

Checkpoint Contents

Federal Library

Federal Editorial Materials

Federal Taxes Weekly Alert Newsletter

Preview Documents for the week of 11/12/2009 - Volume 55, No. 46

Articles

RIA Special Study: Tax Changes for Businesses, Return Filing and Penalties in the "Worker, Homeownership, and Business Assistance Act of 2009" (11/12/2009)

Federal Taxes Weekly Alert,

RIA Special Study: Tax Changes for Businesses, Return Filing and Penalties in the "Worker, Homeownership, and Business Assistance Act of 2009"

On Nov. 5, the House of Representatives, by a vote of 413-12, passed H.R. 3548, the "Worker, Homeownership, and Business Assistance Act of 2009" (the Act). The measure was OK'd by the Senate on Nov. 4, so it's cleared for the President's expected signature. This Special Study highlights the tax changes for businesses, return filing, and penalties including liberalized rules for net operating losses and toughened penalties for partnerships and S corporations. For a Special Study highlighting the tax changes for individuals, see [19](#).

Five-Year Carryback of NOLs Extended to Include 2009 NOLs and to Apply to Most Businesses

A net operating loss (NOL) is the excess of business deductions (computed with certain modifications) over gross income in a particular tax year. The loss can be deducted, through an NOL carryback or carryover, in another tax year in which gross income exceeds business deductions. In general, NOLs may be carried back two years and forward 20 years. The NOL is first carried back to the earliest tax year for which it's allowable as a carryback or a carryover, and is then carried to the next earliest tax year. A taxpayer may elect to forego the entire carryback period for an NOL and instead carry it forward. Life insurance companies may carry back losses for three years.

If a corporation has a corporate equity reduction transaction (a CERT, i.e., a major stock acquisition or an excess distribution) and an "excess interest loss" (i.e., interest allocable to the CERT) for a "loss limitation year," the loss is an NOL. It's subject to the regular NOL carryback and carryover rules, except that it can't be carried back to a tax year before the year in which the CERT occurred. The "loss limitation year" is generally the tax year in which the CERT occurred (the "CERT year") and each of the next two tax years.

For purposes of the alternative minimum tax (AMT), a taxpayer's NOL deduction cannot reduce the taxpayer's alternative minimum taxable income (AMTI) by more than 90% of the AMTI.

For NOLs arising in tax years ending after Dec. 31, 2007, small businesses can elect to increase the NOL carryback period for an applicable 2008 NOL (the "applicable NOL") from 2 years to 3, 4, or 5 years. A small business for this purpose is defined as a corporation or partnership that meets the gross receipts test of [Code Sec. 448\(c\)](#) (applied by substituting \$15 million for \$5 million) for the tax year in which the loss arose, or a sole proprietorship that would meet that test if the proprietorship were a corporation. This means any trade or business (including one conducted in or through a corporation, partnership, or sole proprietorship) whose average annual gross receipts (for the three-tax-year period (or shorter period of existence) ending with the tax year in which the loss arose are \$15 million or less.

An applicable 2008 NOL is the taxpayer's NOL for any tax year ending in 2008, or, at the taxpayer's

election, any tax year beginning in 2008. Any such election is irrevocable. Additionally, any carryback election may be made only with respect to one tax year. If an eligible small business makes an election to increase the carryback period for an applicable 2008 NOL, then [Code Sec. 172\(b\)\(1\)\(E\)\(ii\)](#) (which defines "loss limitation year") is applied by using the whole number that is one less than the number of years the taxpayer elected as the carryback for the NOL instead of "two."

New law. The Act provides an election for most taxpayers (not just small businesses) to increase the carryback period for an applicable NOL to 3, 4, or 5 years from 2 years. ([Code Sec. 172\(b\)\(1\)\(H\)\(i\)\(I\)](#)), as amended by Act Sec. 13(a))

An applicable NOL means the taxpayer's NOL for any tax year ending after Dec. 31, 2007, and beginning before Jan. 1, 2010. ([Code Sec. 172\(b\)\(1\)\(H\)\(ii\)](#)), as amended by Act Sec. 13(a)) Generally, an election may be made for only one tax year. ([Code Sec. 172\(b\)\(1\)\(H\)\(iii\)\(I\)](#)), as amended by Act Sec. 13(a)) However, an eligible small business that made or makes an election under the Code as in effect before the date of enactment of this Act may make an election for 2 tax years instead of just 1. ([Code Sec. 172\(b\)\(1\)\(H\)\(v\)\(I\)](#)), as amended by Act Sec. 13(a))

