CCH Tax Briefing:

WORKER, HOMEOWNERSHIP, AND BUSINESS ASSISTANCE ACT OF 2009

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Special Report

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New Law Statistics:

- ✔ *Extended NOL carryback for all businesses*
- ✔ *Homebuyer credit through April 30*
- ✔ *Modified long-time homeowners credit*
- ✔ *Mandatory e-filing*
- ✔ *Military base closure exclusion*
- ✔ *Delay in worldwide interest allocation*
- ✔ *$40 billion in tax breaks in 2010-2011*

Inside

New Law Expands Homebuyer Credit And NOL Carryback; Adds Revenue Offsets

Two popular but temporary tax incentives have been given a new lease on life as part of legislation extending unemployment compensation benefits. The Worker, Homeownership, and Business Assistance Act of 2009 (H.R. 3548), signed into law by President Obama on November 6, 2009, extends those incentives and more. Following several weeks of negotiations, the new law was approved in rapid-fire succession, first by the Senate, 98-0, on November 4 and then by the House, 403-12, on November 5.

The first-time homebuyer credit and expanded five-year net operating loss (NOL) carryback, both originally scheduled to expire this year, have been extended and enhanced into 2010. Many homebuyers who are not first-timers will now be eligible for a tax credit up to $6,500, with first-time homebuyers qualifying for a maximum $8,000 credit through at least April 30, 2010. Similarly, nearly all businesses will be able to take advantage of expanded NOL carryback treatment for either 2008 or 2009 NOLs. The new law also excludes from income qualified military base closure payments.

Impact *The availability of quick refunds from 2008 and 2009 NOL five-year carrybacks will mean a huge boost to businesses trying to survive the short term. The housing industry also hopes that the homebuyer credit will continue home sale traffic and bridge the gap between slow winter sales and what is hoped will be a more robust spring market.*

To pay for all this, the new law requires electronic filing of individual returns by all but the smallest return preparers, delays implementation of worldwide interest allocation, increases the penalties for failing to file partnership and S corporation returns, and accelerates estimated tax payments for certain large corporations.

Comment The new law also extends unemployment benefits by up to 14 weeks (with six additional weeks for individuals in states with high unemployment). However, it does not extend the existing temporary exclusion from gross income of the first $2,400 of unemployment benefits received in 2009. The extended unemployment benefits are paid for by keeping the FUTA surtax.

FIRST-TIME HOMEBUYER CREDIT

When originally enacted, the first-time homebuyer credit reached 10 percent of the purchase price of a qualified residence (for a maximum credit of $7,500) and was repayable in equal installments over 15 years. Congress subsequently raised the credit to a maximum to $8,000, set a November 30, 2009 cutoff date, and generally eliminated the repayment requirement.

The new law not only extends the credit, it also extends the credit to higher income taxpayers and allows a reduced credit to some non-first-time homebuyers. The new law also expressly excludes high-end homes from the credit.

Impact *The availability of the credit for higher-income taxpayers and some existing homeowners will not be applied retroactively. These tax breaks are effective only for purchases made after November 6, 2009.*

Extension. The first-time homebuyer credit was scheduled to expire after November 30, 2009. The new law provides a new expiration date of April 30, 2010. If a taxpayer enters into a binding contract before May 1, 2010, to close on the purchase of a principal residence before July 1, 2010, the credit will be treated as not expiring until July 1, 2010.

Comment The first-time homebuyer credit may be allocated between two or more unmarried taxpayers using any reasonable method, the IRS explained in Notice 2009-12. For example, the credit may be allocated between unmarried taxpayers based on their respective contributions toward the purchase price of the residence or their respective ownership interests.

Comment Qualified buyers cannot claim both the District of Columbia first-time homebuyer credit and the general first-time homebuyer credit.

Election. To accelerate claims for the credit, the new law allows taxpayers to elect to treat the purchase of a principal residence in 2009 or before the new deadline in 2010 as made on December 31 of the calendar year preceding the purchase. The first-time homebuyer credit is claimed on Form 5405.

