Material Participation by Trusts, *Frank Aragona Trust v. Commissioner,* 142 T.C. No. 9 (March 27, 2014)

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Trust With Individual Trustees Can Qualify for "Real Estate Professional Exception;" Activities of Trustees As Employees of Wholly Owned LLC Managing Real Estate Are Considered in Determining If Trust Materially Participates in Real Estate Rental Business

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BESSEMER TRUST

TABLE OF CONTENTS

Brief Synopsis

The Frank Aragona Trust qualified for the "real estate professional exception" under §469(c)(7), and the trust materially participated in real estate rental business. *Frank Aragona Trust v. Commissioner*, 142 T.C. No. 9 (March 27, 2014) (Judge Morrison).

The trust qualified for the real estate professional exception so that rental losses were not disallowed as passive activities for purposes of the passive activity loss rules of §469. The IRS raised and the court addressed two major issues. First, the court rejected the IRS's contention that a trust can never qualify for the real estate professional exception even though the regulations refer to personal services "performed by an individual." The court concluded that if the trustees are individuals, their work can be considered "work performed by an individual" and that a trust is capable of performing personal services and therefore can satisfy the §469(c)(7) exception.

Second, the court ruled that the trust materially participated in the real estate business, which is one of the requirements to satisfy the §469(c)(7) real estate professional exception. Three of the six co-trustees were full time employees of a trust-wholly owned LLC that managed the rental properties. The court concluded that the activities of the trustees, including their activities as employees of the LLC, are considered in determining material participation. The court reasoned that their activities as employees counted because (1) Michigan statutory law requires trustees to administer the trust solely in the interests of the beneficiaries, and (2) a Michigan case makes clear that trustees are not relieved of their duties of loyalty by conducting activities thorough a separate entity controlled by the trust. Also, the court rejected the IRS argument that two of the co-trustees owned minority interests in some of the entities that conducted the rental operations and that some of their activities were attributable to their personal portions of the businesses. The court gave several reasons, including that their interests as individual owners were generally compatible with the trust's goals for the jointly held enterprises to succeed.

Basic Facts

The Frank Aragona Trust owned real estate rental properties and also owned interests in wholly owned entities and owned majority interests in other entities that conducted rental real estate activities. The trust was the sole owner of an LLC that managed the real estate properties (it was treated as a disregarded entity for income tax purposes). (The trust also owned majority and minority interests in entities that conducted real estate holding and development activities. Those entities that held and developed real estate were not involved in the issues in this case.)

The trust benefited the grantor's five children, who shared equally in the trust income.

The grantor was the initial trustee. Following his death, there were six co-trustees-- his five children and one independent person. One of the children served as the "executive trustee" and "the trustees formally delegated their powers to the executive trustee (in order to facilitate daily business operations)," but "the trustees acted as a management board for the trust and made all major decisions regarding the trust's property."

Three of the children were full time employees of an LLC that operated the properties.

The LLC employed "several people" in addition to the three children, "including a controller, leasing agents, maintenance workers, accounts payable clerks, and accounts receivable clerks."

The five children were paid $72,000 per year as a trustee fee. Those with limited involvement in the business were paid the same trustee fee as those who were full time employees of the LLC. The independent trustee (an attorney) was paid $14,400 per year.

The trust claimed losses from the rental operations in 2005 and 2006, which contributed to net operating losses that the trust carried back to its 2003 and 2004 years. The issue is whether those rental losses are deductible by the trust or whether they should be treated as passive activity losses that are not currently deductible.

Holdings

1. *Real Estate Professional Exception.* A trust can qualify for the "real estate professional" exception under §469(c)(7) so that rental losses are not disallowed as passive activities for purposes of the passive activity loss rules of §469. If the trustees are individuals, their work can be considered "work performed by an individual" (as required by a regulation), so a trust is capable of performing personal services and therefore can satisfy the §469(c)(7) exception.
2. *Material Participation by Trust.* The trust materially participated in the real estate business, which is one of the requirements to satisfy the §469(c)(7) real estate professional exception. The activities of three of the co-trustees as employees were considered in determining whether the trust materially participated in the business. Activities by two- co-trustees who also owned minority interests in some of the rental entities were not apportioned between the trust and their personal portions of the businesses.

