Part III - Administrative, Procedural, and Miscellaneous

Section 199A Trade or Business Safe Harbor: Rental Real Estate

Notice 2019-07

SECTION 1. PURPOSE

This notice contains a proposed revenue procedure that provides for a safe harbor under which a rental real estate enterprise will be treated as a trade or business solely for purposes of section 199A of the Internal Revenue Code (Code) and §§ 1.199A-1 through 1.199A-6 of the Income Tax Regulations (Regulations) (26 CFR Part 1), which are being published contemporaneously with this notice. To qualify for treatment as a trade or business under this safe harbor, the rental real estate enterprise must satisfy the requirements of the proposed revenue procedure. If an enterprise fails to satisfy these requirements, the rental real estate enterprise may still be treated as a trade or business for purposes of section 199A if the enterprise otherwise meets the definition of trade or business in § 1.199A-1(b)(14).

SECTION 2. BACKGROUND

Section 199A was enacted on December 22, 2017, as part of the act titled “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018,” Pub. L. 115-97, and was amended on March 23, 2018, retroactively to January 1, 2018, by the Consolidated Appropriations Act, 2018, Pub. L.

No. 115-141. Congress enacted section 199A to provide a deduction to non-corporate taxpayers of up to 20 percent of the taxpayer's qualified business income from each of the taxpayer's qualified trades or businesses, including those operated through a partnership, S corporation, or sole proprietorship, as well as a deduction of up to 20 percent of aggregate qualified real estate investment trust (REIT) dividends and qualified publicly traded partnership income.

Section 199A(d) defines a qualified trade or business as any trade or business other than a specified service trade or business (SSTB) or the trade or business of performing services as an employee. Section 1.199A-1(b)(14) defines trade or business, in relevant part, as a trade or business under section 162 other than the trade or business of performing services as an employee.

The Treasury Department and the IRS are aware that whether a rental real estate enterprise is a trade or business is the subject of uncertainty for some taxpayers. To help mitigate this uncertainty, the proposed revenue procedure set forth in section 6 of this notice provides for a safe harbor under which a rental real estate enterprise will be treated as a trade or business solely for purposes of the section 199A deduction.

SECTION 3. REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments on the proposed revenue procedure set forth in section 6 of this notice. Interested parties are invited to submit comments on this notice by **[INSERT DATE 60 DAYS AFTER PUBLICATION OF REG-107892-18 AND REG-134652-18 IN FEDERAL REGISTER]**. Taxpayers may

submit comments electronically via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and NOT-133582-18). Alternatively, taxpayers may submit comments to: CC:PA:LPD:PR (Notice 2019-07), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C., 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2019-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224.

SECTION 4. EFFECTIVE DATE AND IMMEDIATE RELIANCE

The proposed revenue procedure is proposed to apply generally to taxpayers with taxable years ending after December 31, 2017.

Until such time that the proposed revenue procedure is published in final form, taxpayers may use the safe harbor described in the proposed revenue procedure for purposes of determining when a rental real estate enterprise may be treated as a trade or business solely for purposes of section 199A.

SECTION 5. DRAFTING INFORMATION

The principal authors of this notice are Robert D. Alinsky, Vishal R. Amin, Margaret Burow, and Frank J. Fisher of the Office of the Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, contact Robert D. Alinsky or Margaret Burow at (202) 317-5279 or Vishal R. Amin or Frank J. Fisher at (202) 317-6850 (not a toll-free call).

SECTION 6. FORM OF PROPOSED REVENUE PROCEDURE

Set forth below is the form of the proposed revenue procedure that is proposed in this Notice:

FORM OF PROPOSED REVENUE PROCEDURE

26 CFR 1.199A-1: Trade or Business

(Also: §199A)

Rev. Proc. 2019-XX

SECTION 1. PURPOSE

Section 3 of this revenue procedure provides a safe harbor under which a rental real estate enterprise will be treated as a trade or business for purposes of section 199A of the Internal Revenue Code (Code) and §§ 1.199A-1 through 1.199A-6 of the Income Tax Regulations (26 CFR Part I). The safe harbor provided by this revenue procedure applies solely for purposes of section 199A. If an enterprise fails to satisfy the requirements of this safe harbor, the rental real estate enterprise may still be treated as a trade or business for purposes of section 199A if the enterprise otherwise meets the definition of trade or business in § 1.199A-1(b)(14).

SECTION 2. BACKGROUND

Section 199A was enacted on December 22, 2017, as part of the act entitled "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," Pub. L. 115-97, and was amended on March 23, 2018, retroactively to January 1, 2018, by the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141. Congress enacted section 199A to provide a deduction to non-corporate taxpayers of up to 20 percent of the taxpayer's qualified business income from each of the taxpayer's qualified trades or businesses, including those operated through a partnership, S corporation, or sole proprietorship, as well as a deduction of up to 20 percent of aggregate real estate investment trust (REIT) dividends and qualified publicly traded partnership income.

Section 199A(d) defines a qualified trade or business as any trade or business other than a specified service trade or business (SSTB) or a trade or business of performing services as an employee. Section 1.199A-1(b)(14) defines trade or business, in relevant part, as a trade or business under section 162 other than the trade or business of performing services as an employee. Sections 1.199A-5(b) and 1.199A-5(d) define an SSTB and the trade or business of performing services as an employee, respectively.