The amount of the NOL that can be carried back to the 5th tax year before the loss year may not be more than 50% of the taxpayer's taxable income for that 5th preceding tax year determined without taking into account any NOL for the loss year or for any tax year after the loss year. ([Code Sec. 172\(b\)\(1\)\(H\)\(iv\)\(I\)](#)), as amended by Act Sec. 13(a)) The amount of the NOL otherwise carried to tax years after the 5th preceding tax year is adjusted to take into account that the NOL could offset only 50% of the taxable income for that 5th preceding tax year. ([Code Sec. 172\(b\)\(1\)\(H\)\(iv\)\(II\)](#)), as amended by Act Sec. 3(a))



RIA illustration : Corp X, a taxpayer that is not a small business, has an NOL of \$5 million for its tax year ending Aug. 31, 2009. In its tax year ending Aug. 31, 2004, it had taxable income of \$6 million. If X elects to carry its NOL back to its 2004 tax year, then it will be able to apply only \$3 million of that loss against its taxable income for 2004. In determining the amount of the NOL that can be carried forward to years ending after Aug. 31, 2004 by X, the NOL is reduced by only the \$3 million that it offset for the 2004 tax year.

The 50% limitation does not apply to the applicable 2008 NOL of an eligible small business that was made under an election that would have been valid for such a business under pre-Act law even if the election is made after the enactment of the Act. ([Code Sec. 172\(b\)\(1\)\(H\)\(iv\)\(III\)](#)), as amended by Act Sec. 13(a))

As was the case for small businesses, if an eligible business makes an election to increase the carryback period for an applicable 2008 NOL, then [Code Sec. 172\(b\)\(1\)\(E\)\(ii\)](#) (which defines "loss limitation year") is applied by using the whole number that is one less than the number of years the taxpayer elected as the carryback for the NOL instead of "two." ([Code Sec. 172\(b\)\(1\)\(H\)\(i\)\(II\)](#)), as amended by Act Sec. 13(a))

Suspension of 90% Limitation on NOL for AMT purposes

For tax years ending after 2002, the Act suspends the 90% limitation on the use of any alternative tax NOL deduction attributable to the carryback of an applicable NOL for which the extended carryback period is elected. ([Code Sec. 56\(d\)\(1\)\(A\)\(ii\)\(I\)](#)), as amended by Act Sec. 13(b))

Increase in Carryback Period for Life Insurance Companies

For losses from operations arising in tax years ending after Dec. 31, 2007, the Act allows life insurance companies to elect to carry back an applicable loss from operations for 4 or 5 years and not just 3 years as is provided under pre-Act law. ([Code Sec. 810\(b\)\(4\)\(A\)](#)), as amended by Act Sec. 13(c)) An

applicable loss from operations is the life insurance company's loss from operations for any tax year beginning or ending in 2008 or 2009. ([Code Sec. 810\(b\)\(4\)\(B\)](#), as amended by Act Sec. 13(c)) The amount of the loss that can be carried back to the 5th preceding tax year is limited to 50% of the taxable income for such preceding tax year. ([Code Sec. 810\(b\)\(4\)\(C\)](#) as amended by Act Sec. 13(c))

Businesses Ineligible to Elect Extended Carryback Period

The right to elect an extended carryback period does not apply to any taxpayer if:

... the Federal government acquired an equity interest in that taxpayer under the Emergency Economic Stabilization Act of 2008. (Act Sec. 13(f)(1)(A))

... the Federal government acquired before the enactment date any warrant (or other right) to acquire any equity interest with respect to the taxpayer under the Emergency Economic Stabilization Act of 2008. (Act Sec. 13(f)(1)(B))

... the taxpayer receives after the enactment date funds from the Federal government in exchange for an interest described above under a program established under title I of Division A of the Emergency Economic Stabilization Act of 2008 (unless such taxpayer is a financial institution as defined in Section 3 of such Emergency Economic Stabilization Act, and the funds are received pursuant to a program established by the Secretary of the Treasury for the stated purpose of increasing the availability of credit to small businesses using funding made available under that Act. (Act Sec. 13(f)(1)(C)(1))

Additional FUTA Surtax Is Extended Through June of 2011

Under pre-Act law, the Federal Unemployment Tax Act (FUTA) tax was imposed at a rate of 6.2% through 2009 (the total of the permanent 6% tax rate, and a temporary 0.2% surtax rate), and 6.0% for calendar year 2010 and later years.

