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Treas. Reg. Section 1.163(j)-9

Elections for excepted trades or businesses; safe harbor for certain REITs

(a)Overview. The limitation in section 163(j) applies to business interest, which is defined under section 163(j)(5) as interest properly allocable to a trade or business. The term trade or business does not include any electing real property trade or business or any electing farming business. See section 163(j)(7). This section provides the rules and procedures for taxpayers to follow in making an election under section 163(j)(7)(B) for a trade or business to be an electing real property trade or business and an election under section 163(j)(7)(C) for a trade or business to be an electing farming business.

(b)Availability of election.

(1)In general. An election under section 163(j)(7)(B) for a real property trade or business to be an electing real property trade or business is available to any trade or business that is described in §1.163(j)-1(b)(14)(i), (ii) or (iii), and an election under section 163(j)(7)(C) for a farming business to be an electing farming business is available to any trade or business that is described in §1.163(j)-1(b)(13)(i), (ii) or (iii).

(2)Special rules.

(i) Exempt small businesses. An election described in paragraph (b)(1) of this section is available regardless of whether the real property trade or business or farming business making the election also meets the requirements of the small business exemption in section 163(j)(3) and §1.163(j)-2(d). See paragraph (c)(2) of this section for the effect of the election relating to depreciation.

(ii) Section 162 trade or business not required for electing real property trade or business. An election described in paragraph (b)(1) of this section to be an electing real property trade or business is available regardless of whether the trade or business with respect to which the election is made is a trade or business under section 162. For example, a taxpayer engaged in activities described in section 469(c)(7)(C) and §1.469-9(b)(2), as required in §1.163(j)-1(b)(14)(i), may make an election for a trade or business to be an electing real property trade or business, regardless of whether its activities rise to the level of a section 162 trade or business.

(c)Scope and effect of election.

(1)In general. An election under this section is made with respect to each eligible trade or business of the taxpayer and applies only to such trade or business for which the election is made. An election under this section applies to the taxable year in which the election is made and to all subsequent taxable years. See paragraph (e) of this section for terminations of elections.

(2)Irrevocability. An election under this section is irrevocable.

(3)Depreciation. Taxpayers making an election under this section are required to use the alternative depreciation system for certain types of property under section 163(j)(11) and cannot claim the additional first-year depreciation deduction under section 168(k) for those types of property.

(d)Time and manner of making election.

(1)In general. Subject to paragraph (f) of this section, a taxpayer makes an election under this section by attaching an election statement to the taxpayer's timely filed original Federal income tax return, including extensions. A taxpayer may make elections for multiple trades or businesses on a single election statement.

(2)Election statement contents. The election statement should be titled "Section 1.163(j)-9 Election" and must contain the following information for each trade or business:

(i) The taxpayer's name;

(ii) The taxpayer's address;

(iii) The taxpayer's social security number (SSN) or employer identification number (EIN);

(iv) A description of the taxpayer's electing trade or business sufficient to demonstrate qualification for an election under this section, including the principal business activity code; and

(v) A statement that the taxpayer is making an election under section 163(j)(7)(B) or (C), as applicable.

(3)Consolidated group's trade or business. For a consolidated group's trade or business, the election under this section is made by the agent for the group, as defined in §1.1502-77, on behalf of itself and members of the consolidated group. Only the name and taxpayer identification number (TIN) of the agent for the group, as defined in §1.1502-77, must be provided on the election statement.

(4)Partnership's trade or business. An election for a partnership must be made on the partnership's return for a trade or business that the partnership conducts. An election by a partnership does not apply to a trade or business conducted by a partner outside the partnership.

(e)Termination of election.

