element, the regulations contain two standards that the IRS uses in determining whether the interests of the U.S. government would be prejudiced by the granting of an extension request. First, they provide that the interests of the U.S. government are prejudiced if granting the extension request would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made, taking into account the time value of money.[29] Second, the regulations indicate that the interests of the U.S. government are ordinarily prejudiced if the assessment period for the taxable year in which the regulatory election should have been made or the assessment period for any taxable years that would have been affected by the election had it been timely made are closed.[30] The latter factor serves to ensure that what's good for the goose is good for the gander. If the IRS is precluded from assessing tax, penalties and interest against a taxpayer because the assessment period for a particular year has already expired, then the taxpayer cannot go back to that year and take unfair advantage.

Success of Taxpayers in Obtaining 9100 Relief

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Taxpayers have experienced some degree of success over the years persuading the IRS to grant them 9100 relief to make a late aggregation election. The two most common grounds on which the IRS has seen fit to grant 9100 relief are, without dispute, the taxpayer's ignorance of the aggregation election requirement after exercising due diligence,[31] and the taxpayer's reasonable reliance on bad advice (or no advice) from a qualified tax professional.[32]

Trying to make a late aggregation election by filing a LTR request soliciting 9100 relief has its downsides. For example, the taxpayer must meet all of the highly-technical and fact-specific standards in the applicable regulations. Moreover, preparing an adequate LTR request based on the reasonable-reliance-on-a-qualified-tax-professional defense requires obtaining an affidavit from the tax professional admitting, under penalties of perjury, that he or she committed an egregious error. Logic dictates that convincing one's tax professional to expose himself or herself to personal and professional liability is no easy task—pointed discussions, threats and severed relationships are commonplace. Finally, the taxpayer will incur significant costs, for the legal fees associated with preparing a proper LTR request, for the "user" fee demanded by the IRS to review and process the LTR request, and for the accounting fees to prepare and file amended tax returns if the IRS ultimately grants 9100 relief. To put the amount of work and corresponding fees in perspective, one need look no further than the recent Revenue Procedure containing instructions for LTR requests; it totals approximately 105 pages in 10-point font.[33]

Option Two: Discovery of Election Problem After IRS Scrutiny

Taxpayers often learn about their failure to make an aggregation election as a result of an IRS examination. Filing a LTR request for 9100 relief might technically be possible at this juncture; however, the more common outcome once it reaches this stage is litigation of the issue. As explained above, taxpayers have achieved a certain level of success obtaining 9100 relief to resolve aggregation-election matters, but they seem to fare worse when this issue is broached at trial.

Taxpayers have raised a number of arguments in court to advance their position that, although they did not attach a statement to their original Form 1040 notifying the IRS of the aggregation election, as required by the applicable regulations, they still made an acceptable election. Perhaps the most common argument focuses on Schedule E (Supplemental Income or Loss from Rental Real Estate, Royalties, Partnerships, S Corporations, Estates, Trusts, REMICs, etc.) to Form 1040. There are several variations on this theme, but the thrust of the argument is invariably the following: The taxpayer filed a Schedule E with his Form 1040 to report his rental real estate matters; all items related to rental real estate were aggregated in Part I (Income or Loss from Rental Real Estate or Royalties) of Schedule E; the net loss from all rental real estate activities was reported on Line 43 of Schedule E, which is the proper place for "Reconciliations for Real Estate Professionals"; and the net loss was also reported on Line 17 of the first page of Form 1040. As a consequence of this explicit tax reporting, argue the taxpayers, a proper aggregation election was made. The courts have repeatedly rejected this position, ruling that "[a] taxpayer who aggregated real estate rental activities on his tax returns but who failed to meet the literal requirements of electing combination treatment has been held not to have given clear notice of intent to elect under Sec. 469(c)(7)"[34] and that "consistent treatment of aggregating the rental

income and expenses on [a taxpayer's] Schedule E is not a deemed election to treat the rental real estate activities as a single activity under the requirements of Section 469(c)(7)(A)."[35]

Based on the similar facts and lines of reasoning, taxpayers have also argued to the courts that they have "substantially complied" with the aggregation-election procedures, such that they are entitled to combine the real estate activities under the "substantial compliance" doctrine. This argument has frequently met with failure, too.[36]

Finally, those taxpayers with less support for their position on their Forms 1040 and the Schedules thereto have argued to the courts that presenting an aggregation-election statement either to a revenue agent during an audit or to an IRS attorney before trial constitutes a valid election. The courts have rapidly dispensed with these arguments, noting that the applicable regulations mandate that the aggregation-election statement be attached to the original Form 1040 for the first year in question.[37]

The preceding case law summary underscores the two main shortcomings associated with disputing aggregation-election issues at the trial level, namely, the high cost of litigation and the low likelihood of success.

