Passive Losses

Tax Implications

Course Description

This course addresses the practical aspects of §469 and the needed skill to handle pragmatic issues. Fundamentals are reviewed, planning opportunities identified, creative strategies discussed and evaluated along with remaining traditional approaches. The goal of this instructive program is to understand and solve problems under §469, with emphasis on tax savings ideas. Readers will overview the proper administration of this complex and often cumbersome provision.

Completion Deadline & Exam: This course, including the examination, must be completed within one year of the date of purchase. In addition, unless otherwise indicated, no correct or incorrect feedback for any exam question will be provided.

Course Level: Overview. This program is appropriate for professionals at all organizational levels.
CPE Credits: 11 (CPA, EA)
Field of Study: Taxes
Prerequisite: General understanding of federal income taxation.
Advanced Preparation: None

Course Learning Objectives

Chapter 1: Overview

1. Recognize the broad impact of the §469 limitation provision by:
    - **a.** Recalling the differences between prior law loss treatment and the former and current treatment of losses;
    - **b.** Citing the prior tax shelter problem and Congress's motives and rationales in passing §469;
    - **c.** Specifying economic decision-making changes caused by the limitation;
    - **d.** Identifying income and loss into categories; and
    - **e.** Recognizing the concept of investor participation as central in determining the allowance of a passive loss.

2. Specify the mechanics of the passive loss rules, recognize the impact of §469 to appropriate deductions, identify what type of income may be offset by passive losses and then, determine a passive loss.

3. Identify passive losses under §469 by:

   a. Citing the "bucket" analogy of §469 to:

      (i) specify the categories of a client's annual income and the §469 limitation's impact, and

      (ii) determine "passive items" and "material participation" under §469;

   b. Locating portfolio income based on items deemed nonpassive under the Code; and

   c. Identifying circumstances that allow for special treatment of income and loss.

4. Recognize the suspension of disallowed losses, identify ways to ultimately "free up" passive losses, specify the treatment of passive credits including potential basis adjustment, and determine a fully taxable disposition indicating the impact of related party transactions.

5. Identify the impact and tax consequences of a fully taxable disposition (FTD) by:

   a. Determining an entire interest disposition, particularly for a partnership or grantor trust;

   b. Specifying the allowance of suspended losses upon installment sale, exchange, gift or death;

   c. Selecting the order of recognized tax attributes upon an FTD; and

   d. Recognizing ways to escape the application of the FTD and other passive loss rules particularly for closely held corporations and personal service corporations that change their operations and nature.

6. Identify which clients are or are not subject to the passive loss rules by:

   a. Specifying types of corporations to which §469 applies and citing the elements of their Code definitions;

   b. Recognizing the general rental activity rule exception and eligibility requirements

   c. Determining "pre-enactment interest," "qualified interest" and "pre-enactment activity" identifying their §469 "phase in" treatment; and

   d. Citing §469's effective date and recognizing the IRS's application authority under 469(l).

Chapter 2: Material Participation

1. Identify how to avoid the application of the passive loss rules through material participation, and factors under the TRA '86 that were considered in determining whether the taxpayer's involvement in the operation of the activity is regular, continuous, and substantial.

2. Specify tests provided by the initial February 19, 1988 regulations on material participation and how these tests provide useful §469 categories, determine participation and how to keep appropriate records of participation in an activity, identify exceptions to the definition of what counts toward material participation, specify the husband and wife rule associated with the passive loss rules, determine annual material participation.
3. Recognize special applications of the material participation rule by:
    - **a.** Citing the general rule for limited partnership interests and listing four exceptions;
    - **b.** Recalling its current application to trusts, estates and certain corporations including members of an affiliated group and the rules for such entities; and
    - **c.** Determining the application of the material participation rule to retired or disabled farmers under the regulations.