(1)In general. An election under this section automatically terminates if a taxpayer ceases to engage in the electing trade or business. A taxpayer is considered to cease to engage in an electing trade or business if the taxpayer sells or transfers substantially all of the assets of the electing trade or business to an acquirer that is not a related party in a taxable asset transfer. A taxpayer is also considered to cease to engage in an electing trade or business if the taxpayer terminates its existence for Federal income tax purposes or ceases operation of the electing trade or business, except to the extent that such termination or cessation results in the sale or transfer of substantially all of the assets of the electing

trade or business to an acquirer that is a related party, or in a transaction that is not a taxable asset transfer.

(2)Taxable asset transfer defined. For purposes of this paragraph (e), the term taxable asset transfer means a transfer in which the acquirer's basis or adjusted basis in the assets is not determined, directly or indirectly, in whole or in part, by reference to the transferor's basis in the assets.

(3)Related party defined. For purposes of this paragraph (e), the term related party means any person who bears a relationship to the taxpayer which is described in section 267(b) or 707(b)(1).

(4)Anti-abuse rule. If, within 60 months of a sale or transfer of assets described in paragraph (e)(1) of this section, the taxpayer or a related party reacquires substantially all of the assets that were used in the taxpayer's prior electing trade or business, or substantially similar assets, and resumes conducting such prior electing trade or business, the taxpayer's previously terminated election under this section is reinstated and is effective on the date the prior electing trade or business is reacquired.

(f)Additional guidance. The rules and procedures regarding the time and manner of making an election under this section and the election statement contents in paragraph (d) of this section may be modified through other guidance (see §§601.601(d) and 601.602 of this chapter). Additional situations in which an election may terminate under paragraph (e) of this section may be provided through guidance published in the Federal Register or in the Internal Revenue Bulletin (see §601.601(d) of this chapter).

(g)Examples. The examples in this paragraph (g) illustrate the application of this section. Unless otherwise indicated, X and Y are domestic C corporations; D and E are U.S. resident individuals not subject to any foreign income tax; and the exemption for certain small businesses in §1.163(j)-2(d) does not apply.

(1)Example 1: Scope of election.

(i) Facts. For the taxable year ending December 31, 2021, D, a sole proprietor, owned and operated a dairy farm and an orchard as separate farming businesses described in section 263A(e)(4). D filed an original Federal income tax return for the 2021 taxable year on August 1, 2022, and included with the return an election statement meeting the requirements of paragraph (d)(2) of this section. The election statement identified D's dairy farm business as an electing trade or business under this section. On March 1, 2023, D sold some but not all or substantially all of the assets from D's dairy farm business to D's neighbor, E, who is unrelated to D. After the sale, D continued to operate the dairy farm trade or business.

(ii) Analysis. D's election under this section was properly made and is effective for the 2021 taxable year and subsequent years. D's dairy farm business is an excepted trade or business because D made the election with D's timely filed Federal income tax return. D's orchard business is a non-excepted trade or business, because D did not make an election for the orchard business to be an excepted trade or business. The sale of some but not all or substantially all of the assets from D's dairy farm business does not affect D's election under this section.

(2)Example 2: Availability of election.

(i) Facts. E, an individual, operates a dairy business that is a farming business under section 263A and also owns real property that is not part of E's dairy business that E leases to an unrelated party through a triple net lease. E's average gross receipts, excluding inherently personal amounts, for the three years prior to 2021 are approximately \$25 million, but E is unsure of the exact amount.

(ii) Analysis. Under paragraph (b)(2)(i) of this section, E may make an election under this section for the dairy business to be an electing farming business, even though E is unsure whether the small business exemption of §1.163(j)-2(d) applies. Additionally, under paragraph (b)(2)(ii) of this section, assuming the requirements of section 163(j)(7)(C) and this section are otherwise satisfied, E may make an election under this section for its triple net lease property to be an electing real property trade or business, even though E may not be engaged in a trade or business under section 162 with respect to the real property.

(3)Example 3: Cessation of entire trade or business.

