



April 03, 2019

Mr. Jason Kristall
Senior Technician Reviewer
IRS Office of Chief Counsel
Income Tax & Accounting, Branch 2
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Recommendation for the 2018 Instructions for Form 461 – Limitation on Business Losses

Dear Mr. Kristall:

The American Institute of CPAs (AICPA) appreciates the opportunity to submit the following recommendation on the 2018 Instructions for Form 461, Limitation on Business Losses, dealing with application of the new loss limitation of section 461(l).¹ We acknowledge the efforts of the Internal Revenue Service (IRS) in issuing the 2018 Form 461² and instructions.³ However, we recommend an update to the definition of a “trade or business” on page 1 of the 2018 Form 461 instructions as follows:

Current Language:

*“An activity qualifies as a trade or business if your primary purpose for engaging in the activity is for income or profit and **you are involved in the activity** with continuity and regularity.”*

Recommended Language:

*“An activity qualifies as a trade or business if your primary purpose for engaging in the activity is for income or profit and **the activity is conducted** with continuity and regularity.”*

The language in the instructions should specify that the “activity” is conducted with regularity and continuity. The taxpayer’s “involvement” in the regularity and continuity is not one of the tests for a trade or business. The taxpayer may have a passive role as an investor in a partnership, but he/she is still “in” a trade or business if the business itself is conducted with

¹All section references in this letter are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder, unless otherwise specified.

² See 2018 Form 461: <https://www.irs.gov/pub/irs-prior/f461--2018.pdf>.

³ See 2018 Form 461 Instructions: <https://www.irs.gov/pub/irs-prior/i461--2018.pdf>.

regularity and continuity. Likewise, a sole proprietor may not have involvement in her sole proprietorship in the quantitative sense of hours, but nonetheless the business is conducted with regularity and continuity (through agents hired by the sole proprietor).

* * * * *

The AICPA is the world's largest member association representing the CPA profession, with more than 431,000 members in 137 countries and territories, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. Please contact Donald Zidik, Chair, AICPA Individual & Self-Employed Tax Technical Resource Panel, at (781) 801-1468 or donaldz@waldronrand.com; Amy Wang, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9264 or amy.wang@aicpa-cima.com; or me at (408) 924-3508 or annette.nellen@sjsu.edu.

Sincerely,



Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee

cc: Ms. Adrienne M. Mikolashek, Branch Chief, Office of Associate Chief Counsel
(Passthroughs & Special Industries), Internal Revenue Service