New law. The Act provides that the 6.2% FUTA tax rate continues to apply through June of 2011, and the 6.0% rate applies for the remainder of calendar year 2011 and for later years. ([Code Sec. 3301](#), as amended by Act Sec. 10) That is, the temporary 0.2% surtax is extended for 1½ years through June 30 of 2011.

Estimated Tax Payments For Large Corporations Increased For 2014

In general, corporations must make quarterly estimated tax payments of their income tax liability. For a corporation whose tax year is a calendar year, these estimated tax payments must be made by Apr. 15, June 15, Sept. 15, and Dec. 15. Fiscal year taxpayers make quarterly payments on "corresponding" dates (i.e., the due dates are 3 1/2, 5 1/2, 8 1/2, and 11 1/2 months, respectively, after the fiscal year beginning date).

The "Corporate Estimated Tax Shift Act of 2009" (Sec. 202 of H.J. Res. 56, signed into law on July 28, 2009, as [P.L. 111-42](#)), provides that for large corporations (those with assets of not less than \$1 billion as of the end of the preceding tax year), the amount of the required installment of corporate estimated tax that is otherwise due in July, Aug., or Sept. 2014 will be 100.25% of the amount otherwise due, and the amount of the next required installment is appropriately reduced to reflect the amount of the increase to 100.25% in the earlier installment.

New law. The Act provides that for large corporations, the required payment of estimated tax otherwise due in July, August, or Sept. of 2014 under the "Corporate Estimated Tax Shift Act of 2009" will be increased by 33%. The amount of the next required installment will be appropriately reduced to reflect the amount of the increase in the earlier installment. (Act Sec. 18)



RIA observation: This will have the effect of accelerating government revenue for the

affected fiscal year.

Delay in Application of Worldwide Allocation of Interest

Under current law, foreign corporations can't be included in making interest allocations, since they aren't eligible to be included in a consolidated group. In addition, certain financial corporations that are treated as members of the affiliated group for consolidated return purposes are excluded for purposes of making interest allocations. Instead, they are treated as a separate single corporation for those purposes.

For tax years beginning after Dec. 31, 2010, an election (subject to a first year transition rule) will be available under which interest can be allocated on a worldwide basis, including foreign corporations, rather than just among domestic corporations. If this election is made, certain bank and financial holding companies will be treated as includable corporations solely for purposes of applying the worldwide interest allocation rules separately to those corporations.

New law. The Act delays the effective date of the worldwide interest allocation rules for seven years, until tax years beginning after Dec. 31, 2017. It also eliminates the special transition rule that applies in the case of the first tax year to which the worldwide interest allocation rules apply. (Code Sec. 864 (f) , as amended by Act Sec. 15)



RIA observation: The worldwide allocation of interest rule may never go into effect. It was included as a provision in the health reform bill currently working its way through the House (H.R. 3962, the "Affordable Health Care for America Act") but was dropped when included in the Worker, Home Ownership and Business Assistance Act of 2009. To make up the lost revenue, H.R. 3962 would repeal the worldwide interest allocation rule entirely and close a biofuel tax credit loophole.

Increased Penalty for Failure to File Partnership or S Corporation Returns

Civil penalties apply for failure to file a partnership and S corporation returns. The penalty is \$89 times the number of partners or shareholders for each month (or fraction of a month) that the failure continues, up to a maximum of 12 months for returns required to be filed after Dec. 31, 2008.