Analysis

1. *Rental Losses Are Passive Unless the Real Estate Professional Exception Applies.* Any rental activity is considered a passive activity, §469(c)(2), unless what has been termed the "real estate professional exception" under §469(c)(7) applies.

   The exception in §469(c)(7) has two tests. First, more than one-half of the "personal services" performed in trades or businesses by the taxpayer during the taxable year are performed in real property businesses in which the taxpayer materially participates. §469(c)(7)(B)(i). Second, the taxpayer must perform more than 750 hours of services during the taxable year in real property trades or businesses in which the taxpayer materially participates. §469(c)(7)(B)(ii). [Observe that both of these tests require material participation by the taxpayer, just to meet the real estate professional exception, aside from the general material participation requirement under §469(c)(1)(B). But presumably the same standards would apply for the general material participation requirement as for the material participation requirement that is part of the real estate professional exception.]
2. *Trusts Can Satisfy the Real Estate Professional Exception.* The IRS argued that a trust can never meet the real estate professional exception. [This is consistent with the IRS's position in CCA 201244017.] The regulations describe "personal services" as that term is used in the first of the two tests for the real estate professional exception as meaning "any work performed by *an individual* in connection with a trade or business." Reg. §1.469-9(b)(4). The IRS argues, based on its regulations, that a trust is not an individual so cannot possibly meet the requirements of the real estate professional exception. The court rejects

this argument. While comments in the House Report and Conference Committee Report for §469(c)(7) state that the provision applies to "individuals and closely held C corporations," the Reports do not say that the exception applies *only* to individuals and closely held C corporations. Congress could have excluded trusts if had meant to do so; other exceptions in the passive loss rules apply only to "any natural person," but the §469(c)(7) exception does not have that limitation.

The court reasons that if the trustees are individuals, they can meet this regulatory requirement:

> If the trustees are individuals, and they work on a trade or business as part of their trustee duties, their work can be considered "work performed by an individual in connection with a trade or business." Sec. 1.469-9(b)(4), Income Tax Regs. We conclude that a trust is capable of performing personal services and therefore can satisfy the section 469(c)(7) exception.

3. *Little Authority Regarding Material Participation by Trust.* Section 469(h) states that material participation requires "regular, continuous, and substantial" involvement in the operations of the business. Regulations address how individuals or corporations meet the material participation requirement, but there is no statute or regulation addressing how a trust materially participates. There is one line in the legislative history about trust material participation. S. Rept. No 99-313, at 735 (1986), 1986-3 C.B. 1, 735 states that a trust "is treated as materially participating in an activity … if an executor or fiduciary, in his capacity as such, is so participating."

4. *Activities of Non-Trustee Employees.* One case has addressed material participation by a trust. It held that the activities of non-trustee employees can be considered in determining whether a trust materially participated in a ranching activity. *Mattie K. Carter Trust v. United States,* 256 F. Supp.2d 536 (N.D. Tex. 2003).

   The *Aragona Trust* court specifically noted that it was not faced with deciding whether the activities of non-trustee agents or employees should be disregarded. (Footnote 15).

5. *Activities of Trustees as Employees Are Counted*. The IRS argued that the activities of the three co-trustees as full-time employees of the LLC should not be considered because (1) they performed their activities as employees, and (2) it is impossible to disaggregate the activities they performed as employees and as trustees. [This is consistent with the IRS's reasoning in TAM 201317010.]

   The court concluded that the activities of the trustees, including their activities as employees, should be considered in determining whether the trust materially participated in real estate operations. The court reasoned that state law requires trustees to look out solely for the interests of trust beneficiaries, and that trustees are not relieved of their duties of loyalty by conducting activities through an entity wholly owned by the trust.

