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The Small Business Jobs Act of 2010

-by Neil E. Harl

In a surprise move, the United States Senate on September 16, 2010 approved the Small Business Jobs Act of 20101 by a vote of 61 to 38 and sent the bill to the House of Representatives which reportedly has no plans to amend the bill. Approval is expected some time during the week of September 20. Although the editorial policy of Agricultural Law Digest is to delay coverage until legislation is signed into law, the importance of this legislation for taxpayer planning for 2010 and 2011 is sufficiently great to justify an exception.

The following is a summary of the major provisions of the bill as it was approved by the Senate.

Depreciation

The legislation increases the amount of expense method depreciation2 for qualifying property placed in service during the taxable year in 2010 and 2011 from $250,0003 and a threshold phase-out of $800,000 to a maximum allowance of $500,000 and a threshold phase-out of $2,000,000.4

The provision also expands, temporarily, the definition of property qualifying for expense method depreciation to include specified categories of interests in real property including qualified leasehold improvement property,5 qualified restaurant property6 and qualified retail improvement property.7 The maximum allowance that may be claimed on those real property items is $250,000 for each taxable year. Excess amounts can be carried over but only to taxable years in which the definition of eligible section 179 property includes qualified real property. The provision also permits a taxpayer to elect to exclude real property from the definition of section 179 property. Act § 2021, amending I.R.C. § 179, effective for taxable years beginning after December 31, 2009.

The new legislation also extends the so-called “bonus” depreciation8 for one year (2010) at the 50 percent level for qualified property acquired and placed in service during 2010 (2010 or 2011 for long-lived and transportation property).9 Act § 2022, amending I.R.C. § 168(k), effective for property placed in service in taxable years ending after December 31, 2009.

Start-up expenditures

The legislation increases the amount allowed as a deduction for start-up expenditures.10 For

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taxable years beginning in 2010, the new law increases the amount of start-up expenditures a taxpayer can elect to deduct from $5,000 to $10,000 and also increases the deduction phase-out threshold such that the $10,000 allowance is reduced by the amount by which the total cost of start-up expenditures exceeds $60,000 rather than $50,000.\textsuperscript{11} Act § 2031, amending I.R.C. § 195, effective for taxable years beginning after December 31, 2009.

**Cellular telephones**

The legislation removes cellular telephones (and similar telecommunications equipment) from the definition of listed property.\textsuperscript{12} That eliminates the restrictions on claiming depreciation and the heightened substantiation requirements imposed on cellular telephones. Of course, the depreciation is still limited to the percentage of business use.\textsuperscript{13}

The change does not affect the authority of the Department of the Treasury to determine the appropriate characterization of cellular telephones as a fringe benefit under I.R.C. § 132.\textsuperscript{14} Act § 2043, amending I.R.C. § 280F, effective for taxable years ending after December 31, 2009.

**Deducting health insurance costs in computing self-employment income**

In figuring adjusted gross income for income tax purposes under current law, self-employed individuals are allowed to deduct the cost of health insurance for themselves, their spouse, dependents and any children under age 27 as of the end of the taxable year.\textsuperscript{15} However, the deduction allowable for the cost of health insurance for self-employed individuals (and their spouse, dependents and children under age 27) is not taken into account in determining the self-employed taxpayer’s net earnings from self-employment for purposes of SECA taxes.\textsuperscript{16}

Under the provision of the Act, the deduction allowed for income tax purposes is also allowed for 2010 in calculating net earnings from self-employment for purposes of the SECA tax. Act § 2042, amending I.R.C. § 162(l), effective for the taxpayer’s first taxable year beginning after December 31, 2009.

**Five-year carryback of general business credit of eligible small businesses**

Under present law, general business credits may not exceed the excess of the taxpayer’s net income tax over the greater of the taxpayer’s tentative minimum tax or 25 percent of so much of the taxpayer’s net regular tax liability as exceeds $25,000.\textsuperscript{17} General business credits in excess of this amount may be carried back one year and forward for up to 20 years.\textsuperscript{18}

The provision extends the carryback period from one to five years for eligible small business credits (defined as the sum of the general business credits for an eligible small business). An eligible small business is a corporation the stock of which is not publicly traded, or a partnership which meets the gross receipts test of section 448(c).\textsuperscript{19} For a sole proprietorship, the gross receipts test is applied as if it were a corporation. Credits for a partnership or S corporation are not treated as eligible small business credits by a partner or shareholder unless the partner or shareholder meets the gross receipts test for the taxable year in which the credits are treated as current year business credits. Act § 2012, amending I.R.C. § 39, effective for credits determined in the taxpayer’s first taxable year after December 31, 2009.

**General business credit not subject to AMT**

Under the provision, an eligible small business credit may offset both regular tax and alternative minimum tax liability. The tentative minimum tax is treated as being zero for eligible small business credits.