New law. Under the Act, the base amount on which a penalty is computed for a failure with respect to filing either a partnership or S corporation return for a tax year beginning after Dec. 31, 2009, is increased to \$195 per partner or shareholder. (Code Sec. 6698(b)(1) and Code Sec. 6699(b)(1) , as amended by Act Sec. 16)



RIA observation: Over the fiscal period 2011 to 2019, this provision is projected to raise \$642 million (partnership penalties) and \$587 million (S corporation penalties). Whether these projections will stand up remains to be seen. The huge percentage increase in the amount of the penalty (almost 120%) could cause even more taxpayers than anticipated to comply with the filing requirement so that less revenue will be realized than projected.

Expansion of Electronic Filing by Return Preparers

IRS is authorized to issue regs specifying which returns must be filed electronically. There are several limitations on this authority. First, it can only apply to persons required to file at least 250 returns during the calendar year. Second, IRS is prohibited from requiring that income tax returns of individuals, estates, and trusts be submitted in any format other than paper, although these returns may be filed electronically by choice.

New law. The Act generally maintains the current rule that regs may not require any person to file electronically unless the person files at least 250 tax returns during the calendar year. However, for returns filed after Dec. 31, 2010, it provides an exception to this rule and mandates that IRS require electronic filing by "specified tax return preparers." This term includes all return preparers except those who neither prepare nor reasonably expect to prepare ten or more individual income tax returns in a calendar year. "Individual income tax return" is defined to include returns for estates and trusts as well as individuals. ([Code Sec. 6011\(e\)](#) , as amended by Act Sec. 17)



RIA observation: There is no sanction for failure to comply with this change. Indeed, this provision is scored as having only a negligible effect on revenue. But it could free up IRS personnel and in that sense make IRS operations more efficient.

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RIA Special Study: Tax Changes for Individuals in the "Worker, Homeownership, and Business Assistance Act of 2009"

On Nov. 5, the House of Representatives, by a vote of 413-12, passed H.R. 3548, the "Worker, Homeownership, and Business Assistance Act of 2009" (the Act). The measure was OK'd by the Senate on Nov. 4, so it's cleared for the President's expected signature. This Special Study highlights the tax changes for individuals in the Act, namely changes extending and generally liberalizing the first time homebuyer tax credit (FTHTC). For a Special Study highlighting the tax changes for businesses, return filing, and penalties, see [19](#).



RIA observation: Many of the liberalized changes affecting the FTHTC are effective for purchases after the enactment date, which is expected to be soon. An individual on the verge of closing a home purchase who would be benefitted by one of the liberalized changes explained below may want to delay the closing until after the enactment date. This should be done only if the benefit of gaining the effect of the liberalized rule would outweigh any adverse impact resulting from the delay, such a loss of a mortgage commitment or a favorable interest rate.

Homebuyer Credit Extended and Liberalized

A refundable tax credit is available for qualifying first-time home purchases after Apr. 8, 2008, and before Dec. 1, 2009. For homes bought in 2009, the maximum first time homebuyer tax credit (FTHTC) is equal to the lesser of \$8,000 (\$4,000 for a married individual filing separately) or 10% of the principal residence's purchase price (for purchases before 2009, the dollar limits are \$7,500 (\$3,750 for marrieds filing separately). The FTHTC phases out for individual taxpayers with modified adjusted gross income (AGI) between \$75,000 and \$95,000 (\$150,000 and \$170,000 for joint filers) for the year of purchase.

An individual is treated as a first-time homebuyer if he (and his spouse, if married) had no ownership interest in a principal residence in the U.S. during the 3-year period before the purchase of the home. A taxpayer who buys a qualifying residence after Dec. 31, 2008, and before Dec. 1, 2009, may elect to be treated as having bought the home on Dec. 31, 2008, so that he may claim the credit on the 2008 income tax return. No District of Columbia first-time homebuyer credit may be claimed by any taxpayer for the purchase of a residence after Dec. 31, 2008, and before Dec. 1, 2009, if the national first-time homebuyer credit is allowable to the taxpayer (or his spouse) with respect to such purchase.

Recapture rules apply for homes bought on or before Dec. 31, 2008. In general, the FTHTC is recaptured ratably over fifteen years with no interest charge beginning in the second tax year after the tax year in which the home is purchased. For homes bought after Dec. 31, 2008, and before Dec. 1, 2009, the FTHTC is recaptured only if the taxpayer disposes of the home (or the home otherwise ceases to be the principal residence of the taxpayer) within 36 months from the date of purchase.

