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The Worker, Homeownership, and Business Assistance Act of 2009

The Worker, Homeownership, and Business Assistance Act of 2009 was signed into law on November 6, 2009. The new law extended and modified the first-time homebuyer tax credit. In addition, the law allows businesses with net operating losses (NOLs) for 2008 or 2009 to carry back those losses for up to five years.

This article outlines some of the tax provisions in the new legislation and discusses the issues that taxpayers should consider before taking advantage of the tax planning opportunities it presents.

First-time homebuyer credit

The bill extends the first-time homebuyer tax credit that was included in the American Recovery and Reinvestment Act of 2009 (ARRA) through April 30, 2010 and modifies it to apply to certain current homeowners who buy a new primary residence. The credit was originally slated to expire for purchases after November 30, 2009. As enacted in the ARRA, a refundable homebuyer tax credit equal to the lesser of \$8,000 or 10 percent of a home's purchase price is available to individuals buying a principal residence for the first time. The credit phased out for individuals with modified adjusted gross income (AGI) during the year of purchase between \$75,000 and \$95,000 and for joint filers with modified AGI between \$150,000 and \$170,000.

The new bill raises the modified AGI phase-out range to between \$125,000 and \$145,000 for individuals and between \$225,000 and \$245,000 for joint filers.

For homes purchased after December 31, 2008, individuals must repay the credit only if they dispose of or move from their principal residence within 36 months of purchase. Individuals who purchased homes on or before that date must recapture the credit ratably over 15 years (with no interest charge) beginning in the second taxable year after the taxable year in which the home was purchased.

The Worker, Homeownership, and Business Assistance Act of 2009, cont.

The bill provides that a taxpayer can continue to elect to treat the purchase of a principal residence purchased after December 31, 2008 and before May 1, 2010, as occurring on December 31 of the prior calendar year. Before this change, the election applied only to homes purchased after December 31, 2008 and before December 1, 2009. This election allows the taxpayer to accelerate claiming the credit to a preceding year tax return.

The bill also makes the credit available to any individual who purchases a home before July 1, 2010, provided that a written binding contract is in place before May 1, 2010.

Significant opportunity for long-term residents - A significant opportunity was created for certain individuals who are selling one primary residence and buying another. In the past, these individuals could not qualify for the first-time homebuyer credit; however, under the bill, certain long-term resident homebuyers who purchase a new principal residence may be eligible for a credit of up to \$6,500. To qualify, an individual must have used the same principal residence for five consecutive years during the eight-year period ending on the closing date for the purchase of a new principal residence.

For example, a married couple uses their principal residence for 10 years ending on January 31, 2010, the closing date for purchasing a new home. The purchase price of their new home is \$500,000 and the couple's modified AGI for the year of purchase is \$100,000. In this case, the couple would qualify for a refundable credit of \$6,500, whereas under prior law the couple would receive no credit.

The same modified AGI limitations that apply to the first-time homebuyer credit also apply here. Therefore, homeowners with significantly higher incomes do not qualify for this credit.

District of Columbia homebuyers - First-time homebuyers or long-term residents in the District of Columbia cannot claim both the national first-time homebuyer credit under this bill and the District of Columbia first-time homebuyer credit available under current law for the purchase of a home after December 31, 2008. In this case, only the national credit is allowed.

Military personnel - Finally, the bill provides two carve-outs for military personnel.

First, service members who are forced to either sell or cease using their home after December 31, 2008 and within 36 months of purchase, as a result of official extended-duty service would be exempt from having to repay the tax credit. Home purchased prior to January 1, 2009 are subject to the 15-year recapture rule, and repayment of the credit would cease to apply in the taxable year the disposition or cessation occurs or any subsequent taxable year.

The Worker, Homeownership, and Business Assistance Act of 2009 cont.

Second, 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 have one additional year to qualify for the credit (i.e., the credit is extended through April 30, 2011).

Errors associated with credit - The bill also makes several changes to expand the definition of mathematical or clerical errors for purposes of administration of the credit by the Internal Revenue Service. For example, in some cases, the IRS can assess additional tax without the issuance of a notice of deficiency that would be typically required. This change applies to returns for taxable years ending on or after April 9, 2008.