An eligible small business is a corporation the stock of which is not publicly traded or a partnership which meets the gross receipts test of I.R.C. § 448(c).\textsuperscript{20} For a sole proprietorship, the gross receipts test is applied as though it were a corporation. Partners and shareholders of S corporations must meet the gross receipts test for the taxable year in which the credits are treated as current year business credits. Act § 2013, amending I.R.C. § 38, effective for credits determined in a taxpayer’s first taxable year beginning after December 31, 2009.

**Temporary reduction in recognition period for S corporation built-in gains tax**

For taxable years beginning in 2011, the legislation provides that the recognition period is the five calendar year period, not ten, beginning with the first day of the first taxable year for which the corporation was an S corporation.\textsuperscript{21} Act § 2014, amending I.R.C. § 1374, effective for taxable years beginning after December 31, 2010.

**Small business stock**

The 2010 law increases the percentage exclusion for qualified small business stock acquired during 2010 to 100 percent and the minimum tax preference does not apply. As a result, no regular tax or alternative minimum tax is imposed on the sale of eligible stock held for at least five years. Act § 2011, amending I.R.C. § 1202, effective for stock issued after the date of enactment and before January 1, 2011.

**Corporate estimated tax**

The legislation increases the required payment of estimated tax due in July, August or September 2015 by 36 percentage points for corporations with assets of at least $1 billion.\textsuperscript{22} Act § 2131, amending I.R.C. § 6655, effective on the date of enactment of the legislation.

**ENDNOTES**

1 Senate Amendment 4594 to H.R. 5297, 111th Cong., 2d Sess. (2010).
2 I.R.C. § 179.
5 For the meaning of the term, see I.R.C. Sec. 168(e)(7).
6 See I.R.C. § 168(e)(7).
7 See I.R.C. § 168(e)(8), without regard to I.R.C. § 168(e)(8)(E).
CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

FEDERAL TAX

DISCHARGE. In a Chief Counsel Notice, the IRS discusses the dischargeability in bankruptcy of taxes for which a return was not filed until after an assessment was made. The IRS noted that returns filed after an assessment do not qualify as returns for bankruptcy purposes because the return serves no tax purpose. The IRS noted one contrary opinion, In re Colsen, 446 F.3d 836 (8th Cir. 2006), holding that a document that on its face evinces an honest and reasonable attempt to satisfy the tax laws qualifies as a return, whether or not it was filed after assessment. The IRS further pointed to an unnumbered paragraph added to Section 523(a) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: “For the purpose of this subsection, the term ‘return’ means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements).” Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.” Thus, a “section 6020(b)” substitute return filed solely by IRS produces nondischargeable taxes but a “section 6020(a)” (return filed by IRS with the assistance and signature of the taxpayer) can create dischargeable taxes. The IRS also ruled that a late filed return does not necessarily result in nondischargeable taxes, so long as the return is filed before assessment and otherwise qualifies for discharge. In addition, the IRS noted that some taxes may qualify for discharge and some may not, depending on the assessment date in relation to the return filing and the bankruptcy petition date. See also Harl, Agricultural Law § 120.06[4] (2010). CC-2010-016.

Sept. 8, 2010.

The debtor owed taxes for 1998-2006 and filed for chapter 7 in 2009. The debtor had filed several serial bankruptcy cases beginning in 2005 and did not seek an automatic stay in several of the cases. The IRS sought to extend the three year assessment period for each of the bankruptcy cases so that the taxes for 2002 through 2006 were nondischargeable. The court held that the three year period would be extended for only the periods, plus 90 days, where the automatic stay was imposed. The IRS also sought summary judgment for nondischargeability of all the taxes for willful evasion of payment of the taxes. Although the court found that the taxpayer had a known duty to pay the taxes, the evidence was not sufficient for a summary judgment on the issue of whether the debtor’s actions would be held to be willful. The court noted that the debtor had misvalued assets and filed returns late but had also cooperated with the IRS, made offers in compromise and had legitimate financial difficulties. In re Acker, 2010-2 U.S. Tax Cas. (CCH) ¶ 50,611 (E.D. Tex. 2010).

The debtor filed the 2000 income tax return late in 2003 but did not pay any tax. The debtor filed a bankruptcy petition in 2005 and the IRS filed notice of federal tax lien in 2009 for the 2000 taxes, penalties and interest. The debtor responded that the tax principal had been paid and that the interest was discharged in bankruptcy because the interest functioned as a penalty and was dischargeable under Section 507(a). The court rejected the characterization of interest as a penalty because interest and penalties were each specifically treated under the bankruptcy laws. The debtor agreed that the taxes for 2000 were not discharged in the bankruptcy case; therefore, the court held that, because the underlying taxes were not discharged, the interest on the taxes was also not discharged. Leathley v. Comm’r, T.C. Memo 2010-194.