(i) Facts. X has a real property trade or business for which X made an election under this section by attaching an election statement to A's 2021 Federal income tax return. On March 1, 2022, X sold all of the assets used in its real property trade or business to Y, an unrelated party, and ceased to engage in the electing trade or business. On June 1, 2027, X started a new real property trade or business that was substantially similar to X's prior electing trade or business.

(ii) Analysis. X's election under this section terminated on March 1, 2022, under paragraph (e)(1) of this section. X may choose whether to make an election under this section for X's new real property trade or business that A started in 2027.

(4)Example 4: Anti-abuse rule.

(i) Facts. The facts are the same as in Example 3 in paragraph (g)(3)(i) of this section, except that X re-started its previous real property trade or business on February 1, 2023, when X reacquired substantially all of the assets that X had sold on March 1, 2022.

(ii) Analysis. X's election under this section terminated on March, 1, 2022, under paragraph (e)(1) of this section. On February 1, 2023, X's election was reinstated under paragraph (e)(4) of this section. X's new real property trade or business is treated as a resumption of X's prior electing trade or business and is therefore treated as an electing real property trade or business.

(5)Example 5: Trade or business continuing after acquisition.

(i) Facts. X has a farming business for which X made an election under this section by attaching an election statement to X's timely filed 2021 Federal income tax return. Y, unrelated to X, also has a farming business, but Y has not made an election under this section. On July 1, 2022, X transferred all of its assets to Y in a transaction described in section 368(a)(1)(D). After the transfer, Y continues to operate the farming trade or business acquired from X.

(ii) Analysis. Under paragraph (e)(1) of this section, Y is subject to X's election under this section for the trade or business that uses X's assets because the sale or transfer was not in a taxable transaction. Y cannot revoke X's election, but X's election has no effect on Y's existing farming business for which Y has not made an election under this section.

(6)Example 6: Trade or business merged after acquisition.

(i) Facts. The facts are the same as in Example 5 in paragraph (g)(5)(i) of this section, except that Y uses the assets acquired from X in a trade or business that is neither a farming business (as defined in section 263A(e)(4) or §1.263A-4(a)(4)) nor a trade or business of a specified agricultural or horticultural cooperative (as defined in section 199A(g)(4)).

(ii) Analysis. Y is not subject to X's election for Y's farming business because the farming trade or business ceased to exist after the acquisition.

(h)Safe harbor for REITs.

(1)In general. If a REIT holds real property, as defined in §1.856-10, interests in one or more partnerships directly or indirectly holding real property (through interests in other partnerships or shares in other REITs), as defined in §1.856-10, or shares in one or more other REITs directly or indirectly holding real property (through interests in partnerships or shares in other REITs), as defined in §1.856-10, the REIT is eligible to make the election described in paragraph (b)(1) of this section to be an electing real property trade or business for purposes of sections 163(j)(7)(B) and 168(g)(1)(F) for all or part of its assets. The portion of the REIT's assets eligible for this election is determined under paragraph (h)(2) or (3) of this section.

(2)REITs that do not significantly invest in real property financing assets. If a REIT makes the election under paragraph (h)(1) of this section and the value of the REIT's real property financing assets, as defined in paragraphs (h)(5) and (6) of this section, at the close of the taxable year is 10 percent or less of the value of the REIT's total assets at the close of the taxable year, as determined under section 856(c)(4)(A), then all of the REIT's assets are treated as assets of an excepted trade or business.

(3)REITs that significantly invest in real property financing assets. If a REIT makes the election under paragraph (h)(1) of this section and the value of the REIT's real property financing assets, as defined in paragraphs (h)(5) and (6) of this section, at the close of the taxable year is more than 10 percent of the value of the REIT's total assets at the close of the taxable year, as determined under section 856(c)(4)(A), then for the allocation of interest expense, interest income, and other items of expense and gross income to excepted and non-excepted trades or businesses, the REIT must apply the rules set forth in §1.163(j)-10 as modified by paragraph (h)(4) of this section.

(4)REIT real property assets, interests in partnerships, and shares in other REITs.