Example Amy purchases a principal residence on January 31, 2010. If Amy elects to treat the purchase as made on December 31, 2009, Amy can accelerate the tax benefit by claiming the credit on her 2009 return filed in 2010. Otherwise, Amy will have to wait to claim the credit on her 2010 return filed in 2011.

"The first-time homebuyer credit and expanded net operating loss (NOL) carryback...have been extended and enhanced into 2010."

Comment In May, the U.S. Department of Housing and Urban Development (HUD) announced that taxpayers could monetize the first-time homebuyer credit. Taxpayers financing through a state housing agency or other HUD-approved advance programs can monetize 100 percent of the down payment. Taxpayers using Federal Housing Administration (FHA) lenders can apply the credit to closing costs or make a larger down payment above the FHA-required 3.5 percent minimum. HUD's authorization for monetizing the credit has no sunset date.

Non-first-time buyers

Effective for purchases after November 6, 2009, the credit is no longer restricted to first-time homebuyers. Individuals who the new law refers to as "long-time residents of the same principal residence" may be eligible for a modified credit even though they are not technically first-time homebuyers. The new law treats as a first-time homebuyer an individual who has owned and used the same residence as his or her principal residence for any five-consecutive year period during the previous eight-year period ending with the date on which the new residence is purchased.

Impact *This provision is aimed not only at individuals who are stepping-up from their first home to a larger and more expensive residence, but also at retirees who are moving to more manageable quarters.*

Comment Non-first-time homebuyers will benefit from the credit but at a reduced amount. Their maximum credit will be $6,500 rather than $8,000 ($3,250 for married taxpayers filing separately rather than $4,000).

Income thresholds. Previously, the first-time homebuyer credit phased out for single individuals with modified adjusted gross income (MAGI) between $75,000 and $95,000 and for married couples filing joint returns with MAGI between $150,000 and $170,000. The new law raises the start of the phase-out for single individuals to $125,000 and the start of the phase-out for married couples filing joint returns to $225,000.

Repayment. For principal residences purchased in 2009 and 2010, there is generally no requirement to repay the first-time homebuyer credit. However, a taxpayer may have to repay the credit if the residence ceases to be his or her principal residence within 36 months from the date of purchase.

Comment The full amount of the credit the taxpayer received becomes due on the return for the year in which the residence ceases to be the taxpayer's principal residence. Exceptions, such as death, continue to apply.

Purchase price. For the first time, Congress set a ceiling on eligibility for the credit based on the purchase price of the principal residence. No credit is allowed if the purchase price of the principal residence exceeds $800,000.

Impact *The $800,000 cap applies to purchases immediately after the date of enactment and, therefore, applies to purchases during the rest of November, as well as during the new, extended time period.*

Impact *The $800,000 is a cliff amount, with no gradual phase out of the credit provided for higher amounts. The $800,000 cap is also applied nationwide, with no adjustment for regional factors.*

Servicemembers

The new law waives the credit recapture rules for members of the U.S. uniformed services, Foreign Service, and intelligence community who are called to duty before 36 months after the date of purchase of a principal residence. Additionally, the new law extends the first-time homebuyer credit for individuals on qualified official extended duty outside the U.S. to purchases made before May 1, 2011 (or July 1, 2011, for taxpayers with binding contracts).

Comment Uniformed services include the U.S. Armed Forces (Army, Navy, Air Force, Marines, and Coast Guard) as well as commissioned corps of the U.S. Public Health Service and the National Oceanic and Atmospheric Administration.

Oversight. To curb abuses of the first-time homebuyer credit, the new law gives the IRS math error authority to disallow the credit during processing. The new law also expressly excludes dependents and related parties from claiming the credit. Additionally, the taxpayer (or his or her spouse) must be at least 18 as of the date of the purchase to be eligible. All taxpayers must attach a copy of their settlement agreement to their return.

Impact *Math error authority, which is retroactive to April 9, 2008, allows the IRS to access and send a notice of assessment of additional tax without using deficiency procedures.*

Impact *Earlier this year, the IRS cautioned that additional documentation requirements could slow processing of the credit.*

NOL CARRYBACK

The American Recovery and Reinvestment Act of 2009 (2009 Recovery Act) allowed eligible small businesses (with average gross receipts of $15 million or less) to elect to carry back net operating losses (NOLs) from 2008 for three, four or five years rather than the standard two years. The new law provides a similar election to *all* U.S. businesses of every size to carry back NOLs up to five years but with a 50-percent income limit on NOL offsets in the fifth year.

