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AN INDEPENDENT MEMBER OF BDO SEIDMAN ALLIANCE

Memo

To: Clients

From: Weber • O'Brien, Ltd.

Re: American Recovery and Reinvestment Act 2009

This month the American Recovery and Reinvestment Act of 2009 ("The Act") was signed into law. We believe that each and every builder and developer must be aware of all provisions of the new tax act as they may apply to them.

The following is a summary of the relevant tax benefits and provisions of the American Recovery and Reinvestment Act of 2009.

Extension of bonus depreciation

Last year, Congress temporarily allowed business to recover the costs of capital expenditures made in 2008 faster than the ordinary depreciation schedule would allow by permitting these businesses to immediately write off 50% of the cost of new qualifying depreciable property acquired in 2008 for use in the United States. The additional depreciation deduction was allowed against both regular income tax and alternative minimum tax. The new law extends this temporary benefit for qualifying property purchased and placed into service in 2009.

Higher Caps on Vehicle Depreciation

The regular dollar cap on depreciation of new vehicles placed in service in 2009 has been increased by $8,000 when bonus depreciation is taken. The first year depreciation dollar cap for new autos is now $10,960 (up from $2,960). The depreciation limit on a new qualifying truck or van increases to $11,160 from $3,160.

Extension of enhanced small business expensing (Section 179)

In order to help small businesses quickly recover the cost of certain capital expenses, small business taxpayers may elect to write off the cost of these expenses in the year of acquisition in lieu of recovering these costs over time through depreciation. Last year, Congress temporarily increased the amount that small businesses could write off for capital expenditures incurred in tax years beginning in 2008 to $250,000 and increased the phase-out threshold for 2008 to $800,000. The new law extends these temporary increases for capital expenditures incurred in tax years beginning in 2009. For tax years beginning after 2009, the deductible expense cannot exceed $125,000, indexed for inflation and the phase out begins at $500,000, also indexed for inflation.

Expanded loss carry-back of net operating losses for small businesses

Under pre-Act law, net operating losses (NOLs) may be carried back to the two years before the year that the loss arises and carried forward to each of the succeeding twenty years. For NOLs arising in 2008, the new law allows an eligible small business to elect to carry-back the NOL three, four, or five years. This applies to small businesses with average annual gross receipts, for the past three years, of $15 million or less.

Special rules apply in calculating the average gross receipts of affiliated companies.

For taxpayers with a fiscal year end, an election may be made to apply this provision to the tax year beginning in 2008 rather than to the tax year ending in 2008.

NOTE THIS PROVISION IS VERY INTERESTING TO BUILDERS AND DEVELOPERS WHO HAVE SIGNIFCANT NOL CARRY-BACKS AVAILABLE**.

Incentives to hire unemployed veterans and disconnected youth

Businesses are allowed to claim a work opportunity tax credit in 2009 and 2010 equal to 40% of the first $6,000 of wages paid, in the first year of employment, to employees of one of nine targeted groups. The new law expands the work opportunity tax credit to include two new targeted groups: (1) unemployed veterans; and (2) disconnected youth.

Individuals qualify as unemployed veterans if they were discharged or released from active duty from the United States Armed Forces during the five-year period before date of hire and received unemployment compensation for more than four weeks during the year before being hired.

Individuals qualify as disconnected youths if they are between the ages of 16 and 25 and have not been regularly employed or attended school in the past 6 months.

Certification of the individuals status as a member of a targeted group must be received from a designated local agency prior to employment.

Extension of monetization of accumulated AMT & R&D credits in lieu of bonus depreciation

The new law extends the provision contained in the Foreclosure Prevention Act of 2008 and allows AMT and loss taxpayers in 2009 to elect to receive 20% of the value of their old AMT or research and development (R&D) credits to the extent such taxpayers invest in assets that qualify for bonus depreciation.

Delayed recognition of certain cancellation of debt income

To benefit certain businesses that buy their own debt at a discount, the new law lets the businesses elect to recognize cancellation of debt income ("CODI") over 10 years (defer tax on CODI for the first four or five years and recognize this income ratably over the following five tax years) for specified types of business debt repurchased by the business in 2009 or 2010.