(i) Real property assets. Assets held by a REIT described in paragraph (h)(3) of this section that meet the definition of real property under §1.856-10 are treated as assets of an excepted trade or business.

(ii) Partnership interests. If a REIT described in paragraph (h)(3) of this section holds an interest in a partnership, in applying the partnership look-through rule described in §1.163(j)-10(c)(5)(ii)(A)(2), the REIT treats assets of the partnership that meet the definition of real property under §1.856-10 as assets of an excepted trade or business. This application of the definition of real property under §1.856-10 does not affect the characterization of the partnership's assets at the partnership level or for any non-REIT partner. However, no portion of the adjusted basis of the REIT's interest in the partnership is allocated to a non-excepted trade or business if the partnership makes an election under paragraph (h)(7) of this section and if all of the partnership's assets are treated as assets of an excepted trade or business under paragraph (h)(2) of this section.

(iii) Shares in other REITs.

(A) In general. If a REIT (shareholder REIT) described in paragraph (h)(3) of this section holds an interest in another REIT, then for purposes of applying the allocation rules in §1.163(j)-10, the partnership look-through rule described in §1.163(j)-10(c)(5)(ii)(A)(2), as modified by paragraph (h)(4)(ii) of this section, applies to the assets of the other REIT (as if the other REIT were a partnership) in determining the portion of shareholder REIT's adjusted basis in the shares of the other REIT that is allocable to an excepted or non-excepted trade or business of shareholder REIT. However, no portion of the adjusted basis of shareholder REIT's shares in the other REIT is allocated to a non-excepted trade or business if all of the other REIT's assets are treated as assets of an excepted trade or business under paragraph (h)(2) of this section.

(B) Information necessary. If shareholder REIT does not receive, either directly from the other REIT or indirectly through the analysis of an applicable financial statement (within the meaning of section 451(b)(3)) of the other REIT, the information necessary to determine whether and to what extent the assets of the other REIT are investments in real property financing assets, then shareholder REIT's shares in the other REIT are treated as assets of a non-excepted trade or business under §1.163(j)-10(c).

(iv) Tiered entities. In applying §1.163(j)-10(c)(5)(ii)(E), the rules in paragraphs (h)(4)(ii) and (h)(4)(iii)(A) and (B) of this section apply to any partnerships and other REITs within the tier.

(5) Value of shares in other REITs.

(i) In general. If a REIT (shareholder REIT) holds shares in another REIT, then solely for purposes of applying the value tests under paragraphs (h)(2) and (3) of this section, the value of shareholder REIT's real property financing assets includes the portion of the value of shareholder REIT's shares in the other REIT that is attributable to the other REIT's investments in real property financing assets. However, no portion of the value of shareholder REIT's shares in the other REIT is included in the value of shareholder REIT's real property financing assets if all of the other REIT's assets are treated as assets of an excepted trade or business under paragraph (h)(2) of this section.

(ii) Information necessary. If shareholder REIT does not receive, either directly from the other REIT or indirectly through the analysis of an applicable financial statement (within the meaning of section 451(b)(3)) of the other REIT, the information necessary to determine whether and to what extent the assets of the other REIT are investments in real property financing assets, then shareholder REITs shares in the other REIT are treated as real property financing assets for purposes of paragraphs (h)(2) and (3) of this section.

(iii) Tiered REITs. The rules in paragraphs (h)(5)(i) and (ii) of this section apply successively to the extent that the other REIT, and any other REIT in the tier, holds shares in another REIT.