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Recent Change of Heart by the IRS–Issuance of Rev. Proc. 2011-34

As explained above, the options for taxpayers who neglected to file a timely aggregation election have historically had two principal options, and neither was too appealing. The IRS recently introduced, without much fanfare, a third option for taxpayers. This new option is found in Rev. Proc. 2011-34, which announces "special procedures" for administrative relief for real estate aggregation elections.[38]

To be eligible to make a late aggregation election under Rev. Proc. 2011-34, a taxpayer must file a statement with the IRS representing that *all* four of the following criteria are met:

- The taxpayer failed to make an aggregation election "solely because the taxpayer failed to timely meet the requirements in § 1.469-9(g)."
- The taxpayer filed consistently with having made an aggregation election on any tax return that would have been affected thereby.
- The taxpayer "timely" filed each return that would have been affected by the aggregation election if it had been timely made. Proc. 2011-34 indicates that there is "timely," and then there is "timely." For purposes of establishing eligibility for Rev. Proc. 2011-34, a taxpayer will be treated as having "timely" filed a required tax or information if such return was filed within six months after its due date, excluding extensions.
- The taxpayer has "reasonable cause" for the failure to file a timely aggregation election.[39]

Even if a taxpayer qualifies for expedited administrative relief under Rev. Proc. 2011-34, the inevitable procedural requirements must be met. These requirements, which lack a certain degree of clarity in Rev. Proc. 2011-34, appear to be as follows:

- The taxpayer must attach a statement to a Form 1040X for the most recent tax year.
- The statement must contain the declaration required by Reg. §1.469-9(g)(3) (*i.e.*, that the taxpayer is a "qualifying taxpayer"), must explain the reason(s) for the taxpayer's failure to file a timely aggregation election, must include a representation that the taxpayer meets the four eligibility requirements described in Rev. Proc. 2011-34, must identify the tax year for which the taxpayer seeks to make the late election, must indicate at the top that the statement is being "Filed Pursuant to Rev. Proc. 2011-34," and must contain an executed declaration by the taxpayer stating that the information is true, correct, and complete to the best of his knowledge.
- The taxpayer must file the Form 1040X and statement with the IRS Service Center where the taxpayer will file his current Form 1040.[40]

Rev. Proc. 2011-34 indicates that the IRS will notify the taxpayer upon receipt of a late-aggregation-election application that satisfies the procedural requirements.[41] It goes on to state that any taxpayer who actually receives relief under Rev. Proc. 2011-34 will be treated by the IRS as having made a timely aggregation election as of the year for which the election was requested.[42]

Latent Issues Related to Rev. Proc. 2011-34

At first glance, Rev. Proc. 2011-34 seems destined to trigger praise from taxpayers, as well as from tax professionals who neglected to notify their clients of the need to file an aggregation election pursuant to Code Sec. 469(c)(7)(A) and the underlying regulations. However, a deeper analysis reveals five interesting issues.

First, few people likely realize that the "special procedures" announced in Rev. Proc. 2011-34 have been advocated by tax professionals for over 15 years and rejected by the IRS for just as long. The preamble to the regulations from 1995 about the aggregation election evidences this:

> Some comments [to the proposed regulations] requested that the regulations permit qualifying taxpayers to make or revoke the aggregation election on an *amended* income tax return. After careful consideration of the issue, the final regulations adopt the rule in the proposed regulations that aggregation elections must be made or revoked on an *original* return.[43]

Why the sudden change of heart by the IRS? The answer could simply be a matter of numbers: The IRS may lack the resources to handle the audits, LTR requests and tax litigation related to late aggregation elections. According to Rev. Proc. 2011-34, "[t]he estimated *annual* number of respondents for the taxable years in which this revenue procedure applies is 2,000."[44] That constitutes a significant number of taxpayers each year that blew the regular election and seek refuge in Rev. Proc. 2011-34.

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Second, Rev. Proc. 2011-34 expressly states that the issuance of an acknowledgement letter by the IRS and the granting of an extension by the IRS to the taxpayer to file a late aggregation election "do *not* constitute an express or implied determination" concerning whether the taxpayer satisfies the four eligibility requirements of Rev. Proc. 2011-23, whether the taxpayer meets the requirements under Code Sec. 469(c)(7)(B) (*i.e.*, whether the taxpayer is a "real estate professional") or whether the taxpayer "materially participated" in any activity."[45] Taxpayers relying on positive news from the IRS under Rev. Proc. 2011-34, therefore, should be cautious. Indeed, acknowledgement and/or approval from the IRS under the "special procedures" do not preclude the IRS from initiating an audit and challenging the character of losses under the Code Sec. 469 standards.