Chapter 3: Activity Definition

1. Recognize the history and rationale of the definition of "activity" by:
    - **a.** Specifying the impact of TRA '86, §183, and the at-risk rules specifying differences between the former complex definition and the final simplified regulations;
    - **b.** Identifying why it is operationally important to separate activities and how activities were originally separated under the Committee Reports; and
    - **c.** Citing Notice 88-94's role in determining separate activities.
2. Identify the importance of the original undertaking rule used to determine an activity by:
    - **a.** Recalling its legislative history including the early concepts of "undertakings," "separate source of income production" and "support operations;"
    - **b.** Specifying the primary undertaking rule, its key variants such as aggregate, integrated and professional service undertakings and exceptions to the primary rule;
    - **c.** Recognizing its provisions for controlled undertakings permitted elective treatments and their effect on participation; and
    - **d.** Identifying miscellaneous entity rules used for determining activities and reasonable and unreasonable methods of organizing operations.
3. Determine the differences between the temporary, the final simplified activity regulations, and their key elements by:
    - **a.** Identifying factors used to determine whether two or more trade or business undertakings could be a single integrated business;
    - **b.** Specifying rental activities, limited partnership activities, and partnership and S corporation activities according to their special rules, and citing conditions that permit a taxpayer to later regroup activities.

c. Recognizing the tax consequences of inappropriate activity grouping and conditions permitting part of an activity to be a separate activity.

4. Recognize the importance of the passive activity audit guide as a tool to avoid audit by:

   a. Specifying potential audit issues that the passive activity audit guide addresses whether or not a Form 8582 has been filed;

   b. Determining why investment interest deductions on Form 8582 and Schedule A are an indicator for an audit issue and the guide's focus on the material participation standard;

   c. Identifying indicators of significant participation activities, misstatements of active management and net lease arrangements;

   d. Determining when vacation rentals do not qualify for the $25,000 offset and the material participation test must be met; and

   e. Specifying self-charged expenses, rental and nonrental activity grouping, and divorce transaction that can trigger audits.

Chapter 4: Passive and Non-Passive Activities

1. Determine the differences between passive activities and nonpassive activities under §469 by:

   a. Recognizing a "trade or business activity" and the effect of participation on that characterization;

   b. Specifying a "rental activity" identifying conditions for a rental activity to exist and the resulting passive presumption; and

   c. Identifying exceptions to the general rule that rental activities are presumed passive.

2. Recognize the uncertain initial characterization of an activity and its potential recharacterization by:

   a. Citing exceptions to passive activity status and their tax effect;

   b. Determining a working interest in oil and gas based on financial risk and the special exemption to qualifying working interests;

   c. Specifying forms of entities in which a taxpayer can hold an interest that is not deemed to properly limit the taxpayer's liability when determining whether the activity is passive or nonpassive;

   d. Identifying differences between limited liability and loss protection allowing the working interest passive treatment;

   e. Specifying special oil and gas rules that can be applied when the taxpayer has disqualified deductions and the well produces a net loss and the rationale behind such rules; and

   f. Recognizing the requirement of separate accounting for portfolio income of a passive activity from other items related to such activity and citing the basis for this rule.

Chapter 5: Passive Activity Loss

1. Recognize the tax treatment of a passive loss including its identification, netting and suspension by:
   a. Determining a "passive activity loss" and its tax treatment;
   b. Identifying the appropriate passive loss tax treatment of spouses and working interests in oil or gas;
   c. Citing the special passive loss rule for closely held corporations; and
   d. Determining an affiliated group's passive activity loss using specified items of each group member.
2. Specify reasons why disallowed passive activity losses must be allocated among all the taxpayer's activities producing a loss during the tax year, determine how to allocate disallowed passive activity losses and how it may be applied to multiple activities, identify the ratable portion of a loss and the ratable portion of a passive activity deduction under §469, and recognize significant participation activities and how to determine loss, if any.