(6)Real property financing assets. For purposes of this paragraph (h), real property financing assets include interests, including participation interests, in the following: Mortgages, deeds of trust, and installment land contracts; mortgage passthrough certificates guaranteed by Government National Mortgage Association (GNMA), Federal National Mortgage Association (FNMA), Federal Home Loan Mortgage Corporation (FHLMC), or Canada Mortgage and Housing Corporation (CMHC); REMIC regular interests; other interests in investment trusts classified as trusts under §301.7701-4(c) of this chapter that represent undivided beneficial ownership in a pool of obligations principally secured by interests in real property and related assets that would be permitted investments if the investment trust were a REMIC; obligations secured by manufactured housing treated as single family residences under section 25(e)(10), without regard to the treatment of the obligations or the properties under state law; and debt instruments issued by publicly offered REITs.

(7)Application of safe harbor for partnerships controlled by REITs. A partnership is eligible to make the election under paragraph (h)(1) of this section if one or more REITs own directly or indirectly at least 50 percent of the partnership's capital and profits, the partnership meets the requirements of section 856(c)(2), (3), and (4) as if the partnership were a REIT, and the partnership satisfies the requirements described in paragraph (h)(1) of this section as if the partnership were a REIT. The portion of the partnership's assets eligible for this election is determined under paragraph (h)(2) or (3) of this section, treating the partnership as if it were a REIT.

(8)REITs or partnerships controlled by REITs that do not apply the safe harbor. A REIT or a partnership that is eligible but chooses not to apply the safe harbor provisions of paragraph (h)(1) or (7) of this section, respectively, may still elect, under paragraph (b)(1) of this section, for one or more of its trades or businesses to be an electing real property trade or business, provided that such trade or business is otherwise eligible to elect under paragraph (b)(1) of this section. A REIT or partnership that makes the election under paragraph (b)(1) of this section without utilizing the safe harbor provisions of paragraph (h) of this section may not rely on any portion of paragraphs (h)(1) through (7) of this section.

(i)[Reserved]

(j)Special anti-abuse rule for certain real property trades or businesses.

(1) In general. Except as provided in paragraph (j)(2) of this section, a trade or business (lessor) does not constitute a trade or business eligible for an election described in paragraph (b)(1) of this section to be an electing real property trade or business if at least 80 percent, determined by fair market rental value, of the real property used in the business is leased to a trade or business (lessee) under common control with the lessor, regardless of whether the arrangement is pursuant to a written lease or pursuant to a service contract or another agreement that is not denominated as a lease. For purposes of this paragraph (j), fair market rental value is the amount of rent that a prospective lessee that is unrelated to the lessor would be willing to pay for a rental interest in real property, taking into account the geographic location, size, and type of the real property. For purposes of this paragraph (j), two trades or businesses are under common control if 50 percent of the direct and indirect ownership of both businesses are held by related parties within the meaning of sections 267(b) and 707(b).

(2) Exceptions.

(i) De minimis exception. The limitation in paragraph (j)(1) of this section does not apply, and the lessor is eligible to make an election under paragraph (b)(1) of this section, if the lessor leases, regardless of whether the arrangement is pursuant to a written lease or pursuant to a service contract or another agreement that is not denominated as a lease, at least 90 percent of the lessor's real property, determined by fair market rental value, to one or more of the following:

(A) A party not under common control with the lessor or lessee;

(B) A party under common control with the lessor or lessee that has made an election described in paragraph (b)(1) of this section for a trade or business to be an electing real property trade or business or electing farming business, but only to the extent that the real property is used as part of its electing real property trade or business or electing farming business; or

(C) A party under common control with the lessor or lessee that is an excepted regulated utility trade or business, but only to the extent that the real property is used as part of its excepted regulated utility trade or business.

(ii) Look-through exception. If the de minimis exception in paragraph (j)(2)(i) of this section does not apply because less than 90 percent of the lessor's real property is leased to parties described in paragraphs (j)(2)(i)(A), (B), and (C), the lessor is eligible to make the election under paragraph (b)(1) of this section to the extent that the lessor leases the real property to parties described in paragraph (j)(2)(A), (B), or (C), and to the extent that the lessee subleases (or lessees ultimately sublease) the real property to:

(A) A party not under common control with the lessor or lessee;

(B) A party under common control with the lessor or lessee that has made an election described in paragraph (b)(1) of this section for a trade or business to be an electing real property trade or business or electing farming business to the extent that the real property is used as part of its electing real property trade or business or electing farming business; or

(C) A party under common control with the lessor or lessee that is an excepted regulated utility trade or business to the extent that the real property is used as part of its excepted regulated utility trade or business.

