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A More Formal Disaster Relief Program

-by Neil E. Harl*

Until 2008, with some exceptions which featured a more general scope, disaster relief tended to be enacted for a specific term and for a specific disaster. As an example, the $100 deductible was suspended for losses on or after August 25, 2005, attributable to Hurricane Katrina. However, in the Emergency Economic Stabilization Act of 2008, the Congress created what some have termed a national disaster relief program. Additional legislation may be needed to create a complete fabric of relief provisions, particularly in light of the fact that many of the 2008 enactments have a limited life (through 2009 only) although the scope of the legislation is national.

This article discusses some of the more significant features of the 2008 legislation.

Disaster expenses

The 2008 legislation allows taxpayers to deduct currently “qualified disaster expenses.” Taxpayers may elect to treat “qualified disaster expenses” paid or incurred in connection with a trade or business or with business-related property under three circumstances:

• If for the abatement or control of hazardous substances released on account of a federally-declared disaster occurring before January 1, 2010;
• For the removal of debris from, or the demolition of structures on, real property which is business-related property destroyed or damaged as a result of a federally-declared disaster occurring before 2010; and
• For the repair of business-related property damaged as a result of a federally-declared disaster occurring before 2010, provided the amount is otherwise chargeable to capital account.

The deduction is treated as depreciation and is subjected to recapture under I.R.C. Section 1245 rules (if not otherwise classified as Section 1245 property).

Casualty losses

The rule has been that non-business losses were deductible only to the extent total non-business casualty and theft losses did not exceed 10 percent of adjusted gross income. Under the 2009 amendment, the 10-percent-of-adjusted-gross-income limitation was repealed, so that the entire loss is deductible as an itemized deduction.

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limitation on casualty loss claims does not apply to federally-declared disaster areas. Taxpayers who do not itemize their deductions can increase their standard deduction by the amount of their net disaster loss for disaster losses occurring before 2010.

Non-business casualty losses have been limited to $100. The $100 floor was raised in 2008 to $500 for 2009 only and reverts to $100 after 2009. Taxpayers can apply casualty losses occurring in a disaster area and attributable to a federally-declared disaster, at the taxpayer’s election, in the taxable year preceding the year the disaster occurred.

**Net operating loss carryback**

Under the 2008 legislation, taxpayers can carry back net operating losses that are classified as “qualified disaster losses” for up to five previous tax years. The term “qualified disaster loss” is defined as the lesser of the taxpayer’s net operating loss during the year of the disaster or the sum of general losses under I.R.C. § 165 plus environmental remediation costs under I.R.C. § 198. Taxpayers may elect out of this carryback allowance before the due date of the return for the year (with extensions) of the net operating loss for which the election is to be in effect. Once made, the election is irrevocable for that taxable year.

Remember, “farming losses” since 1997 have been eligible for a five year carryback.

**Special depreciation allowance**

Up to 50 percent of a taxpayer’s depreciable basis in purchased “qualified disaster assistance property” may be deducted during the first year the property is placed in service. The property must be placed in service by the taxpayer on or before the date which is the last day of the third calendar year following the applicable disaster date (the fourth calendar year for non-residential real property and residential rental property).

Eligible property includes property with a recovery period of 20-years or less, computer software, water utility property and qualified leasehold improvement property or which is non-residential real property or residential rental property. Substantially all of the use of the property must be in a disaster area with respect to a federally-declared disaster occurring before January 1, 2010. The property must be used in the active conduct of a trade or business by the taxpayer in the disaster area and rehabilitates property damaged, or replaces property destroyed or condemned as a result of the federally-declared disaster. The property must be similar in nature to, and located in the same county as, the property being rehabilitated or replaced. The original use of the property must commence with the taxpayer on or after the applicable disaster date (it must be “new” property).

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**ENDNOTES**

1 E.g., I.R.C. § 123(a) (if a principal residence is damaged or destroyed by fire, storm or other casualty, amounts received from insurance are not included in gross income if used to compensate or reimburse for loss of use or occupancy of the residence by the taxpayer and members of the household).


5 I.R.C. § 198A.


8 I.R.C. § 198A(b)(2)(C).

9 I.R.C. § 198A(b)(3).

10 I.R.C. § 198A(d).

11 I.R.C. § 198.

12 I.R.C. § 280B.

13 I.R.C. § 198A(e).

14 I.R.C. § 165(h)(2).

15 I.R.C. § 165(h)(3).


19 I.R.C. § 165(i)(1).


21 Id.

22 I.R.C. § 172(b)(3).

23 Id.

24 I.R.C. § 172(b)(1)(G) (“carryback to each of the 5 taxable years preceding the taxable year of such loss”).

25 I.R.C. § 168(n).


29 Id.

30 Id.