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CLIENT ALERT

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Business Tax Provisions of the Worker, Homeownership, and Business Assistance Act of 2009

On November 6, 2009, President Barack Obama signed into law the Worker, Homeownership, and Business Assistance Act of 2009 (the "Act"). The significant tax changes applicable to businesses under the Act are summarized below.[1]

Net Operating Loss Carryback. A net operating loss ("NOL") for a taxable year is the excess of business deductions over the business' gross income for that taxable year. Under current law, a taxpayer may "carry back" an NOL to offset taxable income of the two tax years immediately prior to the tax year in which the NOL is incurred and may then carry forward any remaining portion of the NOL up to 20 years to offset taxable income in future tax years. Current law also provides that "eligible small businesses" may elect to carry back an "applicable 2008 NOL" for three, four or five years. An "eligible small business" is generally defined as a taxpayer with annual gross receipts of $15,000,000 or less in the tax year in which the applicable 2008 NOL arose. For purposes of the election, an "applicable 2008 NOL" is defined as the taxpayer's NOL for any tax year ending in 2008, or, at the taxpayer's election, any tax year beginning in 2008. The election to extend the carryback period is irrevocable and can be made only with respect to one tax year.

[1] All Section references are to the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

The Act extends the availability of the election to carry back "an applicable NOL" up to five years to most taxpayers, excluding certain taxpayers discussed below. For these purposes "an applicable NOL" is defined as the taxpayer's NOL for any tax year ending after December 31, 2007, and beginning before January 1, 2010. Generally, an election may be made for only one year. However, an "eligible small business" that made or makes an election under the Code as in effect prior to November 6, 2009 (i.e., the enactment date of the Act) may make an election for two tax years instead of one year.

The election under the Act must be made by the due date (including any extensions) for filing the taxpayer's tax return for the taxpayer's last taxable year beginning in 2009. Any such election, once made, is irrevocable. In addition, the Act provides for certain transition rules with respect to NOLs for a taxable year ending before the date of enactment of the Act. Any election made by the taxpayer to waive the carryback period under Code Section 170(b)(3) may be revoked at any time before the due date (including any extensions) for the taxpayer's last taxable year beginning in 2009 and any application under Code Section 6411(a) for a tentative carryback refund with respect to an NOL for a tax year ending before the date of enactment of the Act will be treated as timely filed if filed before the due date for the taxpayer's 2009 tax return (including any extensions).

In addition, the Act provides certain limitations on the amount of NOLs that may be carried back to the fifth tax year. A taxpayer may not use an applicable NOL to offset more than 50% of the taxpayer's taxable income for the fifth preceding tax year (not taking into account any NOLs for the fifth preceding tax year or any subsequent year). The amount of NOLs carried back to years two, three and four is adjusted to take into account such 50% limitation. However, the 50% limitation does not apply to the applicable 2008 NOL of an eligible small business if an election is made under law in effect prior to the Act, even if such election is made after the date of enactment of the Act.

Certain taxpayers are ineligible to elect an extended carryback period including (1) any taxpayer in which the federal government has acquired an equity interest or any warrant or right to acquire an equity interest in the taxpayer under the Emergency Economic Stabilization Act of 2008 (the "EESA"); (2) a taxpayer that receives funds from the federal government after the enactment date of the Act in exchange for an equity interest or a right to acquire such equity interest in the taxpayer under a program established under the EESA, unless the taxpayer is a financial institution as defined in the EESA and the funds are used pursuant to a program established by the Secretary of the Treasury for the purpose of increasing the availability of credit to small businesses; (3) the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac); and (4) any taxpayer who is a member of the same affiliated group as a taxpayer described in this paragraph.

In conclusion, C corporations (including recently electing S corporations) with NOLs from C corporation tax years ending after December 31, 2007 and beginning before January 1, 2010 may want to consider utilizing the election procedure provided for in the Act and extend the carryback period for any applicable NOLs for up to five years.

Other Provisions Applicable to Businesses

Suspension of 90% NOL Limitation for Alternative Minimum Tax Purposes. Under current law, for purposes of the alternative minimum tax ("AMT"), a taxpayer's NOL deduction cannot reduce the alternative taxable income of the taxpayer by more than 90%. The Act suspends this 90% limitation for tax years ending after 2002 in the case of an "applicable NOL" for which the extended carryback period has been elected.

FUTA Surtax. Prior to the Act, the Federal Unemployment Tax Act ("FUTA") was imposed at a rate of 6.2% (which is comprised of a 6% permanent tax rate and a 0.2% temporary surtax) through 2009 and at a rate of 6% for 2010 and later years. The Act extends the application of the 0.2% FUTA surtax through June of 2011. The 6% rate will apply for the remainder of 2011 and subsequent years.

Estimated Tax Payments for Large Corporations Increased for 2014. Generally, a corporation must make quarterly estimated tax payments with respect to its income tax liability for the taxable year. For a corporation whose taxable year is the calendar year, these estimated tax payments must be made by April 15, June 15, September 15 and December 15. On July 28, 2009, the Corporate Estimated Tax Shift Act of 2009 ("Shift Act") was signed into law, requiring large corporations (i.e., corporations with assets of not less than $1 billion as of the preceding taxable year) to increase the amount of their quarterly estimated tax payments for July, August or September of 2014 to an amount equal to 100.25% of the amount that would otherwise be due, with the amount of their next quarterly estimated tax payment being reduced accordingly. Under the Act, the quarterly estimated tax payments for such large corporations in July, August or September 2014 under the Shift Act will be increased by an additional 33%. The amount of the next required quarterly estimated payments will be reduced to reflect such increase in the earlier installments.

Increased Penalty for Failure to File Partnership or S Corporation Returns. If a partnership or an S corporation fails to file an annual return, a penalty is imposed in the amount of $89 multiplied by the number of shareholders or partners for each month that the failure continues; however, the penalty may be imposed for only 12 months. Under the Act, the penalty is increased to $195 per partner or shareholder for tax years beginning after December 31, 2009.