New law. The Act extends the FTHTC and liberalizes it by making it available to (1) higher-income taxpayers and (2) to existing homeowners who are qualifying "long-time residents" and who buy another principal residence. However, for the first time there will be a dollar cap on residences qualifying for the FTHTC.

FTHTC extended. Under the Act, the FTHTC is extended to apply to a principal residence purchased by the taxpayer before May 1, 2010. ([Code Sec. 36\(h\)](#), as amended by Act Sec. 11(a)) The FTHTC also applies to the purchase of a principal residence before July 1, 2010 by any taxpayer who enters into a written binding contract before May 1, 2010, to close on the purchase of a principal residence before July 1, 2010. ([Code Sec. 36\(h\)](#), as amended by Act Sec. 11(a)(1)(C))

See discussion below for the extended FTHTC period available to qualifying service members.

FTHTC available to higher income taxpayers. For purchases after the enactment date, the FTHTC phases out for individual taxpayers with modified adjusted gross income (AGI) between \$125,000 and \$145,000 (\$225,000 and \$245,000 for joint filers) for the year of purchase. ([Code Sec. 36\(b\)\(2\)\(A\)\(i\)\(II\)](#), as amended by Act Sec. 11(c)(2))

FTHTC available for existing homebuyers who are "long-time residents." For purchases after the enactment date, any individual (and, if married, the individual's spouse) who has maintained the same principal residence for any 5-consecutive year period during the 8-year period ending on the date of the purchase of a subsequent principal residence is treated for FTHTC purposes as a first-time homebuyer of that subsequent principal residence. The maximum allowable credit for such taxpayers is \$6,500 (\$3,250 for a married individual filing separately). ([Code Sec. 36\(c\)\(6\)](#) and [Code Sec. 36\(b\)\(1\)\(D\)](#), as amended by Act Secs. 11(b) and 11(c))

New limitation on home price for FTHTC. For purchases after the enactment date, the FTHTC cannot be claimed for buying a residence if its purchase price exceeds \$800,000. ([Code Sec. 36\(b\)\(3\)](#), as amended by Act Sec. 11(d))



RIA observation: There is no phaseout mechanism. A purchase price that exceeds the \$800,000 threshold by even a single dollar will cause the loss of the entire credit.

The Act includes the following "housekeeping" changes to conform the general FTHTC rules to the above changes:

... A taxpayer may elect to treat a qualifying home purchase after 2008 as made on December 31 of the calendar year preceding the purchase for purposes of claiming the credit on the prior year's tax return. ([Code Sec. 36\(g\)](#), as amended by Act Sec. 11(a)(3))

... No District of Columbia first-time homebuyer credit is allowed to any taxpayer with respect to the purchase of a residence after 2008, if the national FTHTC is allowable to the taxpayer (or the taxpayer's spouse) with respect to such purchase. ([Code Sec. 1400C\(e\)](#), as amended by Act Sec. 11(i))

New Anti-Abuse Provisions for Homebuyer Credit

The Act makes the following changes to help prevent abuse of the FTHTC.

... For purchases after the enactment date, the FTHTC can't be claimed unless the taxpayer has attained 18 years of age as of the date of purchase. A taxpayer who is married is treated as meeting the age requirement if the taxpayer or his spouse meets the age requirement. ([Code Sec. 36\(b\)\(4\)](#), as amended by Act Sec. 12(a))

... For purchases after the enactment date, the FTHTC can't be claimed by a taxpayer if he can be claimed as a dependent by another taxpayer for the tax year of purchase. ([Code Sec. 36\(d\)\(3\)](#), as amended by Act Sec. 11(g))

... For returns for tax years ending after the enactment date, the FTHTC is not allowed unless the taxpayer attaches to the relevant tax return a properly executed copy of the settlement statement used to complete the purchase. ([Code Sec. 36\(d\)\(4\)](#)), as amended by Act Sec. 12(b))

... For purchases after the enactment date, the definition of a qualifying purchase for FTHTC purposes is amended to exclude property acquired from a person related to the person acquiring the property or the spouse of the person acquiring the property, if married. ([Code Sec. 36\(c\)\(3\)\(A\)\(i\)](#)), as amended by Act Sec. 12(c))

