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New Late Election for Aggregating RE Interests

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The IRS has issued new rules that will allow certain real estate professionals to make late elections to treat all interests in rental real estate as a single real estate activity for purposes of the passive activity loss ("PAL") rules.

The PAL rules prohibit the use of losses and credits from passive activities to offset income from nonpassive activities. Generally, rental activities are automatically considered to be passive activities regardless of the amount of the taxpayer's participation in the activity. However, rental activities can be exempt from automatic passive treatment if such activities are carried out by a "qualifying real estate professional." A taxpayer generally is a "qualifying real estate professional" if during the tax year, (1) more than half of the personal services he or she performs are in real property trades or businesses in which he or she materially participates, and (2) he or she performs more than 750 hours of services in real property trades or businesses in which he or she materially participates.

If a taxpayer is a qualifying real estate professional, the PAL rules generally are applied as if each interest of the taxpayer in real estate were a separate activity. But, a qualifying taxpayer may make an election to treat all interest in rental real estate as one activity. This election is made by filing a statement with the taxpayer's original income tax return for the year. The statement must contain a declaration that the taxpayer is a qualifying taxpayer for the tax year and that he or she is making the election under Code Â§ 469(c)(7)(A).

Previously, relief from a late election could only be made through a private letter ruling request. Under new Revenue Procedure 2011-34, effective June 13, 2011, certain qualifying taxpayers who fail to make a timely election may make a late election on an amended return. In addition to following other requirements set forth in the Revenue Procedure, the taxpayer must have filed all required federal income tax returns consistent with the requested aggregation for all of the years including, and following, the year the taxpayer intends the requested aggregation to be effective.

Contact your tax advisor if you have questions about the applicability of the new late election procedures for you or your clients.

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