Chapter 6: Passive Activity Gross Income

1. Identify passive activity gross income by:
   a. Determining "passive activity gross income" under §469;
   b. Specifying income from the disposition of property used in a passive activity including mixed or alternating use property;
   c. Recognizing the general treatment of rental activity income and gain from the disposition of appreciated property formerly used in a nonpassive activity; and
   d. Citing conditions that must be met to offset up to $25,000 per year of losses and credits related to a passive activity against nonpassive income.
2. Recognize the income characterization impact of a taxpayer's relationship to an activity by:
   a. Specifying the differences between active participation and material participation and the effect of changing participation;
   b. Identifying the $25,000 allowance, the aggregation of credits and deductions, allocation order and generation of a potential net operating loss;
   c. Selecting the differences between the activity treatment of a real estate dealer and a lessor of property particularly under a net lease; and
   d. Determining the tax result of a positive §481 adjustment for an activity.
3. Identify specialty items and unique rules that complicate the calculation of gross passive income by:

a. Recognizing the dangers of self-charged interest and what measures can be taken to avoid this item's passive nature identifying proposed regulations for dealing with such interest;

b. Citing the types of portfolio income that are not included in passive activity gross income;

c. Determining a "publicly traded partnership" for taxation purposes and how net income from such entities is portfolio income;

d. Recognizing safe harbors to be addressed in future regulations, and

e. Specifying types of income that are deemed compensation for personal services and their effect on portfolio income.

4. Determine tax attributes and subsequent events that can cause a recalculation of gross passive income by:

   a. Identifying a loss from an oil and gas interest that is initially treated as nonpassive and income from a property whose basis is determined by reference to such property.

   b. Citing additional miscellaneous exclusions from passive activity gross income;

   c. Specifying types of income that are considered gross income derived in the ordinary course of a trade or business and their effect on portfolio income; and

   d. Recognizing types of recharacterization rules, what type of conversion each prevents, and identifying whether certain transactions will be recharacterized based on the tests provided by the regulations.

Chapter 7: Passive Activity Deduction

1. Determine a "passive activity deduction," how it is processed under §469, and aggregate qualified residence interest using §469(j)(7), specify passive activity deductions with other deduction limitations and identify effects the coordination rule has on the determination of passive activity deductions.

2. Recognize how to account for losses on disposition according to Reg. §1.469-2T(d)(5), and cite instances that require such a loss to be allocated, determine a negative §481 adjustment, and specify exceptions to the passive activity deduction.

Chapter 8: Passive Activity Credits

1. Determine "passive activity credits" and the regular tax liability allocable to passive activities, cite the $25,000 allowance according to the regulations, identify a closely held corporation's passive activity credit net active income for the tax year and under §469, and determine how passive activity limitations apply to credits and how to allocate disallowed credits.

2. Specify circumstances where separate identification of credits is required and the order of credit limitations, cite the special rule for partners and S corporation shareholders, determine how

passive activity credits match with other limitations, and identify the tax treatment of carryover passive activity credits.

Chapter 9: Items Received from Pass-Through Entities

1. Identify items received from pass-through entities as passive or non-passive according to the passive loss rules, determine a taxpayer's participation and the application of §469 to payments to partners as outsiders and as partners, specify the tax consequences of cash payments in liquidation of a partner's interest, and identify categories of cash payments in such a liquidation.
2. Recognize items and events that uniquely adjust or allocate passive losses for pass-through entities and their owners by:
   - **a.** Determining gain or loss from a sale or exchange of a partnership interest according to regulations and the applicable valuation date for such purposes;
   - **b.** Identifying the ratable portion of any gain or loss allocable to such an entity conducted activity computing net gain or net loss and any §743(b) basis adjustment;
   - **c.** Specifying the treatment of portfolio assets owned by pass-through entities allocating gain or loss according to regulation; and
   - **d.** Determining the allocation of gain or loss from a disposition of an interest in a subsidiary entity and the special restriction on conversion of nonpassive income.

Chapter 10: Interaction with Other Code Sections

1. Recognize the application and ordering interaction of §469 with other Code sections by:
   - **a.** Specifying §469's restricted application to deductions from passive activities;
   - **b.** Identifying whether or when net passive losses from an activity:
     - **(i)** are deductible against other sources of income,
     - **(ii)** reduce a taxpayer's at-risk amount, and
     - **(iii)** impact attributable interest deductions;
   - **c.** Determining how passive activity income or deduction relate to §1211;
   - **d.** Recognizing the impact of the husband and wife rules of §§469, 704(d), 465 and 1366(d), and
   - **e.** Identifying corporate tax provisions requiring coordination with §469.