The new, expanded election is available for NOLs incurred in either 2008 or 2009, but not for both years. However, an eligible small business that elected under the 2009 Recovery Act to carryback 2008 NOLs may make the election for an additional year, enabling the qualified small business to carry back NOLs from both 2008 and 2009 for up to five years.

Timelines/Effective Dates

HOMEBUYER CREDIT	Purchases after 11/06/09	Purchases after 11/30/09
$6,500 for long-time homeowners	✔	
$125K/$225K AGI limit	✔	
$800K purchase price limit	✔	
Extension of credit		✔
NOL CARRYBACK	**Tax yrs ending after 12/31/07**	**Tax yrs beginning/ending in 2009**
2008/2009 five-year carryback	✔	
Small business additional 2009 carryback		✔

Estimated Revenue Impact
New Law
(Millions of Dollars)

PROVISION	Fiscal Years 2010 – 2011	Fiscal Years 2010 – 2019
Homebuyer Credit	- $12,715	-$10,823
NOL Carryback	- $27,327	- $10,407
Base Closing Payments	- $160	- $243
Worldwide Interest Allocation	$494	$20,123
Filing Penalties	negligible	$1,229

Impact *This is a major expansion of the NOL rules. The Joint Committee on Taxation (JCT) estimates that the new carryback provisions would cost the federal government and benefit businesses by nearly $34 billion in 2010 (but balancing out to $10.4 billion over 10 years).*

Impact *A business that carries back an NOL to a prior profitable year can obtain a quick refund from the IRS for that prior year. This will provide additional cash that the business can use to pay expenses, maintain operations, and make new investments.*

Comment An NOL is the excess of the taxpayer's business deductions over its gross income. Absent legislation, an NOL can generally be carried back two years and carried forward 20 years to offset taxable income.

50-percent limitation

Under the new law, an NOL carried back to the fifth year before the loss year is limited to 50-percent of the available taxable income for that year. Any remaining NOL can fully offset taxable income in the remaining four carryback years.

Example Acme Company has profits of $50 million each year from 2004 through 2008. For 2009, Acme has a net operating loss of $100 million. Acme can elect to carry back the 2009 NOL five years, to 2004 and subsequent years. For 2004, Acme can claim an NOL deduction of 50 percent of its 2004 taxable income, or $25 million. The NOL balance of $75 million can be used to fully offset Acme's 2005 income of $50 million. The remaining NOL of $25 million can then be deducted against 2006 income, reducing the NOL to zero.

The 50-percent limitation does not apply to an eligible small business that elected to carry back its 2008 NOL under the 2009 Recovery Act. However, it does apply to its 2009 NOLs.

Election. The election to take advantage of the new law's NOL provision must be made by the due date (including extensions) for the tax return filed for the taxpayer's last taxable year beginning in 2009. Once made, the election is irrevocable. If the taxpayer had previously elected not to carry back an NOL from a tax year ending before the date of enactment of the new law, the taxpayer may revoke that election before the due date (including extensions) for filing the taxpayer's 2009 return.

Impact *The election is available for a tax year ending after December 31, 2007, and beginning before January 1, 2010. Thus, a fiscal year taxpayer can make the election for tax years beginning or ending in either 2008 or 2009.*

Comment The new law authorizes the IRS to implement election procedures. The IRS will likely follow the NOL election procedures it crafted under the 2009 Recovery Act.

Insurance companies. Under normal circumstances, insurance companies generally can carry back operating losses up to three years. The new law would give insurance companies a similar election to carry back NOLs from 2008 or 2009 for either four years or five years. The same 50-percent limit would apply to carrybacks to an insurance company's fifth year preceding the loss year.

AMT. The new law also suspends the 90-percent income limitation on the use of NOLs for determining the alternative minimum tax (AMT) for an extended carryback year.

