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Federal Tax Alert

Subject:

The Worker, Homeownership and Business Assistance Act of 2009

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Summary

On November 6, 2009, President Obama signed H.R. 3548, the Worker, Homeownership and Business Assistance Act of 2009 (the "Act"). The Act contains a number of tax provisions.

Details

Net Operating Losses

A key provision of the Act is the expansion of the net operating loss ("NOL") carryback provisions. The American Recovery and Reinvestment Act ("ARRA"), which was passed earlier this year, allowed an "eligible small business" to carry back an NOL arising in 2008 for three, four, or five taxable years, rather than the two-year period otherwise applicable. Under the ARRA provision, a taxpayer with a fiscal year, i.e., other than a calendar year, was entitled to choose the extended carryback period for the taxable year that began or ended in 2008.

The Act allows all taxpayers (without regard to their gross receipts) to carry back an NOL arising in either 2008 or 2009 (but not both years) for three, four, or five years. Like the comparable ARRA provision, a taxpayer with a fiscal year may effectively choose from among three taxable years, i.e., any taxable year beginning or ending in 2008 or 2009, as the loss year eligible for the extended carryback period. If the loss is carried back for five taxable years, it may only offset 50 percent of the taxable income in that fifth preceding taxable year. The remaining NOL is carried forward from the fifth preceding year until it is utilized. There is no limitation on the amount of income that may be offset by an NOL in any other year. In addition, the Act suspends the 90-percent limitation on the use of an alternative tax NOL deduction attributable to carrybacks for which the extended carryback period is elected.

An eligible small business that has timely made or timely makes an election to carry back a 2008 NOL under the ARRA can also elect to carry back a 2009 loss under the new provisions.

A similar extended carryback period is available for the loss from operations of a life insurance company. The extended carryback period may not be used by certain taxpayers that have received or will receive financial assistance under the Emergency Economic Stabilization Act of 2008 in the form of an equity infusion or acquisition of a warrant (or other right).

The election to carry back an NOL for three, four, or five years is made by the due date (with extension) for filing the tax return for the taxpayer's last taxable year beginning in 2009. In addition, affected taxpayers have an identical period of time in which to revoke a prior election under section 172(b)(3) to forgo the entire NOL carryback period for the loss year.

First-Time Homebuyer Credit

The Act extends and expands the first-time homebuyer credit. Under the ARRA, the credit applied to homes purchased before December 1, 2009. The amount of the available credit was ten percent of the purchase price of the new residence, subject to a maximum of $8,000 ($4,000 in the case of a married individual filing a separate return). The Act extends the credit to homes purchased before May 1, 2010. However, if the taxpayer has a binding written contract before May 1, 2010, to purchase a principal residence, then the closing must occur before July 1, 2010.

Under prior law, for homes purchased before January 1, 2009, the credit must be repaid ratably over a 15-year period. Further, this repayment is accelerated if the taxpayer disposes of the principal residence or it ceases to be the taxpayer's principal residence within 36 months of the date of purchase of the principal residence. For homes purchased after December 31, 2008, the 15-year repayment requirement does not apply, but the credit is recaptured under the 36-month rules set forth in the preceding sentence.

Under the ARRA, the credit phased out for taxpayers with modified adjusted gross income between $75,000 and $95,000 ($150,000 to $170,000 for married taxpayers filing a joint return). The Act raises the phase-out range to between $125,000 and $145,000 for individual taxpayers and between $225,000 and $245,000 for married taxpayers filing a joint return.

The credit was originally available only to a first-time home buyer, defined for this purpose as an individual having no ownership interest in a principal residence in the United States for a three-year period preceding the purchase. The Act expands the credit to certain long-term residents of a home. A reduced credit is available if a taxpayer has owned and used a house as the taxpayer's principal residence for any five-consecutive-year period during the eight-year period ending on the closing date for the purchase of the new principal residence. The reduced credit is 10 percent of the purchase price of the new residence, with a maximum of $6,500 ($3,250 for a married individual filing a separate return).

The Act provides two special rules for military personnel. First, recapture of the credit will not apply to military personnel who dispose of a principal residence or cease using a home as a principal residence after December 31, 2008, in connection with Government orders received by the individual or the individual's spouse for qualified official extended duty service. In addition, in the case of military personnel serving outside the United States for at least 90 days during the period beginning after December 31, 2008, and ending before May 1, 2010, the credit is extended for one year, i.e., the purchase must occur before May 1, 2011 (or July 1, 2010, under the binding-contract rules described above).

Extension of FUTA Surtax

To pay for the extension of unemployment insurance benefits, the Act extends the 0.2-percent FUTA surtax through June 30, 2011.

Delayed Effective Date for Worldwide Interest Allocation

The American Jobs Creation Act of 2004 contained an election allowing taxpayers to utilize a liberalized rule for allocating interest expense in determining the allowance of the foreign tax credit. This provision was to be effective for taxable years beginning after December 31, 2010. The Act makes the provision effective for taxable years beginning after December 31, 2017.

Increased Penalties for Failure to File Partnership and S Corporation Returns

Under current law, the penalty for the failure to file a partnership or S corporation return is $89 per partner or shareholder for each month or portion of a month the return is not filed, up to a maximum of 12 months. The penalty may also be imposed for incomplete returns or Schedules K-1. The Act increases the penalty to $195 per partner or shareholder. This provision is effective for returns for taxable years beginning after December 31, 2009.

Corporate Estimated Tax Payments

In the case of corporations with assets of at least $1 billion, the Act increases the required estimated tax payment due in July, August or September 2014 by 33 percentage points, to 133.25 percent of the payment otherwise due for the quarter. The payment due in the following quarter is reduced by a corresponding amount.

Mandatory Electronic Filing of Tax Returns

The Act requires tax return preparers who prepare more than 10 tax returns for individuals, trusts, or estates to electronically file the tax returns. This provision is effective for tax returns filed after December 31, 2010.