Other enhancements made to assist in administration of the credit provide that:

- No credit is allowed unless the buyer (or spouse of buyer) is age 18 or older on the date of purchase;
- The buyer must attach a copy of the settlement statement to the tax return for the year of purchase;
- The definition of purchase excludes property acquired from a person related to the buyer (or buyer's spouse); and
- No credit is allowed to any taxpayer if the taxpayer is a dependent of another taxpayer.

Exclusion for payments related to military base realignment and closure

The American Recovery and Reinvestment Act of 2009 expanded the Department of Defense Homeowner Assistance Program (HAP), which provides payments to certain employees and members of the armed forces to offset the adverse effects on housing values that result from a military base realignment or closure. Payments received under HAP, as in effect on November 11, 2003, are excluded from tax and are also not considered wages for FICA and Medicare tax purposes. The exclusion is limited to the amount that a home's fair market value has declined.

The bill expands the tax exclusion to HAP payments attributable to the ARRA, effective for payments made after February 17, 2009.

Five-year NOL carryback

The loss carryback gives cash-strapped businesses greater flexibility in writing off current losses against past profits by allowing them to carry back NOLs for up to five years (current law allows two years) for losses incurred in taxable years beginning or ending in either 2008 or 2009, but not both.

The Worker, Homeownership, and Business Assistance Act of 2009 cont.

Businesses may offset 50 percent of taxable income in the fifth preceding year and 100 percent of taxable income in the remaining four carryback years. If an election is made to carry back an NOL to the fifth year preceding the loss year, the carryback is limited to 50 percent of taxable income. The remaining balance of the NOL generated in the loss year is carried forward to the fourth year preceding the loss year, and so on, until the loss is utilized or expired.

The provision also suspends the 90 percent limitation on the use of any alternative tax NOL deduction attributable to carrybacks of the applicable NOL for which an extended carryback period is elected. For purposes of applying the 50 percent taxable income limitation to the carryback of an alternative tax NOL deduction to the fifth preceding taxable year, the limitation is applied separately based on alternative minimum taxable income.

Unlike the carryback enacted in the ARRA, this provision is not limited to small businesses. All taxpayers meeting a gross receipts test qualify other than those specifically excluded. Generally, the provision does *not* apply to any taxpayer (or member of the affiliated group) in which the federal government acquired or acquires an equity interest (or warrants or other rights) pursuant to the Emergency Economic Stabilization Act of 2008. Small businesses that have already elected to carry back 2008 losses under the ARRA are permitted to carry back losses from 2009. A taxpayer must make the election by the extended due date for filing the return for the taxpayer's last taxable year beginning in 2009. The election, once made, is irrevocable.

The provision is generally effective for NOLs arising in taxable years ending after December 31, 2007 and beginning before January 1, 2010. The modification to the alternative tax NOL deduction applies to taxable years ending after December 31, 2002. The modification with respect to operating loss deductions of life insurance companies applies to losses from operations arising in taxable years ending after December 31, 2007.

Taxpayer considerations

Before filing an irrevocable election to carry back a 2008 loss to 2003, 2004, 2005, or 2006, taxpayers should think about the impact of such election. Failure to consider all implications of the election could result in potentially unpleasant surprises. In particular, taxpayers should consider both the tax and financial statement impact of the NOL carryback.

Federal tax - Taxpayers should analyze current tax positions in order to optimize the NOL generated in 2008 or 2009 (the loss year). The NOL generated in the loss year can be optimized through an analysis of accounting methods. For 2009, both items that require an accounting method change and those that do not may be considered, while optimizing a loss in 2008 may be achieved solely through analysis of items that do not require an accounting method change.

The Worker, Homeownership, and Business Assistance Act of 2009 cont.

State tax - Taxpayers should understand and navigate the myriad of state income tax laws. Many states have their own NOL regimes and most do not provide for NOL carrybacks. It remains to be seen whether those states that do follow the federal rules will conform to the new federal five-year carryback provision or decouple from it. Due to state budgetary constraints, it seems likely that many states will not conform to the federal law change.

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Warmest Regards,

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