   > The trustees were required by Michigan statutory law to administer the trust solely in the interests of the trust beneficiaries, because trustees have a duty to act as a prudent person would in dealing with the properly of another, i.e., a beneficiary. Mich. Comp. Laws sec. 700.7302 (2001) (before amendment by 2009 Mich. Pub. Acts No. 46); see also In re Estate of Butterfield, 341 N.W.2d 453, 459 (Mich. 1983) (construing Mich. Comp. Laws sec. 700.813 (1979), a statute in effect from 1979 to 2000 that was a similarly-worded predecessor to Mich. Comp. Laws sec. 700.7302).

Trustees are not relieved of their duties of loyalty to beneficiaries by conducting activities through a corporation wholly owned by the trust. Cf. In re Estate of Butterfield, 341 N.W.2d at 457 ("Trustees who also happen to be directors of the corporation which is owned or controlled by the trust cannot insulate themselves from probate scrutiny [i.e., duties imposed on trustees by Michigan courts] under the guise of calling themselves corporate directors who are exercising their business judgment concerning matters of corporate policy.") Therefore their activities as employees of Holiday Enterprises, LLC, should be considered in determining whether the trust materially participated in its real-estate operations.

6. *Activities of Trustees Who Also Co-Own Interests in the Business Are Counted.* The IRS argued that some trustees owned minority interests in some of the real estate activities and some of their activities were attributable to their personal portions of the businesses. The court rejected this argument, giving four reasons for considering the activities of the co-trustees who co-owned minority interests in the same business entities. (1) Their combined interests were not a majority interest. (2) Their combined interest was never more than the trust's interest in the entities. (3) Their interests as owners were compatible with the trust's goals for the success of the joint enterprise. (4) They were involved in managing day-to-day operations of the businesses.

7. *Multiple Fiduciaries.* If there are multiple fiduciaries, how many of them must be involved in the business in order for the trust to materially participate? [Technical Advice Memorandum 200733023 provides that merely labeling a person involved in the business as a "special trustee" will not suffice. The determining factor is whether the special trustee had powers that could be exercised solely without the approval of another trustee. If so, material participation of the special trustee would suffice. This raises the concern by extension of whether a majority of the multiple fiduciaries must be involved in the business.] The *Aragona Trust* court did not address how to determine material participation by a trust that has multiple trustees. However, in *Aragona Trust*, three of the six co-trustees (*not* a majority) were full-time employees of the LLC that operated the real estate business. Therefore, *Aragona Trust* suggests that having a majority of co-trustees involved in the business is not required in order for the trust to materially participate.

Observations

1. *Case of Huge Importance; Increasing Significance Because of 3.8% Tax on Net Investment Income.* There has been only one other case (*Carter Trust*, a federal district court case) addressing how a trust materially participates in a business. This is the first case exhibiting how the Tax Court will address the issue—and it is a "regular" Tax Court case, not just a memorandum opinion.

   The issue in *Aragona Trust* was whether the trust could deduct business losses under §469. Whether a trust materially participates in a business is increasingly important because non-passive business income is not subject to the 3.8% tax on net investment income (NII). The issue has far more importance than when the only issue was the ability to deduct losses under §469. Many trusts own interests in businesses that result in hundreds of thousands if not millions of dollars of business income per year. Whether that trust income is subject to the additional 3.8% tax can be quite significant. Furthermore, Richard Dees (Chicago) points out that the regulations under §1411 take the position that the characterization of trust income as NII is made at the trust level, and distributing income to a beneficiary who is actively involved in a business does not convert the income from being NII at the trust level to being non-NII at the beneficiary level. Reg. §1.1411-3(e)(3)(ii). (For grantor trusts, the participation in the business of the grantor deemed-owner of the trust is determinative.)

