PUBLICATION

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

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President Obama signed the Worker, Homeownership, and Business Assistance Act of 2009 (WHBA Act) on November 6, 2009. The WHBA Act offers significant benefits not only to businesses through an expanded net operating loss (NOL) carryback period, but also to home buyers through an extension and expansion of the first-time homebuyers tax credit. Congress offset the cost of these tax benefits by expanding e-filing requirements for paid tax preparers, increasing penalties for failure to file partnership and S corporation returns, delaying worldwide allocation of interest for multinational taxpayers, and increasing certain corporate estimated tax payments for large corporations. This Alert summarizes the tax provisions in the WHBA Act.

A. Tax Benefits Under the WHBA Act:

- ***First-Time Homebuyers Credit.*** The first-time homebuyer credit was included in the Housing and Economic Recovery Act of 2008 and equals 10% of the home purchase price with a maximum of $7,500 for homes bought in 2008, and $8,000 for homes bought in 2009. For homes bought in 2008, the credit generally operates as an interest free loan repayable over 15 years. For purchases after 2008, the 15-year repayment requirement does not apply. The entire outstanding credit generally becomes due if the taxpayer disposes of the home or ceases using it as a principal residence within 36 months of the purchase date. The WHBA Act includes the following modifications to the first-time homebuyers credit:

  - Extends the eligibility period for the credit to cover homes purchased prior to May 1, 2010, or for which a binding contract is in place before May 1, 2010 if the purchase closes before July 1, 2010.
  - Provides additional benefits to military personnel (including Foreign Service members and intelligence community members) by:
    - Waiving the credit recapture rules in the case of a disposition of a principal residence or cessation of use of the home as a principal residence in connection with government orders received by the individual or the individual's spouse for qualified official extended duty.
    - Extending the eligibility period for the credit for one year for military personnel serving outside the United States for at least 90 days between January 1, 2009 and April 30, 2010, meaning that those members of the military, intelligence community, and Foreign Service will qualify for the credit if they purchase a home before May 1, 2011 (or enter into a binding contract for the purchase of a home before May 1, 2011 and close on the purchase before July 1, 2011).
  - Continues to allow taxpayers purchasing a principal residence after December 31, 2008 to accelerate receipt of the credit by electing to treat the purchase as having been made on December 31 of the prior calendar year and taking the credit on the prior year's tax return.
  - Increases the income thresholds for phase-out of the credit to $125,000 for single individuals (from $75,000) and to $225,000 for married couples filing joint returns (from $150,000).
  - Limits eligibility for the credit by disallowing the credit if the purchase price for the home exceeds $800,000, requiring that the taxpayer or the taxpayer's spouse be age 18 or older to claim the credit, and providing that individuals who can be claimed as a dependent of another taxpayer for the taxable year that the credit is claimed are ineligible for the credit.

- Prohibits taxpayers from claiming both the District of Columbia first-time homebuyer credit and the general first-time homebuyer credit.
- Allows long-time homeowners (individuals who have owned and used the same residence for five consecutive years during the prior eight years) to receive a reduced credit on the purchase of a new residence. The credit is reduced to $6,500 (from $8,000) for married couples filing jointly and to $3,250 (from $4,000) for single individuals or married filing separate returns.

