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Worker, Homeownership, and Business Assistance Act of 2009

-by Neil E. Harl*

One of the shortest tax bills in modern time, containing only 18 provisions, passed the Congress and was signed into law on November 6, 2009.¹ Notwithstanding its brevity, the legislation contains some very significant provisions for workers, homeowners and businesses.

Credits for Home Ownership

Under the Housing Assistance Tax Act of 2008,² a taxpayer who was a first-time home buyer was eligible for a 10-percent (of the purchase price) refundable credit equal to the lesser of \$7,500 (\$3,750 for a married taxpayer filing separately) or 10 percent of the purchase price of a principal residence.³ The credit phased out for individual taxpayers with modified adjusted gross income in the year of purchase between \$150,000 and \$170,000 for joint filers, \$75,000 to \$95,000 for those married filing separately.⁴ The credit was recaptured over 15-years with no interest charge beginning in the second taxable year after the taxable year in which the home was purchased.⁵ In the event the taxpayer sold the home or the home ceased to be used as the principal residence of the taxpayer or the taxpayer's spouse, before complete repayment of the credit, any remaining credit amount was due on the return for the year the home was sold or ceased to be used as the principal residence.⁶ The provision was effective for qualifying home purchases on or after April 9, 2008, and before December 1, 2009.⁷

In 2009, Congress passed and the President signed the American Recovery and Reinvestment Act of 2009⁸ which increased the maximum 10 percent first-time home buyer tax credit from \$7,500 to \$8,000.⁹ The Act also eliminated any required repayment after 36 months in the home for any credit allowed for the purchase of a principal residence after December 31, 2008 and before December 1, 2009,¹⁰ the date set for termination of the first-time home buyer credit program.¹¹ The phase-out continued at the same levels for the credit authorized in 2009.

The legislation signed on November 6, 2009¹² extended the \$8,000 tax credit for first-time home buyers through April 30, 2010.¹³ The new legislation also authorizes a reduced credit of \$6,500 for individuals (and, if married, the individual's spouse) who have owned and used the same residence as their principal residence for any five consecutive-year period

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during the eight year period ending on the date of purchase of a subsequent principal residence.¹⁴ The individual or individuals are considered to be a first-time home buyer.¹⁵ The income phase-out is changed from \$75,000/ \$150,000 to \$125,000/ \$225,000.¹⁶ The new law specifies that the purchase price of the residence cannot exceed \$800,000¹⁷ and the purchaser must have attained the age of 18-years unless the taxpayer is married and one of the spouses meets the age requirement.¹⁸ The new rules also provide that the residence cannot be acquired from the spouse's family by gift or inheritance (where the income tax basis carries over), in addition to the related party limitations in the earlier enactment.¹⁹ Special rules apply to military personnel.

Five-year Carryback of Net Operating Losses

The American Recovery and Reinvestment Act of 2009²⁰ provided for a three, four or five year carryback of 2008 net operating losses (the choice was up to the taxpayer) but only for qualified small businesses with average gross receipts of \$15 million or less.²¹

Under the legislation signed into law on November 6, 2009, law, for net operating losses for a taxable year ending after December 31, 2007 and beginning before January 1, 2010 (basically 2008 and 2009), the net operating loss by election can be carried back as many as five years and is open to all businesses (except for those receiving funds under the Troubled Asset Relief Program -- TARP--if the federal government acquired or had the right to acquire an equity interest in the firm).²² However, an election may be made *for only one taxable year*.²³ For elections to carry back the NOL to the fifth taxable year preceding the taxable year of the loss, the amount of NOL is limited to 50 percent of the taxpayer's taxable income for all except for elections by small businesses.²⁴

These provisions do not apply to farming losses²⁵ Farming losses have been eligible for five year carryback since 1998.²⁶

Failure to File Penalty for S Corporation and Partnership Returns

The legislation raises the penalty for failure to file an S corporation or partnership return from \$89 to \$195 per shareholder or partner per month for a maximum of 12 months. The change is effective for tax years beginning after December 31, 2009.²⁷

Mandatory E-Filing

Tax return preparers, except for those expecting to file 10 or fewer individual income tax returns during the calendar year, are required to e-file the returns, effective for returns filed after 2010.²⁸ This applies to taxes imposed by subtitle A of the Internal Revenue Code (income tax).²⁹

FUTA surtax

The new law extends the 0.2 percent FUTA surtax through

2010 and for the first six months of calendar year 2011.³⁰ Thus, the 6.2 percent rate will continue into the first half of 2011.

Unemployment Benefits

The legislation provides 14 additional weeks of unemployment benefits to all unemployed workers who exhaust their benefits and six additional weeks of benefits to unemployed workers who exhaust their benefits in states with 8.5 percent unemployment or more.³¹

ENDNOTES

¹ H.R. 3548, Worker, Homeownership, and Business Assistance Act of 2009, 111th Cong., 1st Sess. (2009), an Act to amend the Supplemental Appropriations Act of 2008, Pub. L. No. 110-252, 122 Stat. 2323 (2008).

² Pub. L. No. 110-289, § 3011(a), 122 Stat. 2888 (2008).

³ I.R.C. § 36(a). See IR 2008-106. The credit was claimed on Form 5405.

⁴ I.R.C. § 36(b)(2).

