

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

MICHAEL V. SHANNON & HOPE W.)	
SHANNON,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 16441-12.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	
)	
)	
)	
)	

ORDER

This case is set for trial at a special session of the Court starting on Wednesday, September 28, 2016, in Birmingham, Alabama. The Shannons moved for partial summary judgment on July 29, 2016 and the Court spoke with the parties on September 20, 2016 to discuss it.

We assume the parties know the background facts of the case and the usual rules about summary judgment. The Shannons--whom no one doubts are real-estate professionals--argue that there can also be no dispute that they made an effective election to aggregate their rental real-estate activity for the tax years 2005, 2008, and 2009.

Two elections are in play here. The first is their election to aggregate these activities on their 2009 tax return. A copy of the election is attached to their motion, but respondent could not find it as an attachment to their original return. Under the regulation, that election must be attached to an original return, *see* 26 C.F.R. § 1.469-9(g)(3) (1995). This is a genuine factual dispute--as the Shannons foresaw in their election under Revenue Procedure 2011-34.

The second election was this election under Revenue Procedure 2011-34. In this election, the Shannons sought to use the procedure that the IRS has created to retroactively treat all of a taxpayer's rental real-estate interests as one activity. The Shannons wanted this election to be effective for all tax years from 2003 forward. Under that revenue procedure, the effectiveness of the election depends among other things on the taxpayers' having filed consistently on any return that would have been affected. In this case that would be all returns from 2003 onward. These returns were not attached to the Shannons' motion so they have not proven that part of the "consistency requirement."

The Court acknowledges a lurking issue here--namely, what does "consistently" mean? Does it mean that a taxpayer in the real-estate business can simply choose to aggregate all his properties even if there are changes in his portfolio from year to year? If so, what happens if his return omits a property (e.g. one that produced no income or deductions during that return year)--does it render the election invalid for *all* properties or simply throw the excluded property back into the passive-activity rules?

This more interesting question is not one that has an obvious answer from the brief time in research the Court has had or in the Shannons' motion papers. Without a clear answer the Court is loath to hold that they have shown entitlement to judgment as a matter of law on this key issue.

It is therefore

ORDERED that petitioners' motion for partial summary judgment is denied.

**(Signed) Mark V. Holmes
Judge**

Dated: Washington, D.C.
September 21, 2016