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Highlights of Recent Tax Legislation

By Christopher J. Loughran and William R. Hamerman

On November 6, 2009, President Obama signed into law the Worker, Homeownership, and Business Assistance Act of 2009 (the Act). Many provisions in this act extend and/or liberalize a number of the tax provisions originally put in place by the American Recovery and Reinvestment Tax Act of 2009 that was signed into law this past February.

The key aspects of the Act are listed below:

Net Operating Loss Provisions

Five Year Net Operating Loss (NOL) Carryback Provision Extended and Liberalized

The Act extends the special five year carryback provision for 2008 losses enacted in February to 2009 losses as well. More importantly, the Act allows the election to be made by most taxpayers, including individuals (not just small businesses). Under the new law, any taxpayer (so long as it has not been “bailed out” by the federal government under the TARP program) is allowed to choose to carryback a 2008 or 2009 NOL up to five years (technically any NOL for a tax year ending after December 31, 2007 and beginning before January 1, 2010). If the taxpayer does elect to carry back the NOL five years, the NOL utilized in the fifth year back is limited to 50% of the taxable income of the fifth year. The 50% restriction does not apply to qualifying small businesses (QSBs) that utilize pre-Act law for 2008 NOLs. In addition, QSBs that carried back their 2008 NOL under the prior law may also elect (but are not required) to carry back a 2009 NOL under the new law.

If the taxpayer decides not to use the special rule, both the 2008 and 2009 NOL would fall under the normal two year carryback rule.

Suspension of 90% AMT NOL Limitation

If a taxpayer elects under the Act to use the three, four or five year carryback, 100% of the applicable NOL is available for alternative minimum tax (AMT) purposes (rather than 90%). If the taxpayer elects out of the Act’s extended NOL carryback period, and uses the normal two year carryback rules, the NOL will be limited to 90% of AMT income.

Transition Rules

If a taxpayer elected to waive the use of the normal two year NOL carryback (i.e. opted for carry forward only) for a tax year ending before November 6, 2009, the Act allows the taxpayer to revoke such waiver if the revocation is filed by the extended due date of the taxpayer’s last tax year beginning in 2009.

A taxpayer that has previously filed a tentative carryback claim or amended return (e.g. previously filed a two year carryback claim) can still elect the three, four or five year period allowed under the Act. The election statement must specify that it is amending a prior application or claim. This provision does not apply to prior applications or claims filed

by QSBs under The American Recovery and Reinvestment Tax Act of 2009.

In addition, an application for a tentative carryback adjustment for any applicable NOL is timely if filed by the extended due date of the taxpayer’s last tax year beginning in 2009.

Taxpayers subject to any of these transition rules should ensure they comply with the detailed election requirements specified in Revenue Procedure 2009-52.

Individual Provisions

Extension and Liberalization of First-time Homebuyer Credit

The first-time homebuyer credit (if you can still call it that) has been extended and liberalized such that it is now available for higher income taxpayers and some taxpayers who are not actually first-time homebuyers. Originally, the \$8,000 maximum credit was set to expire on December 1, 2009. That date has now been extended in two parts. A written binding offer on a principal residence must be in place *before* May 1, 2010, and the closing on the purchase must occur *before* July 1, 2010. Also, the credit was originally phased out for modified adjusted gross incomes above \$75,000 (\$150,000 for joint filers) with the credit completely phased out at \$95,000 (\$170,000 for joint filers). The phase-out threshold has now been increased to \$125,000 with complete phase-out by \$145,000 (\$225,000 and \$245,000 for joint filers).

The greatest change to the credit is that it is now available to “long-time residents” as well as first-time homebuyers. Whereas a first-time homebuyer is a homebuyer who has not owned a home in the prior three years before the purchase, a “long-time resident” is a homebuyer who has maintained the same principal residence for any consecutive five year period during the eight year period ending on the date of purchase of a subsequent principal residence. For these “long-time resident” homebuyers, the credit is limited to the lesser of \$6,500 or 10% of the purchase price of the home (and the modified AGI phase-outs noted above apply).

Also, no credit is available for any purchase (first time or “long-time”) where the purchase price of the home is over \$800,000; there is no phase-out such that the entire credit is lost at \$800,001. The Act still allows the credit for purchases

made after 2008 to be claimed on the homebuyer's prior year tax return, i.e. the credit for 2010 purchases may be claimed on a 2009 tax return.

There is no requirement in the Act that the old principal residence be sold to claim the credit. However, the acquired residence must be occupied and made the principal residence of the taxpayer in order to claim the credit.

For purchases otherwise qualified after November 6, 2009, the taxpayer must be 18 or older at the date of purchase, and cannot be eligible to be claimed as a dependent of another taxpayer for the year of purchase. Also, purchases from related parties generally will not qualify for the credit.

Miscellaneous

Increased Penalty for Failure to File Partnership or S Corporation Returns

The Act increases the penalty for failure to file partnership or S corporation tax returns. The penalty is increased from \$89 per partner/shareholder per month to \$195 per partner/shareholder per month. For example, a partnership with two partners who file a return two months late would be penalized \$780 (\$195 x 2 partners x 2 months).

For any questions or additional clarification, please contact your tax advisor or one of the Perkins tax shareholders listed below:

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This bulletin is a summary and is not intended as tax or legal advice. You should consult with your tax advisor to obtain specific advice with respect to your fact pattern.

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