2. *"Regular" Tax Court Opinion.* This is a "regular" Tax Court opinion, not a memorandum opinion of one judge. Taxpayers faced with similar situations know they can challenge the IRS in the Tax Court, rather than in a district court, and know the Tax Court's position.

3. *Possibility of IRS Guidance Project.* There is little guidance regarding how a trust or estate "materially participates" in a trade or business, under either the §469 or §1411 regulations. The §1411 final regulations declined to provide any guidance regarding this issue, despite the fact that it is now of much greater importance than for just the passive activity loss rules. The Preamble to the final regulations points out that "the issue of material participation of estates and trusts is currently under study by the Treasury Department and the IRS and may be addressed in a separate guidance project issued under section 469 at a later date." The IRS requested comments, including "recommendations on the scope of any such guidance and on specific approaches to the issue."

   While *Aragona Trust* provides very important viewpoints of the Tax Court, various issues remain for which the IRS could provide helpful guidance (for example, whether material participation by a decedent would be "tacked" to the estate or perhaps to a testamentary trust for some period of time).

4. *Overview of IRS Growing Attacks on Trust Material Participation.* Regulations addressing passive activity rules for trusts and estates have never been written. The IRS position is that the trustee must be involved directly in the operations of the business on a "regular, continuous, and substantial" basis. The IRS points to the legislative history of §469, which states very simply:

   > Special rules apply in the case of taxable entities that are subject to the passive loss rule. An estate or trust is treated as materially participating in an activity if an executor or fiduciary, in his capacity as such, is so participating. S. Rep. No. 99-313, at 735.

   The IRS lost the only prior reported case that has addressed material participation by trusts. (The *Mattie K. Carter Trust* case is discussed below.) Since then, the IRS has issued several informal ruling positions, generally taking a strict approach toward trust material participation.

   Letter Ruling 200733023 disagreed with the *Carter Trust* decision and said that activities of "Special Trustees" would not be considered in determining the trust's material participation if they did not have the authority to commit the trust to any course of action without approval of the trustees.

   Letter Ruling 201029014 was taxpayer friendly in recognizing that a trust could materially participate in the activities of a multi-tiered subsidiary through the activities of its trustee even though the trustee had no direct authority to act with respect to the business in its capacity as trustee (because of the remote relationship of the trust to the subsidiary).

   Technical Advice Memorandum 201317010 takes a very hard-nosed approach, refusing to recognize the activities of a co-trustee who was also the president of a subsidiary of an S corporation in which the trust owned an interest, reasoning in part that the activities were largely in the individual's capacity as employee and not as trustee. The *Aragona Trust* case in particular seems to undermine the IRS's strict approach in that TAM.

This prior case and these prior rulings are discussed in more detail below. Query whether, following its loss in *Aragona Trust,* the IRS will change its harsh attacks on seemingly every effort by a trust to materially participate in a business.

5. *Specific Facts of Aragona Trust Involved Wholly Owned Management Entity.* The court's reasoning in *Aragona Trust* was related to the specific facts of the case. The court reasoned that state law requires trustees to look out solely for the interests of trust beneficiaries, and that trustees are not relieved of their duties of loyalty by conducting activities through an entity wholly owned by the trust (citing *In re Estate of Butterfield*, which refers to trustees who are directors of a corporation controlled by the trust). The court's reasoning is understandable in light of the fact that it specifically addressed the fact scenario presented by the Aragona Trust. The court gave no indication that it would necessarily limit its reasoning to that situation. Indeed, the first rationale (that the trustee must look out solely for the interests of trust beneficiaries) seems to acknowledge that any activities of a trustee must be consistent with the trustee's duties to the beneficiaries.

6. *Can Trustee Ever "Take Off Its Hat" As Trustee?* Some commentators have described this issue in terms of whether a trustee can ever "take off its hat" as a fiduciary. Under this approach, all activities of a trustee should be considered in determining material participation by the trust.