Third, the eligibility requirements of Rev. Proc. 2011-34 are unclear in many respects. For instance, the extension application must contain a representation that the taxpayer failed to make an aggregation election "*solely because* the taxpayer failed to timely meet the requirements in § 1.469-9(g)."[46] This presumably means that the taxpayer met the other requirements of the applicable regulation, namely, that the taxpayer is a "qualifying taxpayer" or "real estate professional." No clarity on this issue exists, though. Rev. Proc. 2011-34 also demands that the taxpayer filed tax returns for all years that would have been affected by an aggregation election in a manner consistent with making having made a timely election.[47] The specifics of "consistent treatment" are not detailed in Rev. Proc. 2011-34, but one might interpret this as a sign that the IRS is now embracing the "deemed election" or "substantial compliance" theories that it traditionally fought in the Tax Court. As mentioned earlier in this article, taxpayers who failed to attach an election statement to their original Forms 1040 have frequently raised the following argument at trial: (1) we filed a Schedule E with our Forms 1040 to report rental real estate matters; (2) all items related to rental real estate were aggregated in Part I (Income or Loss from Rental Real Estate or Royalties) of Schedule E; (3) the net gain or loss from all rental real estate activities was reported on Line 43 of Schedule E, which shows "Reconciliations for Real Estate Professionals;" (4) the net gain or loss was also reported on Line 17 of the first page of Form 1040; and (5) Based on the preceding facts, the IRS and courts should conclude that we made a timely aggregation election. If the IRS has truly reversed its longstanding position about the "deemed election" defense, Rev. Proc. 2011-34 would have been improved by spelling this out. Finally, the eligibility requirements are unclear in terms of acceptable justifications for taxpayer noncompliance. Rev. Proc. 2011-34 states that the taxpayer must represent that he had "reasonable cause" for failing to file a timely aggregation election.[48] Incorporating this standard is bound to be a catalyst for disputes: Does the IRS mean "reasonable cause" as broadly defined in the context of accuracy-related penalties under Code

Sec. 6662 and delinquency penalties under Code Sec. 6651, or does it mean the narrower definition of reasonableness found in the regulations for 9100 relief, or does it mean some type of specialized reasonableness, such as the unique standards under Code Sec. 6721 and Code Sec. 6724 related to information returns?

Fourth, Rev. Proc. 2011-34 explains that taxpayers only need to submit a statement containing representations that they satisfy the four eligibility requirements, not the actual supporting documentation.[49] It states, in particular, that a "taxpayer is eligible for an extension of time to file a § 1.469-9(g) election … if the taxpayer represents on a statement that satisfies the procedural requirements [of Rev. Proc. 2011-34] and under penalties of perjury that its meets all of the [eligibility] requirements."[50] Applying a literal interpretation of such language, taxpayers would *not* be required to submit paperwork proving that they satisfied the conditions to be considered "real estate professionals," filed Forms 1040 completed as if they had made an aggregation election, submitted Forms 1040 to the IRS in a timely manner and/or had reasonable cause for not making a proper aggregation election earlier.

Fifth, Rev. Proc. 2011-34 clarifies that the new "special procedures" do not supersede existing options, noting the following:

> 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 election … [but] a taxpayer that is not eligible for relief under this revenue procedure may still request relief by applying a private letter ruling.[51]

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Under either administrative methodology—filing an application under Rev. Proc. 2011-34 or seeking a LTR request—the taxpayer would necessarily need to be a "qualifying taxpayer" and demonstrate "reasonable cause" for failing to make a timely aggregation election. Therefore, deductive reasoning leads to the conclusion that the old option (*i.e.*, seeking a LTR request for 9100 relief) remains the only path for taxpayers who failed to file Forms 1040 in a manner consistent with having made an aggregation election and/or who filed delinquent Forms 1040. Moreover, the old option may still be preferable to those taxpayers who desire the heightened authority associated with a LTR ruling.

Conclusion

Certain facts are beyond dispute: many taxpayers will continue holding interests in various real estate undertakings; a percentage of such taxpayers will remain oblivious to the aggregation election rules and procedures in the tax code and regulations; the traditional methods for curing a blown election, seeking a LTR or taking the matter to court, each have serious shortcomings for taxpayers; and the IRS will likely persist in auditing and challenging passive activity matters. Rev. Proc. 2011-34 has a great deal of appeal in light of this reality. However, before potentially compounding a problem by blindly relying on Rev. Proc. 2011-34, taxpayers should first consult with knowledgeable advisors to determine whether they are eligible for the "special procedures" and, if so, whether following them is the best path to tax redemption.