(iii) Inapplicability of exceptions to consolidated groups. The exceptions in paragraphs (j)(2)(i) and (ii) of this section do not apply when the lessor and lessee are members of the same consolidated group.

(iv) Exception for certain REITs. The special anti-abuse rule in paragraph (j)(1) of this section does not apply to REITs or to partnerships making an election under paragraph (h)(7) of this section that lease qualified lodging facilities, as defined in section 856(d)(9)(D), and qualified health care properties, as defined in section 856(e)(6)(D).

(3) Allocations. See §1.163(j)-10(c)(3)(iii)(D) for rules related to the allocation of the basis of assets used in lessor trades or businesses described in paragraphs (j)(1) and (j)(2)(i) of this section.

(4) Examples. The examples in this paragraph (j)(4) illustrate the application of paragraphs (j)(1), (2), and (3) of this section. Unless otherwise indicated, the parties are all domestic entities and are not members of a single consolidated group within the meaning of §1.1502-1(h).

(i)

Example (1). Related party lease of hotel.

(A) Facts. X and Y are under common control, as defined in paragraph (j)(1) of this section. X owns one piece of real property, a hotel, that X leases to Y. Y operates the hotel and provides hotel rooms and associated amenities to third party guests of the hotel. The form of the arrangement with third party hotel guests is a license to use rooms in the hotel and associated amenities. Y is a real property trade or business that has made an election under paragraph (b)(1) of this section.

(B) Analysis. Because X leases at least 80 percent of X's real property to a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. However, under the de minimis exception under paragraph (j)(2)(i) of this section, 100 percent of the fair market rental value of the building is leased to a party under common control that has made an election to be an electing real property trade or business. Accordingly, X is eligible to make the election described in paragraph (b)(1) of this section for its entire trade or business.

(ii) Example (2).

(A) Facts. The facts are the same as in Example 1 in paragraph (j)(4)(i)(A) of this section, except that Y has not made an election under paragraph (b)(1) of this section, and is not otherwise using the real property in an excepted trade or business.

(B) Analysis. Because X leases at least 80 percent of X's real property, determined by fair market rental value, to Y, a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. X is not eligible for the de minimis exception under paragraph (j)(2)(i) of this section because X

does not lease at least 90 percent of its real property to a party under common control, as defined in paragraph (j)(1) of this section, such as Y, and Y is not using the property in an otherwise excepted trade or business. However, X is eligible for the look-through exception under paragraph (j)(2)(ii) of this section because X leases 100 percent of its real property to Y, a party that is under common control, and Y subleases 100 percent of the real property to parties that are not under common control with X or Y. The fact that the license provided to hotel guests is not denominated as a lease does not prevent these licenses from being treated as a lease for purposes of paragraph (j) of this section. Accordingly, under the look-through exception under paragraph (j)(2)(ii) of this section, X is eligible to make the election described in paragraph (b)(1) of this section with regard to its entire trade or business.

(iii)Example (3). Sublease to related party and unrelated third party.

(A) Facts. X owns one piece of real property that X leases to Y, a party under common control, as defined in paragraph (j)(1) of this section. Y does not operate an excepted trade or business. Y subleases 80 percent of the real property, determined by the fair market rental value, to a party under common control with Y that does not operate an excepted trade or business and 20 percent of the real property, determined by the fair market rental value, to an unrelated third party.