TARP restrictions. The election to carry back NOLs up to five years is not available to companies receiving assistance under the Trouble Asset Relief Program (TARP) if the federal government acquired stock (or a right to acquire stock) in the company before the date of enactment of the new law, or if the federal government provides funds to the company (in exchange for a stock interest) after the date of enactment of the new law. The federal mortgage agencies (Fannie Mae and Freddie Mac) cannot make the election. Members of an affiliated group containing any of these taxpayers also are denied the election.

MILITARY EXCLUSION

More than 40 years ago, Congress created the Housing Assistance Program (HAP) to compensate qualified military and civilian employee homeowners when base closures negatively impact the real estate market. In some cases, HAP makes payments to offset the decline in real estate values. These payments are excluded from the recipient's gross income. The 2009 Recovery Act expanded HAP to cover, among other things, recent base realignment and closure actions as well as members of the U.S. armed forces who are relocated during the current real estate slowdown. The new law expands the exclusion from income to cover HAP payments under the 2009 Recovery Act.

Comment The provision is effective for all HAP payments made after February 17, 2009, the effective date of the 2009 Recovery Act.

ELECTRONIC FILING

The new law significantly expands the universe of e-filing by requiring individual returns prepared by paid return preparers to be filed electronically with limited exceptions. The e-file requirement applies to any return of tax imposed by subtitle A on individuals, estates or trusts filed after December 31, 2010.

Impact *The new law excludes preparers who prepare or reasonably expect to prepare 10 or fewer individual income tax returns from mandatory e-filing.*

Comment The bill maintains the current rule that requires corporations and tax-exempt organizations with assets of $10 million or more and that file at least 250 returns during a calendar year, including income tax, information, excise tax, and employment tax returns, to e-file their Form 1120 and 1120S income tax returns and Form 990 information returns.

Comment Earlier this year, the Treasury Inspector General for Tax Administration (TIGTA) reported that mandatory e- filing by preparers would increase e-filing by nearly 27 percent. The IRS received 156.3 million individual returns in 2008. Approximately 58 percent were filed electronically.

PENALTIES

Effective for returns for tax years beginning after December 31, 2009, the new law increases the penalties for failure to file a partnership or S corporation return. The penalty for failure to file a partnership return increases from $89 to $195. Similarly, the penalty for failure to file an S corporation return increases from $89 to $195. The combined increases are expected to raise approximately $1.2 billion over 10 years.

CORPORATE ESTIMATED TAX

Congress passed the Corporate Estimated Tax Shift Act of 2009 (Shift Act) in July, which revoked provisions of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) with regard to corporate estimated tax payments. The Shift Act increased estimated tax payments for corporations in the $1 billion-plus class to 100.25 percent for estimated payments due in July, August, and September of 2014. The new law increases the required corporate estimated tax payments factor for large corporations for payments due in July, August and September 2014 by 33 percentage points.

Comment The Shift Act allows large corporations to reduce their subsequent estimated tax payments in 2014 by the increase.

FUTA SURTAX

The 0.20 percent FUTA (unemployment) surtax, first enacted in 1976, was most recently extended in the Emergency Economic Stabilization Act of 2008 through year-end 2009. The new law extends the FUTA surtax through June 30, 2011. The total FUTA tax on employers, therefore, continues to be 6.2 percent.

WORLDWIDE INTEREST

Under the American Jobs Creation Act of 2004, a worldwide affiliated group may make a one-time election to determine the foreign source taxable income of the group by allocating and apportioning the domestic members' interest expense on a worldwide basis, as if all members of the group were a single corporation. However, subsequent legislation delayed the effective date of this provision until tax years beginning after December 31, 2010. The new law delays the provision even further: until tax years beginning after December 31, 2017. This measure is expected to raise approximately $20 billion over 10 years.

Impact *The revenue raisers in the new law had all been expected, many having appeared in bills introduced as early as several years ago. The delay in worldwide interest allocation, however, had been used as a "pay-for" in the blended House health care reform bill. House Democrats have already indicated they intend to repeal the worldwide interest application provision entirely as well as provide for new curbs on the biofuel tax credit.*