Endnotes

1 Rev. Proc. 2011-34, IRB 2011-24, 875.
2 Code Sec. 469(a)(1)(A); Code Sec. 469(d)(1).
3 Code Sec. 469(b).
4 Code Sec. 469(g).
5 Code Sec. 469(c)(1).
6 Code Sec. 469(h)(1).
7 Reg. §1.469-5T(a).
8 Code Sec. 469(c)(2).
9 Code Sec. 469(c)(7).
10 Code Sec. 469(c)(7)(B)(i).
11 Code Sec. 469(c)(7)(B)(ii).
12 Code Sec. 469(c)(7)(C).
13 Reg. §1.469-5T(d)(1).
14 Reg. §1.469-5T(f)(4).
15 IRS Publication 925 (Passive Activity and At-Risk Rules) (2006), at 5; *See also* IRS Passive Activity Loss Audit Technique Guide, Training 3149-115 (02-2005), Catalog Number 83479V, at 4-8.
16 T.D. 8175, 1988-1 CB 191, 53 FR 5697 (Feb. 25, 1988).
17 H.R. Rep. 103-11, 103rd Cong., 1st Sess. (May 25, 1993) at pg. 614 (emphasis added).
18 Code Sec. 469(c)(7)(A) (Flush language).
19 Reg. §1.469-9(e)(1).
20 Reg. §1.469-9(g)(1).
21 Reg. §1.469-9(b)(6), which references Reg. §1.469-9(c), which, in turn, references Code Sec. 469(c)(7)(B). The concept of "real estate professional" is not limited to individuals; however, for purposes of simplicity and clarity in this article, it is assumed that the professional is an individual.
22 Reg. §1.469-9(g)(3).
23 Rev. Proc. 2011-34, IRB 2011-24, 875.
24 T.D. 8742, 1998-1 CB 388, 62 Fed. Reg. 68168.
25 Reg. §301.9100-1(b).
26 Reg. §301.9100-3(a).
27 Reg. §301.9100-3(b)(1).
28 Reg. §301.9100-3(b)(3).
29 Reg. §301.9100-3(c)(1)(i).
30 Reg. §301.9100-3(c)(1)(ii).
31 *See, e.g.*, LTR 199924012, 200009040, 200009040, 200234049, 200243025, 200206016, 200303052, 200332004, 200404036, 200406001, 200550014, 200727006, 200728016, 200851001, 200901009, 200931038, 200938001, 200938004, 200942004, 200946011, 200947017, 201013016, 201014038, 201026002, 201027018, 201027028, 201029004, 201031008, 201031009, 201033015, 201050022, 201050023,

ENDNOTES

201117011, 201108027, 201125002, 201126016, 201126026, and 201128009.

[32] *See, e.g.*, LTR 200916009, 200409016, 200534003, 200606016, 200606017, 200942006, 200722006, 200834020, 200816005, 200548020, 200826010, 200724028, and 200534003.

[33] *See* Rev. Proc. 2010-1, IRB 2010-1, 1.

[34] *Jahina*, T. C. Summ. Op. 2002-150, fn. 4. *See also*, *Ajah*, TC Summ. Op. 2010-90 and *A. Shiekh*, TC Memo 2010-126, Dec. 58,239(M), 99 TCM 1526..

[35] *May*, TC Summ. Op. 2005-146.

[36] *See, e.g., M. Kosonen*, TC Memo. 2000-107, Dec. 53,821(M) , 79 TCM 1765.

[37] *Jahina*, T. C. Summ. Op. 2002-150; *D.W. Trask*, TC Memo 2010-78, Dec. 58,186(M), 99 TCM 1335.

[38] *Supra* note 1, Section 3.01.

[39] *Id.*, Section 4.01.

[40] *Supra* note 1, Section 4.02.

[41] *Id.*, Section 4.03.

[42] *Id.*

[43] T.D. 8645, 1996-1 CB 73, 60 Fed. Reg. 66499 (December 21, 1995) (emphasis added).

[44] *Supra* note 1, Section 7 (emphasis added).

[45] *Id.*, Section 5.

[46] *Supra* note 39.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*, Sections 3.02 and 3.03.

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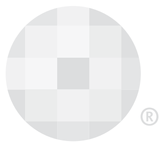
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