- ***Expanded net operating loss carryback period for all businesses.*** The American Recovery and Reinvestment Tax Act of 2009 (Recovery Act) allowed eligible small businesses (defined as a corporation, a partnership, or a sole proprietorship having average annual gross receipts of $15 million or less for the three-year period ending with the 2008 tax year) to elect to carry back NOLs for taxable years that began or ended in 2008, but not both, for up to five years. The WHBA Act offers an extended NOL carryback election allowing all businesses, regardless of size, to carryback NOLs for up to five years for losses incurred in a taxable year that begins after December 31, 2007 and before January 1, 2010. This extended NOL carryback election under the WHBA Act can generally only be made for one taxable year that falls within that period. But eligible small businesses that previously elected to carryback an applicable 2008 NOL under the Recovery Act can also make an extended NOL carryback election for 2009 NOLs under the WHBA Act. NOLs carried back under the WHBA Act's extended carryback election can offset up to 50% of the taxpayer's income in the fifth taxable year preceding the loss, and can offset up to 100% of the taxpayer's income in the other four carryback years. This limitation does not apply to carrybacks under the Recovery Act of an applicable 2008 NOL by an eligible small business, but does apply to carrybacks by an eligible small business of NOLs under the WHBA Act's expanded NOL carryback provision. The WHBA Act also includes an extended NOL carryback election for life insurance companies, suspends the 90% limitation on alternative tax NOL deductions attributable to carrybacks of the NOL for which an extended carryback is elected, and limits the extended carryback for Troubled Asset Relief Program recipients (including other members in the same affiliated group as a TARP recipient).
- ***Exclusion of Expanded Housing Assistance Program Payments from Income.*** In the Recovery Act, Congress expanded the type of payments that can be made under the Department of Defense Homeowner Assistance Program (HAP), and the WHBA Act confirms that recipients of payments under the expanded HAP are not subject to tax on those payments.

B. <u>Revenue Offsets</u>:

- ***Expansion of E-Filing Requirement for Return Preparers.*** The WHBA Act significantly expands the requirements for electronic filing of tax returns by paid tax preparers. Previously, the Treasury Department could not issue regulations requiring a return preparer to file returns electronically unless the return preparer filed 250 or more tax returns during a year or requiring electronic filing of individual, estate, and trust income tax returns. The WHBA Act, however, requires all paid tax return preparers to file all individual, estate, and trust income tax returns electronically after December 31, 2010 unless the return preparer reasonably expects to file 10 or fewer returns during that year.
- ***Delay in Application of Worldwide Allocation of Interest.*** In 2004, Congress modified the interest expense allocation and apportionment rules for affiliated groups to allow a worldwide affiliated group to determine the foreign source income of the group by allocating and apportioning interest expense on a worldwide basis for domestic members of the group and controlled foreign corporations in the group as if they were a single corporation. The worldwide interest allocation rules were previously scheduled to take effect for tax years beginning after December 31, 2010. The WHBA Act further delays their implementation for seven more years, until tax years beginning after December 31, 2017.
- ***Federal Unemployment Tax Act (FUTA) Surtax Extended.*** The WHBA Act extends the expiration of the 0.2% "temporary" FUTA surtax (first enacted in 1976) from the end of the 2009 calendar year to the end of June 2011. Thus, unless the "temporary" surtax is extended again, employers will

continue to pay FUTA tax at the rate of 6.2% (the 6.0% permanent rate plus the 0.2% "temporary" surtax rate) through the end of June 2011, after which the 0.2% temporary FUTA surtax expires and only the permanent 6.0% rate will remain.

- ***Increased Quarterly Estimated Tax Payments For Large Corporations.*** Corporations are generally required to make quarterly estimated tax payments. Earlier this year, Congress increased the estimated payment due from large corporations (those with assets of $1 billion or greater as determined at the end of the preceding tax year) in July, August, or September of 2014 to 100.25% of the tax otherwise due. The WHBA Act increases the estimated payments due from large corporations in July, August, or September of 2014 by an additional 33 percentage points. The next quarterly estimated tax payment will be reduced to reflect the increased payment.
- ***Increased "Failure To File" Penalties For S Corporations and Partnerships.*** Internal Revenue Code §§ 6698(b)(1) and 6699(b)(1) impose penalties for failing to timely file partnership and S corporation tax returns of $89 per month, multiplied by the number of shareholders or partners, up to a maximum of 12 months. The WHBA Act increases the penalties from $89 to $195 for tax years beginning after December 31, 2009.

Should you have any questions or otherwise wish to discuss any tax provisions in the WHBA Act, please contact any attorney in the Firm's Tax Department.