

**Todd F Anderson**

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**From:** Jessica L. Anderson <jessica@deltaattorney.com>  
**Sent:** Tuesday, June 7, 2011 11:28 AM  
**To:** 'Todd Anderson'  
**Subject:** Investment Property/Income Defined

Neldon,

Below are the definitions of Investment Property and Investment Income given by the IRS and which were the intended meaning within the confines of my letter.

**IRS Publication 550 (2010)** (<http://www.irs.gov/publications/p550/ch04.html>)  
**Investment property.** This is property that produces investment income. Examples include stocks, bonds, and Treasury bills and notes. Property used in a trade or business is not investment property.

**IRS Exhibit 7.1: Investment Income And Investment Interest Expense**  
(<http://www.irs.gov/businesses/small/article/0,,id=146845,00.html>)

**LAW:** Under IRC § 163(d) interest on debt on property held for investment is limited to net investment income. Investment income is only income defined in IRC § 469(e)(1), i.e. generally portfolio income. Additionally, it is reduced by investment expenses. It is not business income (other than working interests in oil and gas and traders in stocks and bonds) nor rental income. Furthermore, after 1992 investment income generally does not include long-term capital gains from the sale of investment property unless the taxpayer elects to forego the lower capital gains rate. Also see Reg. § 1.163-8T on interest tracing and Notices 89-35, 88-37 and 88-20 relating to passive activity interest.

**INVESTMENT INCOME:** Investment income includes interest, dividends, royalties, annuities, short-term capital gains, and long-term capital gains (if election on line 4e).

It has always been my belief that your customers who purchase the solar equipment and then turn over the operation of the power generating to a third party are not active participants, such that the income from the business would not be active income. I have been unable to find any way around it and in general my advice and counsel tends to be on the conservative side anyway. I understand you believe that there is a way to draft the contract between the equipment owner and the third party manager in such a way that the income and/or losses will be active. I do not believe that is something I can accomplish for you and would recommend that you seek an attorney that is more familiar and has a greater knowledge in this area than I do.

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