> A review of the existing tax guidance supports considering all of a trustee's actions in a trust-owned business in whatever capacity the trustee acts in determining whether the trust materially participates. The non-tax authorities support this conclusion too: the trustee is unable to completely remove her trustee "hat" when donning a different "hat" in a different capacity in the business. Where a trustee also acts in a potentially managerial role (e.g., for an entity the equity interests of which are trust assets), the trustee's fiduciary duties extend to her managerial activities. A trustee cannot disregard her fiduciary obligations to the beneficiaries when acting in another capacity, for example, as an employee or director, in a business owned by the trust. Because the trust will be a shareholder, the fiduciary duties a trustee owes the beneficiaries will not conflict with the fiduciary duties a director owes the shareholders. If they do, however, the director/trustee will have to recuse herself. Thus, all of the actions undertaken by an individual trustee with respect to any activity owned directly or indirectly by the trust are subject to her fiduciary obligations to the trust beneficiaries and, therefore, relevant to determine whether the trust materially participates under Code sections 469 and 1411. Richard Dees, *20 Questions (and 20 Answers!) On the New 3.8 Percent Tax, Part 1,* TAX NOTES 683, at 688-700 (Aug. 12, 2013) (Question 10) and Richard Dees, *20 Questions (and 20 Answers!) On the New 3.8 Percent Tax, Part 2,* TAX NOTES 785 (Aug. 19, 2013).

In support of his analysis, Mr. Dees cites (and quotes) the Restatement (Third) of Trusts §78, Bogert on Trusts and Trustees §543 (Dec. 2012), and *In re Schulman,* 165 A.D.2d 499, 502 (N.Y. App. Div. 3d Dep't 1991).

7. *Activities of Non-Trustee Agents of Trust Constituted Trust Material Participation, Mattie K. Carter Trust v. U.S.* A 2003 federal district court was the first to address in a reported case what activities can qualify as material participation under the passive loss rules for trusts and estates. *The Mattie K. Carter Trust v. U.S.*, 256 F. Supp.2d 536 (N.D. Tex. 2003). In the *Carter Trust* case, the trust operated active ranch operations, and the trustee hired a ranch manager (who was not a trustee). The IRS maintained that was not material

participation for the trust because the trustee individually did not materially participate. The taxpayer maintained that, analogous to a closely held C corporation (see footnote 3 of the opinion), it could only participate in an activity through its fiduciaries, agents, and employees and that the activities of employees and agents of the trust should be included. The District Court sided with the taxpayer, concluding that material participation should be determined by reference to all persons who conducted the business on the trust's behalf, including employees as well as the trustee. Participation is tested by the activities of the trust itself, which necessarily entails an assessment of the activities of those who labor on the ranch, or otherwise in furtherance of the ranch business, on behalf of the trust. Section 469 states that "a taxpayer" is treated as materially participating in a business if "its" activities in pursuit of that business are regular, continuous, and substantial. I.R.C. § 469(h)(1). The court reasoned that measuring the trust's participation by reference only to the trustee "finds no support within the plain meaning of the statue. Such a contention is arbitrary, subverts common sense, and attempts to create ambiguity where there is none." The court observed that no regulations are on point, but "the absence of regulations and case law does not manufacture statutory ambiguity." The court acknowledged that it had studied the "snippet of legislative history IRS supplied" (including the Senate Finance Committee Report) as well as a footnote in the Joint Committee on Taxation's General Explanation of the Tax Reform Act of 1986, at 242 n.33, but the opinion concludes that "the court only resorts to legislative history were the statutory language is unclear, … which, … is not the case here."

Aragona Trust in footnote 15 said that it was not faced with and did not address whether activities by non-trustee employees are considered in determining a trust's material participation.