(B) Analysis. Because X leases at least 80 percent of X's real property, determined by fair market rental value, to a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. X is not eligible for the de minimis exception in paragraph (j)(2)(i) of this section because X is not leasing at least 90 percent of the real property, determined by fair market rental value, to a party under common control that operates an excepted trade or business and/or unrelated parties. Under the look-through exception under paragraph (j)(2)(ii) of this section, X is eligible to make the election described in paragraph (b)(1) of this section with respect to the 20 percent of the fair market rental value of the real property subleased to an unrelated party because X is treated as directly leasing this portion to an unrelated party. X is not eligible to make the election described in paragraph (b)(1) of this section with respect to the 80 percent of the building subleased to a party under common control because X is still treated as directly leasing this portion to a related party. Under §1.163(j)-10(c)(3)(iii)(D), X must allocate 80 percent of the basis in the real property as a nonexcepted trade or business and 20 percent of the basis in the real property as an excepted trade or business.

(iv)Example (4). Multiple subleases.

(A) Facts. X owns a building that X leases to Y, a party under common control as defined in paragraph (j)(1) of this section. Y does not operate an excepted trade or business. Y subleases 80 percent of the building, determined by fair market rental value, to Z, a party under common control with both X and Y. Y subleases the remaining 20 percent of the building, determined by fair market rental value, to unrelated parties. Z subleases 50 percent of its leasehold interest, determined by fair market rental value, to parties unrelated to X, Y and Z, and uses the remaining leasehold interest in its retail business. Z does not operate an excepted trade or business.

(B) Analysis. Because X leases at least 80 percent of X's real property, determined by fair market rental value, to a party under common control, X is subject to the anti-abuse rule in paragraph (j)(1) of this section. X is not eligible for the de minimis exception in paragraph (j)(2)(i) because X is not leasing at least 90 percent of the building, determined by fair market rental value, to a party under common control that operates an excepted trade or business and/or unrelated parties. Under the lookthrough exception under paragraph (j)(2)(ii) of this section, X is eligible to make the election described in paragraph (b)(1) of this section with respect to the 60 percent of the building that is subleased to unrelated parties, determined by adding 40 percent (50 percent of the 80 percent leasehold interest) from Z's sublease to an unrelated party and 20 percent from Y's sublease to unrelated parties (40 + 20). X is not eligible to make the election described in paragraph (b)(1) of this section with respect to the 40 percent of the building subleased to Z, because Z is a related party that does not operate an excepted trade or business.

(v) Example (5). Lessee's Trade or Business.

(A) Facts. X owns a building that X leases to W, a party under common control as defined in paragraph (j)(1) of this section. W operates the building as a widget manufacturing plant and does not sublease any portion of the building.

(B) Analysis. X is not eligible to make the election described in paragraph (b)(1) of this section because X leases the entire building to a party under common control. X is not eligible for the de minimis exception in paragraph (j)(2)(i) of this section because X is not leasing at least 90 percent of the real property to a party under common control that operates an excepted trade or business and/or unrelated parties. W's trade or business cannot be an electing real property trade or business. X is not eligible for the look-through exception under paragraph (j)(2)(ii) of this section because W is not subleasing any part of the building.

(k) Applicability date. This section applies to taxable years beginning on or after November 13, 2020. However, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b)(1), may choose to apply the rules of this section to a taxable year beginning after December 31, 2017, so long as the taxpayers and their related parties consistently apply the rules of the section 163(j) regulations, and, if applicable, §§1.263A-9, 1.263A-15, 1.381(c)(20)-1, 1.382-1, 1.382-2, 1.382-5, 1.382-6, 1.382-7, 1.383-0, 1.383-1, 1.469-9, 1.469-11, 1.704-1, 1.882-5, 1.1362-3, 1.1368-1, 1.1377-1, 1.1502-13, 1.1502-21, 1.1502-36, 1.1502-79, 1.1502-91 through 1.1502-99 (to the extent they effectuate the rules of §§1.382-2, 1.382-5, 1.382-6, and 1.383-1), and 1.1504-4, to that taxable year.