... For returns for tax years ending after Apr. 8, 2008, the Act expands the definition of mathematical or clerical error for purposes of administration of the credit by IRS so that IRS may assess additional tax without issuance of a notice of deficiency as otherwise required in the case of:

- ... an omission of any increase in tax required by the recapture provisions of the FTHTC;
- ... information from the person issuing the taxpayer identification number (TIN) of the taxpayer that indicates that the taxpayer does not meet the age requirement of the credit;
- ... information provided to IRS on an income tax return for at least one of the two preceding tax years that is inconsistent with eligibility for such credit; or
- ... failure to attach to the return a properly executed copy of the settlement statement used to complete the purchase. ([Code Sec. 6213\(g\)\(2\)](#)), as amended by Act Secs. 11(h) and 12(d))

Additional Homebuyer Liberalizations for Service Members

The Act extends the FTHTC for an additional year, and waives recapture provisions, for individuals who are on qualified official extended duty, which means service on official extended duty as a member of the uniformed services, a member of the Foreign Service of the United States, or an employee of the intelligence community. Qualified official extended duty is any period of extended duty while serving at a place of duty at least 50 miles away from the taxpayer's principal residence or under orders compelling residence in government furnished quarters. Extended duty is any period of duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period. ([Code Sec. 36\(f\)\(4\)\(E\)](#)), as amended by Act Sec. 11(e))

Extension of FTHTC for service members overseas. For an individual (and, if married, the individual's spouse) who serves on qualified official extended duty service outside of the U.S. for at least 90 days during the period beginning after Dec. 31, 2008, and ending before May 1, 2010, the expiration date of the first-time homebuyer credit is extended for one year, through April 30, 2011 (June 30, 2011, in the case of an individual who enters into a written binding contract before May 1, 2010, to close on the purchase of a principal residence before July 1, 2011). ([Code Sec. 36\(h\)\(3\)](#)), as amended by Act Sec. 11(f))

Waiver of FTHTC recapture. In the case of a disposition of a principal residence by an individual (or a cessation of use of the residence that otherwise would cause recapture) after Dec. 31, 2008, in connection with Government orders received by the individual (or the individual's spouse) for qualified official extended duty service, no recapture applies by reason of the disposition of the residence, and any 15-year recapture with respect to a home acquired before Jan. 1, 2009, ceases to apply in the tax year of the disposition. ([Code Sec. 36\(f\)\(4\)\(E\)](#)), as amended by Act Sec. 11(e))

Exclusion from Gross Income of Qualified Military Base Realignment and Closure Fringe

The Department of Defense Homeowners Assistance Program ("HAP") 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.

The American Recovery and Reinvestment Act of 2009 (ARRA) expanded the HAP in various ways. For

example, it allows the Secretary of Defense to provide assistance or reimbursement for certain losses in the sale of family dwellings by members of the Armed Forces living on or near a military installation in situations where: (1) there was a base closure or realignment; (2) the property was purchased before July 1, 2006, and sold between that date and Sept. 30, 2012; (3) the property is the owner's primary residence; and (4) the owner has not previously received benefits under the HAP. Further, it authorizes similar HAP assistance or reimbursement to: (1) wounded members and wounded civilian Department of Defense and Coast Guard employees (and their spouses); and (2) members permanently reassigned from an area at or near a military installation to a new duty station more than 50 miles away. It allows the Secretary to provide compensation for losses from home sales by such individuals to ensure the realization of at least 90% (in some cases, 95%) of the pre-mortgage-crisis assessed value of such property.

Gross income does not include amounts received under the HAP (as in effect on Nov. 11, 2003). Amounts received under the program also are not considered wages for FICA tax purposes (including Medicare). The excludable amount is limited to the reduction in the fair market value of property.

New law. For payments made after Feb. 17, 2009 (ARRA's enactment date), the Act expands the exclusion to HAP payments authorized under ARRA. ([Code Sec. 132\(n\)](#), as amended by Act Sec. 14)



RIA observation: This change could affect some HAP payments received in 2009. Practitioners should be mindful that IRS forms and instructions for 2009 tax years may not be updated to reflect this change.

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