8. *Technical Advice Memorandum 200733023; Rejection of Carter Trust Reasoning, Treatment of Special Trustee.* The IRS disagreed with *Carter Trust* in Technical Advice Memorandum 200733023, concluding that notwithstanding the *Carter Trust* decision, the sole means for a trust to establish material participation is by its fiduciaries being involved in the operations, relying primarily on the legislative history that made specific reference to "an executor or fiduciary, in his capacity as such" clause. The ruling also reasoned that because a business will generally involve employees or agents, a contrary approach would result in a trust invariably being treated as materially participating in the trade or business activity, rendering the requirements of §469(h)(1) superfluous.

   TAM 200733023 also addresses the effect of having Special Trustees with responsibility for the business. The ruling concluded under the facts of that situation, the Special Trustees were not fiduciaries for purposes of §469, because they gave recommendations but they were not able to commit the trust to any course of action or control trust property without the Trustees' express consent. The Trustees retained final decision-making authority over all facets of the business. The ruling reasoned that if advisors, consultants, or general employees could be classified as fiduciaries simply by labeling them so, the §469 material participation requirement for trustees would be meaningless. Furthermore, the ruling concluded that even if the Special Trustees were considered fiduciaries, many of their activities would not count in determining the trust's involvement in the business, because time spent negotiating the sale of the trust's interest in the company and resolving a tax dispute with another partner was not time spent managing or operating the business.

9. *PLR 201029014; No Strict Application of "In Such Capacity" Clause in Legislative History.* Private Letter Ruling 201029014 reiterates the general IRS position that a trust materially participates in business activities only if the trustee is involved in the operations of the entity's activities on a regular, continuous, and substantial basis. It did not mention the *Carter Trust* case, but it cited the Senate Report's "in such capacity" language. The issue was whether a trust could materially participate in the business of a subsidiary (Sub 2) of a subsidiary (Sub 1) owned by a partnership in which the trust owned an interest. In light of the trust's remote relationship with Sub 2, a strict application of the "in such capacity" clause in the legislative history would seemingly have prevented the trustee from being able to materially participate, because any actions of the trustee in the business of Sub 2 would have been taken in some capacity other than as trustee. In PLR 201029014, the IRS did not apply this strict approach, but agreed with the taxpayer that the trustee could materially participate in Sub 2 through the trustee's regular, continuous and substantial involvement in the operations of Sub 2.

10. *TAM 201317010; IRS's Most Recent Strict Attack—Activities of Co-Trustee Who Was President of Business Not Counted in Determining Trust's Material Participation*. If a trust owns an interest in an active trade or business operation, a planning consideration will be whether to name some individual who is actively involved in the business as a co-trustee. However, the IRS questioned that strategy in Technical Advice Memorandum 201317010 (released April 26, 2013). The trust in that TAM had owned stock in an S corporation. The trust had a trustee and a "Special Trustee." The trustee "did not participate in the day-to-day operations of the relevant activities" of the company. The individual who was the Special Trustee was also the president of a qualified Subchapter S subsidiary of the S corporation. The trust instrument limited the Special Trustee's authority in selling or voting the S corporation stock. The IRS concluded that the trust did not materially participate in the activities of the company for purposes of the §469 passive loss rules. The ruling highlights two issues: (1) the Special Trustee's authority was limited to voting and selling the S corporation stock; and (2) the Special Trustee's activities as president were not in the role as fiduciary. As to the first issue, the ruling concluded that time spent serving as Special Trustee voting the stock of the company or considering sales of stock would count for purposes of determining the trust's material participation in the business, but the "time spent performing those specific functions does not rise to the level of being 'regular, continuous, and substantial.'" As to the second issue, the ruling stated in its recitation of facts that the individual serving as president and Special Trustee "is unable to differentiate time spent" as president, as Special Trustee, and as a shareholder. The ruling reasoned that under §469 the owner of a business may not look to the activities of the owner's employees to satisfy the material participation requirement, or else an owner would invariably be treated as materially participating because most businesses involve employees or agents. The ruling concluded that the work of the individual serving as Special Trustee and president "was as an employee of Company Y and not in A's role as a fiduciary" of the trust and therefore "does not count for purposes of determining whether [the trust] materially participated in the trade of business activities" of the company.

