***Moss v. Commissioner, 135 T. C. 365 (2010)***

In Moss v. Commissioner, the U. S. Tax Court ruled that James Moss did not qualify as a real estate professional under Section 469 of the Internal Revenue Code, as he failed to meet the required 750 hours of service in real property trades or businesses. The court clarified that 'on call' time does not count towards this requirement unless actual services are performed. Consequently, Moss's rental property losses were subject to passive activity loss limitations, allowing only a $9,172 deduction out of $40,490 claimed. The court also upheld an accuracy-related penalty for a substantial understatement of income tax.

**Parties**

James F. and Lynn M. Moss (Petitioners) v. Commissioner of Internal Revenue (Respondent)

**Facts**

James Moss worked full-time at a nuclear power plant, Hope Creek, as a nuclear technician-planning, with a regular 40-hour workweek, occasionally working additional hours on call or standby. In addition to his primary job, Moss owned and managed rental properties in New Jersey and Delaware. These properties generated a reported loss of $40,490 on the Mosses' 2007 tax return. Moss maintained a calendar of his activities related to the rental properties but did not record the time spent on these activities until after the tax year, providing a summary estimating 645. 5 hours spent on rental activities. The Mosses contended that Moss should be considered 'on call' for the rental properties during all non-work hours, which they argued should count towards meeting the 750-hour service requirement for real estate professionals under Section 469(c)(7)(B)(ii) of the Internal Revenue Code.

**Procedural History**

The Commissioner of Internal Revenue disallowed $31,318 of the $40,490 loss claimed by the Mosses, allowing a deduction of $9,172. The Mosses petitioned the U. S. Tax Court for a redetermination of their tax liability for the 2007 tax year. The court reviewed the case de novo, applying the preponderance of the evidence standard.

**Issue(s)**

Whether James Moss's 'on call' time for his rental properties can be counted towards the 750-hour service performance requirement to qualify as a real estate professional under Section 469(c)(7)(B)(ii) of the Internal Revenue Code?

Whether the Mosses are subject to the accuracy-related penalty for a substantial understatement of income tax under Section 6662 of the Internal Revenue Code?

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## Rule(s) of Law

Under Section 469(c)(7)(B)(ii) of the Internal Revenue Code, a taxpayer qualifies as a real estate professional if they perform more than 750 hours of services during the taxable year in real property trades or businesses in which they materially participate. Section 1. 469-9(b)(4) of the Income Tax Regulations defines 'personal services' as work performed by an individual in connection with a trade or business. Section 6662 of the Internal Revenue Code imposes an accuracy-related penalty for substantial understatements of income tax, defined as an understatement exceeding the greater of 10% of the tax required to be shown on the return or $5,000.

## Holding

The court held that James Moss's 'on call' time does not count towards the 750-hour service performance requirement under Section 469(c)(7)(B)(ii) because he did not actually perform services during those times. Therefore, Moss did not qualify as a real estate professional, and the rental activities were treated as passive under Section 469(c)(2). The court also held that the Mosses were liable for the accuracy-related penalty under Section 6662(a) due to a substantial understatement of income tax, as they failed to show reasonable cause or good faith in claiming the rental property losses.

## Reasoning

The court reasoned that the statutory language of Section 469(c)(7)(B)(ii) requires the performance of services, not merely the availability to perform them. The court distinguished between Moss's 'on call' time at the nuclear power plant, where he was required to be available for emergency work, and his 'on call' time for the rental properties, where no actual services were performed. The court found that Moss's summary of hours worked on the rental properties did not meet the 750-hour threshold and rejected the Mosses' argument that 'on call' time should be included. Regarding the accuracy-related penalty, the court determined that the Mosses' understatement exceeded $5,000, meeting the threshold for a substantial understatement under Section 6662(d)(1)(A). The court also found that the Mosses did not have a reasonable basis for their tax treatment of the rental property losses and did not rely in good faith on their accountant's advice, as they did not provide the accountant with the necessary information to determine Moss's real estate professional status.

## Disposition

The court entered a decision for the Commissioner of Internal Revenue, upholding the disallowance of $31,318 of the rental property losses and the imposition of the accuracy-related penalty.

## Significance/Impact

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Moss v. Commissioner clarifies the requirement under Section 469(c)(7)(B)(ii) that only actual services performed, not mere availability, count towards the 750-hour threshold for qualifying as a real estate professional. This decision impacts taxpayers seeking to offset passive activity losses with active participation in rental real estate activities. It also serves as a reminder of the importance of maintaining contemporaneous records of time spent on rental activities to substantiate claims of real estate professional status. The case further reinforces the application of accuracy-related penalties for substantial understatements of income tax, emphasizing the need for taxpayers to demonstrate reasonable cause and good faith in their tax positions.

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