January/February 2010

HOLTZ RUBENSTEIN REMINICK
ADVISER

Tax Changes for Businesses

In November 2009, President Obama signed into law the "Worker, Homeownership, and Business Assistance Act of 2009", which extends and expands a popular temporary tax incentive – the five-year net operating loss ("NOL") carryback provisions. The act also makes several other tax changes applicable to businesses. Here are some of the most significant changes:

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

The new, expanded election is available for NOLs incurred in 2008 or 2009, but not for both years. However, eligible small businesses that elected under the 2009 Recovery Act to carry back 2008 NOLs may make the election for an additional year. This enables the qualified small business to carryback NOLs from both 2008 and 2009 for up to five years. It should be noted that the 50% limitation, as mentioned above, 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.

The alternative minimum tax ("AMT") is also affected by the new law, which suspends the 90% income limitation on the use of NOLs for determining AMT for an extended carryback year. This is effective for years ended after December 31, 2002. Under the old law, a taxpayer's NOL deduction cannot reduce the taxpayer's alternative minimum taxable income ("AMTI") by more than 90% of the AMTI.

Generally, an election to waive the carryback period for an NOL cannot be revoked. However, under the transition rules, a taxpayer may revoke that election for a tax year ended before November 6, 2009 by the extended due date of its last tax year beginning in 2009. The transition rules afford an opportunity to take advantage of the newly enacted carryback rules for taxpayers who would have utilized the extended carryback rules had the law been signed before those tax returns were filed.

Other changes in the new act include an additional FUTA Surtax extension through June 2011, and an increased penalty for failure to file partnership or S corporation tax returns.

Under the old law, the Federal Unemployment Tax Act ("FUTA") tax was imposed at a rate of 6.2% through 2009 and 6% for years 2010 and later years. The new law extends the 6.2% rate through June 2011 before switching back to 6% for the remainder of 2011 and for later years.

The penalty for failure to file a partnership or S corporation return (for tax years beginning after December 31, 2009) has been raised to $195 (from $89), multiplied by the number of partners or shareholders, for each month the failure continues, up to a maximum of 12 months.

If you have any questions, please contact Senior Tax Manager Barry Nagler at (631) 719-3354 or BNagler@hrrllp.com.

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Holtz Rubenstein Reminick LLP • www.hrrllp.com

1430 Broadway
New York, NY 10018
212-697-6900

125 Baylis Road
Melville, NY 11747
631-752-7400

To change contact information, please contact info@holtznews.com