    TAM 201317010 creates a significant distinction in the treatment of individuals vs. trusts with respect to the "employee" issue. For individual taxpayers, their activities as employees of a business will be considered for purposes of determining their material participation in the business. For trust taxpayers, the IRS position is that the activities of a trustee as an employee of the business cannot be considered to determine the trust's material participation in the business.

Aragona Trust goes a long way toward rejecting the IRS's strict position in TAM 201317010. The IRS's arguments in *Aragona Trust* were very similar to its reasoning in TAM 201317010 for not considering the activities by the LLC employees/trustees in the business operations:

> [The IRS] reasons that the activities of these three trustees should be considered the activities of employees and not fiduciaries because (1) the trustees performed their activities as employees of Holiday Enterprises, LLC, and (2) it is impossible to disaggregate the activities they performed as employees of Holiday Enterprises, LLC, and the activities they performed as trustees.

The court's rejection of the IRS's position direct rejection of this reasoning calls into question the basic tenets of the TAM. Furthermore, the court rejected the same type of reasoning with respect to its refusal to consider separately the activities attributable to the trust portion and the individual portion of the business by the trustees who also owned personal interests in the business.

Query whether the distinction of serving as employee of the wholly owned LLC in *Aragona Trust* vs. serving as employee of the corporation in the TAM is significant?

11. *Comments of ABA Tax Section Recommend Recognizing All Activities of Trustees in Determining Trust Material Participation.* Comments to the proposed regulations under §1411 by the American Bar Association Tax Section submitted on April 5, 2013 recommend that the IRS issue new proposed regulations regarding material participation for a trust or estate for purposes of §1411. The Tax Section Comments propose that such regulations recognize material participation by an estate or trust under any of three tests, one of which is that "[t]he fiduciary participates in the activity on a regular, continuous, and substantial basis, either directly or through employees or contractors whose services are directly related to the conduct of the activity." In addition to recognizing actions through employees or contractors, material participation of a trust could be based on direct participation of the fiduciary, and in that context, the Tax Section Comments reason that

> any time spent working on the activity should be considered towards meeting the material participation requirements regardless of whether the fiduciary is working on the activity as a fiduciary or in another role, for instance as an officer or an individual investor. If there are multiple fiduciaries, time spent by the fiduciaries could be aggregated for purposes of determining material participation.

12. *Multiple Trustees.* There is no guidance regarding what activities of multiple co-trustees are needed to satisfy the material participation requirement. Must all co-trustees materially participate? A majority? Any one co-trustee? *Aragona Trust* does not address this issue expressly, but on the facts of the case, material participation by each of three out of six co-trustees (not a majority) was sufficient. At a minimum this suggests that material participation by a majority of co-trustees is not required.

    Can the activities of the co-trustees be aggregated? For example, if the 500 hour test that applies to individuals is applied to the activities of trustees, would the trust materially participate if the co-trustees in the aggregate devoted 500 hours to the business? This issue was not presented in *Aragona Trust* because each of three co-trustees met the 500 hour test (because they each worked "full time" for the LLC).

13. *Outstanding Resource.* For a detailed discussion of the application of the non-passive trade or business income exception from the §1411 tax to trusts, see Richard Dees, *20 Questions (and 20 Answers!) On the New 3.8 Percent Tax, Part 1,* TAX NOTES 683, at 688-700 (Aug. 12, 2013) and Richard Dees, *20 Questions (and 20 Answers!) On the New 3.8 Percent Tax, Part 2,* TAX NOTES 785 (Aug. 19, 2013). Another excellent resource including planning strategies with respect to the trust material participation issue is Steve Gorin, *Structuring Ownership of Privately-Owned Business: Tax and Estate Planning Implications* (2014) (a 500+ page article addressing a variety of tax and estate planning issues for businesses available from the author at sgorin@thompsoncoburn.com).