Qualified small business stock

The new law increases the exclusion for gain from the sale of certain small business stock held for more than five years from 50% to 75% for stock issued after the enactment date and before 2011.

S corp holding period

The new law temporarily shortens the holding period of assets subject to built-in gains tax from ten years to seven years. Thus, the recognition period will end at the beginning of 2009 tax year if the S election was made for 2002 (and 2010 if the S election was made for 2003).

Repeal of IRS's built-in loss rules.

The new law provides a prospective repeal of Notice 2008-83, the controversial IRS guidance which provided that if a bank recognizes a loss from the disposition of a loan or takes a bad debt deduction under the specific charge-off or reserve methods of accounting after a change in ownership, that loss or deduction will not be treated as a built in loss attributable to the pre-acquisition period.

The new law included several significant individual tax provisions builders should be aware of as follows:

Tax Credit for First-Time Homebuyers.

The new law also provides for an enhanced credit for First Time Homebuyers with a removal of the repayment requirement. You may remember that last years Housing Act included a tax credit giving first-time homebuyers up to $7,500 (actually $7,500 or 10% of the purchase price, whichever is less) credit for buying a home between April 8, 2008, and July 1, 2009. Single taxpayers with incomes up to $75,000 and married couples with incomes up to $150,000 qualified for the full tax credit. However, despite high hopes that the credit would be effective in getting people to buy homes and thereby reduce the excessive inventory on the market, the credit is widely acknowledged to have failed in its objective. The problem, according to realtors and industry officials, was that buyers were turned off by the odd way the credit worked. While the credit functioned initially like other tax credits, reducing a person's tax liability on a dollar-for-dollar basis, it was unusual in that, unlike other federal tax credits the credit for first-time homebuyers had to be paid back to the government ratably over a period of 15 years (or earlier if the house sold). So, as a practical matter, the credit was the equivalent of an interest-free loan from the government. It was the payback requirement that many in the industry felt kept potential buyers on the sidelines. Now, Congress has beefed up the credit in renewed optimism of enticing more first-time homebuyers to take the plunge.

The new legislation removes the repayment requirement for homes purchased on or after January 1, 2009. The new law also extends the credit through the end of November 2009, and bumps up the maximum credit amount from $7,500 to $8,000. However, the new law retains the recapture provision if the house is sold within three years of purchase.

Small Business Estimated Tax Payments

For qualifying individuals, the prior year safe harbor for estimated tax payments for 2009 is reduced from 100% to 90% of prior year tax. A qualifying individual has adjusted gross income on the preceding tax return of less than $500,000 ($250,000 if married filing separate) and the individual certifies that more than 50% of the gross income on the return was from a small business (generally less than 500 employees).

Residential Energy Property Credit

The non-business energy property credit, Code Section 25(c) has been expanded as well. The new legislation modifies and extends the non-business energy property credit in the following ways:

- The 10% credit rate is increased to 30%;
- The dollar limitations on residential energy property expenditures have been eliminated; instead, all energy property that was previously eligible for the $50, $150, and $300 credits is instead eligible for a 30% credit;
- The $500 lifetime cap ($200 for windows) is eliminated and replaced with an aggregate $1,500 cap for 2009 and 2010; and
- The credit is extended for one year, thru Dec. 31, 2010.

Improvements eligible for the Code Sec. 25C credit include insulation materials, exterior windows and the following that meet minimum energy efficiency ratings:

- Skylights
- Exterior doors
- Central air conditioners
- Natural gas, propane or oil water heaters or furnaces
- Hot water boilers
- Electric heat pump water heaters
- Certain metal roofs
- Biomass fuel stoves
- Advanced main air circulating fans

Please contact your Lawyer or CPA with specific questions regarding the above.

Let's hope this bill provides some limited benefit to builders and developers at this difficult time.

This article is brought to you by James Weber, CPA and Dave O'Brien, CPA of Weber•O'Brien, Ltd., leaders in the Construction Industry, Accounting and Tax Consulting Services.