The Treasury Department and the IRS are aware that whether a rental real estate enterprise is a trade or business for purposes of section 199A is the subject of uncertainty for some taxpayers. To help mitigate this uncertainty, this proposed

revenue procedure provides a safe harbor for treating a rental real estate enterprise as a trade or business solely for purposes of the section 199A deduction.

SECTION 3. RULES OF APPLICATION

.01 *In general*. This safe harbor is available to taxpayers who seek to claim the deduction under section 199A with respect to a rental real estate enterprise. If the safe harbor requirements are met, the real estate enterprise will be treated as a trade or business as defined in section 199A(d) for purposes of applying the regulations under section 199A. Relevant passthrough entities (RPEs) as defined in § 1.199A-1(b)(10) may also use this safe harbor in order to determine whether a rental real estate enterprise is a trade or business as defined in section 199A(d). Failure to satisfy the requirements of this safe harbor does not preclude a taxpayer from otherwise establishing that a rental real estate enterprise is a trade or business for purposes of section 199A.

.02 *Rental real estate enterprise*. Solely for purposes of this safe harbor, a rental real estate enterprise is defined as an interest in real property held for the production of rents and may consist of an interest in multiple properties. The individual or RPE relying on this revenue procedure must hold the interest directly or through an entity disregarded as an entity separate from its owner under § 301.7701-3. Taxpayers must either treat each property held for the production of rents as a separate enterprise or treat all similar properties held for the production of rents (with the exception of those described in paragraph .05 of this section) as a single enterprise. Commercial and

residential real estate may not be part of the same enterprise. Taxpayers may not vary this treatment from year-to-year unless there has been a significant change in facts and circumstances.

.03 *Safe harbor*. Solely for the purposes of section 199A, a rental real estate enterprise will be treated as a trade or business if the following requirements are satisfied during the taxable year with respect to the rental real estate enterprise:

(A) Separate books and records are maintained to reflect income and expenses for each rental real estate enterprise;

(B) For taxable years beginning prior to January 1, 2023, 250 or more hours of rental services are performed (as described in this revenue procedure) per year with respect to the rental enterprise. For taxable years beginning after December 31, 2022, in any three of the five consecutive taxable years that end with the taxable year (or in each year for an enterprise held for less than five years), 250 or more hours of rental services are performed (as described in this revenue procedure) per year with respect to the rental real estate enterprise; and

(C) The taxpayer maintains contemporaneous records, including time reports, logs, or similar documents, regarding the following: (i) hours of all services performed; (ii) description of all services performed; (iii) dates on which such services were performed; and (iv) who performed the services. Such

records are to be made available for inspection at the request of the IRS. The contemporaneous records requirement will not apply to taxable years beginning prior to January 1, 2019.

.04 *Rental services*. Rental services for purpose of this revenue procedure include: (i) advertising to rent or lease the real estate; (ii) negotiating and executing leases; (iii) verifying information contained in prospective tenant applications; (iv) collection of rent; (v) daily operation, maintenance, and repair of the property; (vi) management of the real estate; (vii) purchase of materials; and (viii) supervision of employees and independent contractors. Rental services may be performed by owners or by employees, agents, and/or independent contractors of the owners. The term rental services does not include financial or investment management activities, such as arranging financing; procuring property; studying and reviewing financial statements or reports on operations; planning, managing, or constructing long-term capital improvements; or hours spent traveling to and from the real estate.

.05 *Certain rental real estate arrangements excluded*. Real estate used by the taxpayer (including an owner or beneficiary of an RPE relying on this safe harbor) as a residence for any part of the year under section 280A is not eligible for this safe harbor. Real estate rented or leased under a triple net lease is also not eligible for this safe harbor. For purposes of this revenue procedure, a triple net lease includes a lease agreement that requires the tenant or lessee to pay taxes, fees, and insurance, and to be responsible for maintenance activities for a property in addition to rent and utilities.

This includes a lease agreement that requires the tenant or lessee to pay a portion of the taxes, fees, and insurance, and to be responsible for maintenance activities allocable to the portion of the property rented by the tenant.

.06 *Procedural requirements for application of safe harbor*. A taxpayer or RPE must include a statement attached to the return on which it claims the section 199A deduction or passes through section 199A information that the requirements in Section 3.03 of this revenue procedure have been satisfied. The statement must be signed by the taxpayer, or an authorized representative of an eligible taxpayer or RPE, which states: "Under penalties of perjury, I (we) declare that I (we) have examined the statement, and, to the best of my (our) knowledge and belief, the statement contains all the relevant facts relating to the revenue procedure, and such facts are true, correct, and complete." The individual or individuals who sign must have personal knowledge of the facts and circumstances related to the statement.

SECTION 4. EFFECTIVE DATE

This revenue procedure applies to taxable years ending after December 31, 2017. Until such time that the proposed revenue procedure is published in final form, taxpayers may use the safe harbor described in this proposed revenue procedure for determining when a rental real estate enterprise may be treated as a trade or business solely for purposes of section 199A.

SECTION 5. DRAFTING INFORMATION

The principal authors of this revenue procedure are Robert D. Alinsky, Vishal R.

Amin, Margaret Burow, and Frank J. Fisher of the Office of the Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this revenue procedure contact Robert D. Alinsky or Margaret Burow at (202) 317-5279 or Vishal R. Amin or Frank J. Fisher at (202) 317-6850 (not a toll free call).