

Part III - Administrative, Procedural, and Miscellaneous

Request for Comments Concerning the Application of Section 761

Notice 2004-53

SECTION 1. PURPOSE

This notice requests comments from the public regarding the application of § 1.761-2(a)(2) of the Income Tax Regulations.

SECTION 2. BACKGROUND

Section 761(a) of the Internal Revenue Code provides that, under regulations, the Secretary may, at the election of all of the members of an unincorporated organization, exclude such organization from the application of all or part of subchapter K of chapter 1, subtitle A of the Code, if the income of the members of the organization may be adequately determined without the computation of partnership taxable income and the organization is availed of (1) for investment purposes only and not for the active conduct of a business, (2) for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted, or (3) by dealers in securities for a short period for the purpose of underwriting, selling, or distributing a particular issue of securities.

Section 1.761-2(a)(2) provides that, where the participants in the joint purchase, retention, sale, or exchange of investment property: (i) own the property as coowners, (ii) reserve the right separately to take or dispose of their shares of any property acquired or retained, and (iii) do not actively conduct business or irrevocably authorize some person or persons acting in a representative capacity to purchase, sell, or exchange such investment property, although each separate participant may delegate authority to purchase, sell, or exchange the participant's share of any such investment property for the time being for the participant's account, but not for a period of more than one year, then the group may be excluded from the application of the provisions of subchapter K under the rules set forth in § 1.761-2(b).

SECTION 3. REQUEST FOR PUBLIC COMMENT

The Internal Revenue Service and the Treasury Department request comments regarding the application of the conditions set forth in § 1.761-2(a)(2) and whether those conditions should be revised, modified, or clarified. Among other things, comments are requested on the circumstances under which participants in the joint purchase, retention, sale, or exchange of investment property should be treated as owning the property as coowners for purposes of electing out of subchapter K under section 761.

Comments are also requested on the facts that should be considered in determining whether participants in the joint purchase, retention, sale, or exchange of investment property have reserved the right separately to take or dispose of their underlying shares in the property. For example, comments are requested as to whether an agreement with a third party, such as a lender, that limits the rights of the coowners to take or dispose of their underlying shares in the investment property would prohibit the group from electing to be excluded from the provisions of all or part of subchapter K.

In addition, comments are requested on the meaning of investment property for purposes of § 1.761-2(a)(2). For example, comments are requested on whether rental real estate is (or can be) properly treated as investment property for these purposes. Taxpayers may submit comments in writing to:

Internal Revenue Service
Attn: CC:PSI:RU (Notice 2004-53)
P.O. Box 7604
Room 5226
Ben Franklin Station
Washington, DC 20044

Or have them hand delivered between the hours of 8:00 a.m. and 5:00 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PSI:RU (Notice 2004-53, Room 5226)
1111 Constitution Ave., NW
Washington, DC 20224

Alternatively, taxpayers may submit comments electronically to the following address: Notice.Comments@irsounsel.treas.gov. Please include Notice 2004-53 in the subject line. Comments should be received by November 15, 2004. All comments submitted will be available for public inspection and copying.

The principal author of this notice is Christopher L. Trump of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Christopher L. Trump at (202) 622-3080 (not a toll-free call).