⁵ I.R.C. § 36(f), (f)(7).

⁶ *Id.*

⁷ I.R.C. § 36(h).

⁸ Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁹ I.R.C. § 36(b)(1).

¹⁰ I.R.C. § 36(f)(4)(D).

¹¹ I.R.C. § 36(h).

¹² See note 1 *supra*.

¹³ I.R.C. § 36(h), amended by H.R. 3548, 111th Cong., 1st Sess. (2009).

¹⁴ I.R.C. § 36(c)(6).

¹⁵ *Id.*

¹⁶ I.R.C. § 36(b)(2)(A)(I)(II).

¹⁷ I.R.C. § 36(b)(3).

¹⁸ I.R.C. § 36(b)(4).

¹⁹ I.R.C. § 36(c)(3)(A)(I). The age and spousal family provisions are effective for homes purchased after November 6, 2009, the date of enactment.

²⁰ Pub. L.No. 111-5, 123 Stat. 115 (2009).

²¹ I.R.C. § 172(b)(1)(H).

²² I.R.C. § 172(b)(1)(H).

²³ I.R.C. § 172(b)(1)(H)(iii)(I).

²⁴ I.R.C. § 172(b)(1)(H)(iv).

²⁵ I.R.C. § 172(b)(1)(F)(ii).

²⁶ Pub. L. No. 105-277, § 2013, 112 Stat. 2681-887 (1998).

²⁷ I.R.C. §§ 6698(b)(1), 6699(b)(1).

²⁸ I.R.C. § 6011(e)(3).

²⁹ I.R.C. § 6011(e)(3)(C).

³⁰ I.R.C. § 3301.

³¹ H.R. 3548, Secs. 2 - 9, 111th Cong., 1st Sess. (2009).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

ESTATE PROPERTY. The debtor had established a college savings account for the debtor's child. The debtor deposited \$14,500 into the account and filed a Chapter 7 bankruptcy petition two weeks later. The debtor's parent had also contributed \$40,000 to the account. The Chapter 7 trustee sought turnover of the account balance as estate property. The court held that the account funds were estate property and not eligible for any exclusion. The next issue of the *Digest* will publish an article on this case by Neil E. Harl. *In re Bourguignon*, 2009-2 U.S. Tax Cas. (CCH) ¶ 50,717 (Bankr. D. Idaho 2009).

CHAPTER 12

AUTOMATIC STAY. The debtors had filed a previous Chapter 12 case which was dismissed after the debtors failed to make payments to the trustee. Upon dismissal of the case, a creditor sought to sell farm land collateral held by the debtors. The parties reached an agreement under which the debtors would make all payments in default and pay all real property taxes owed on the property. The debtors made the back payments but failed to pay the taxes. The debtors filed for Chapter 12 again just before the property was to be sold in a trustee's sale. The creditor sought relief from the automatic stay, arguing that the debtors had no equity in the property, did not need the property for a successful reorganization and had improperly filed the case within 180 days of dismissal of the previous Chapter 12 case. The court held that the 180-day rule did not apply because the creditor failed to show that the debtors willfully failed to abide the orders of the bankruptcy court. The court also found that the debtors did have equity in the property, even when the back taxes, attorney's fees and other charges were added. The court denied relief from the automatic stay, noting that the creditor was adequately protected and that the debtors had shown good faith in making all the back payments. The court also noted that the decision was close because the debtors had promised payment of the taxes when the debtor knew that they would not be able to make those payments, but the court gave more weight to the debtors' payment of all defaulted payments. *In re Jochem*, 2009 Bankr. LEXIS 3424 (Bankr. D. Neb. 2009).

PLAN. The debtor was divorced pre-petition and the divorce decree awarded the debtor farmland and farm buildings. The former spouse was awarded almost \$400,000. During the appeal of the divorce decree, the debtor filed for Chapter 12 and the Chapter 12 plan provided for payment of the divorce decree award to the former spouse over 30 years with a 10 year balloon and at 5.25 percent interest. The spouse objected to the plan because the debtor failed to show that the plan was feasible since the income projections were not consistent with the income history of the farm. The court held that the plan would not be confirmed because (1) the income projections were inconsistent with the history of income; (2) the debtor has failed to pay the divorce judgment despite the substantial equity in the farm property; (3) installment payment of the divorce judgment was unfair to the spouse because of the inherent risks in farming which could produce insufficient income to make plan payments; and (4) the plan did not provide for payment of the attorney's fees awarded in the divorce decree. The court indicated that no plan would be confirmed unless it provided for some immediate payment of the divorce judgment. *In re Melcher*, 2009 Bankr. LEXIS 3423 (Bankr. D. Neb. 2009).

FEDERAL FARM PROGRAMS

BRUCELLOSIS. The APHIS has adopted as final regulations amending the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Montana from Class A to Class Free. 74 Fed. Reg. 57245 (Nov. 5, 2009).

FEDERAL ESTATE AND GIFT TAXATION

ESTATE TAX LIEN. In a Chief Counsel Advice Letter, the IRS stated that, if a qualified heir's taxpayer identification number is not included on Form 706 which makes a special use valuation election, the Service should obtain and place, in redacted form, the TIN on Form 668H lien on Section 2032A property. If the qualified heir is a trust, the Form 668H should also include the