

Spring 2009

A Doeren Mayhew Quarterly Construction Newsletter

IRS Guidance Fine Tunes Tax Breaks in 2009 Recovery Act

With the 2008 tax year just behind us, it's not too early to start thinking about tax saving opportunities available for the 2009 tax year. The IRS is moving quickly to issue guidance on the many tax incentives for individuals and businesses in the American Recovery and Reinvestment Act of 2009 (2009 Recovery Act). Since Congress passed the multi-billion dollar stimulus package in February, the IRS has released guidance on the extended net operating loss (NOL) carryback for small businesses, the new Making Work Pay credit, the enhanced first-time homebuyer tax credit, the new COBRA subsidy, and the new sales tax deduction for motor vehicles.

Net Operating Losses

One of the most valuable tax breaks in the 2009 Recovery Act is the extended NOL carryback. Small businesses with an NOL in 2008 can offset this loss against income earned in up to five prior years. This special treatment will accelerate refunds and generate an immediate infusion of cash into a struggling business. The IRS expects record numbers of small businesses to be eligible for the carryback and has promised to expedite refunds.

To qualify for the new five-year carryback provision, a small business must have no greater than an average of \$15 million in gross receipts over a three-year period ending with the tax year of the NOL. Businesses with more than \$15 million in gross receipts can carry back their 2008 NOL for two years.

Generally, small businesses that are not corporations (including sole proprietorships filing schedule C with their Form 1040) may accelerate a refund by using Form 1045, Application for Tentative Refund. Corporations with NOLs may accelerate a refund by using Form 1139, Corporation Application for Tentative Refund.

If your small business is in a loss position this year, the extended NOL carryback should not be overlooked. The requirements for the extended carryback are complex. The professionals at Doeren Mayhew can help you elect this special treatment and maximize your refund.

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Making Work Pay Credit

Many employers have already implemented the new Making Work Pay credit. The credit reaches \$400 for single individuals and \$800 for married couples filing jointly. Like other incentives, the Making Work Pay credit phases out for higher income taxpayers (single individuals with modified AGI above \$75,000 and married couples filing jointly with modified AGI above \$150,000).

Taxpayers do not have to submit a new Form W-4 to their employers; the credit is automatic. However, an employee with multiple jobs or married couples whose combined incomes place them in a higher tax bracket may want to submit a revised W-4 to ensure sufficient withholding. Our office can determine if you need to adjust your withholding.

First-Time Homebuyer Credit

The 2009 Recovery Act raised the maximum first-time homebuyer credit from \$7,500 to \$8,000 (\$4,000 for married couples filing separately) for qualified homes purchased before December 1, 2009. Congress also removed the repayment requirement for homes purchased in 2009. Like other tax incentives, the first-time homebuyer credit has income restrictions. The credit begins to phase out for single individuals with modified AGI above \$75,000 (\$150,000 for married couples filing jointly).

The IRS recently announced that taxpayers can claim the \$8,000 credit on their 2008 tax returns due April 15, 2009, or on their 2009 tax returns next year. Consequently, taxpayers have several filing options.

Taxpayers purchasing a home in the near future and who have already filed their 2008 returns may want to file an amended return. This will allow them to claim the credit almost immediately. However, some individuals may want to wait and take the credit in 2009.

Taxpayers purchasing a home who have not yet filed their 2008 returns may want to request a six-month extension (until October 15, 2009). Alternatively, they can file as planned and then file an amended return to take the credit.

If you are a first-time homebuyer in 2009, don't miss out on this valuable credit. We can help you determine the best time to take the credit.

Economic Recovery Payment

Social Security recipients, disabled veterans, and retired government employees may be eligible for one-time economic recovery payments of \$250. These payments are in lieu of the Making Work Pay credit. However, the economic recovery payment will be a reduction to any Making Work Pay credit for which the recipient qualifies.

The IRS will not be distributing the economic recovery payments. Individuals will receive them from the Social Security Administration, Department of Veterans Affairs, or



other agency. The SSA expects to start making the payments in May.

COBRA Subsidy

Individuals who are involuntarily terminated from employment between September 1, 2008, and December 31, 2009, may qualify for a 65 percent COBRA premium subsidy for up to nine months. Family members may also be eligible for the subsidy. Eligible individuals will pay 35 percent of the COBRA premium and employers will pay the remaining 65 percent. The COBRA subsidy, however, phases out for individuals whose modified AGI exceeds \$125,000 (\$250,000 for married couples filing jointly). Individuals with modified AGI exceeding \$145,000 (\$290,000 for married couples filing jointly) do not qualify for the subsidy.

Employers will recover their share through a payroll tax credit. The IRS has instructed employers to use Form 941, Employer's Quarterly Federal Tax Return, to report their COBRA premium assistance payments. In some cases, such as multi-employer plans, the plan provides the subsidy and will be reimbursed by taking a credit on Form 941.

Sales Tax Deduction for Vehicle Purchases

Congress created a temporary deduction in the 2009 Recovery Act for state and local sales and excise taxes paid on the purchase of new motor vehicles. Cars, light trucks, motor homes, and motorcycles are eligible for the deduction. The deduction is limited to the tax on up to \$49,500 of the purchase price of an eligible motor vehicle. Because this is an above-the-line deduction, taxpayers who do not itemize their deductions can also take advantage of it.

Similar to other incentives, there are income limitations. The deduction phases out for single individuals with modified AGI between \$125,000 and \$135,000 and married couples with modified AGI between \$250,000 and \$260,000.

Constructing a Claim for Lost Productivity Damages

When a construction project is disrupted through no fault of the contractor, lost productivity may be an important element of the contractor's damages. Quantifying the cost of lost productivity, however, is one of the most difficult challenges in construction litigation.

What is lost productivity?

Productivity generally refers to the amount of work a contractor can perform during a given time. Lost productivity simply means that an unanticipated disruption of the project causes the contractor to work less efficiently, which may lead to additional labor, equipment, and material costs.

Lost productivity is often associated with a delay, but lost productivity damages and delay damages aren't the same thing. A contractor may suffer lost productivity even if the project isn't delayed. Of course, when a delay occurs, lost productivity may become a component of the contractor's damages.

How do you measure damages?

Appraisers can use several methods when quantifying lost productivity damages. Determining the appropriate method depends on the particular job's facts and circumstances. One difficulty in establishing damages is distinguishing whether additional costs were caused by lost productivity or by the contractor's failure to estimate correctly.

For this reason, one of the most common methods (and the one generally favored by the courts) is the measured-mile. It compares a contractor's productivity levels during periods in which work was disrupted with productivity levels during undisrupted periods. The advantage of using this method is that it reflects only recoverable productivity losses, eliminating the need to determine whether a loss is attributable, in whole or in part, to bidding mistakes.

The measured-mile method won't work, however, if a project is disrupted from start to finish. This is because periods of optimal productivity for use as a baseline don't exist. Also, for a baseline period to be appropriate, it must involve work that's reasonably similar to the work being done during the disrupted period. Finally, the measured-mile method relies heavily on thorough documentation of the type of work being done, the disruptions to the work, and the additional costs attributable to those disruptions.

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Win Tigers Tickets!

You could win 4 Detroit Tigers baseball tickets for the June 7 (Sunday) game against the Angels! Just complete the form below and fax it to 248.273.6837 by May 21.

First Name	Last Name
Title	
Company Name	Phone Number
Address	City

A random drawing will be held on May 22, 2009, to determine the winner. Entries must be received by May 21, to be eligible. One entry per company please. The winner will be notified by phone on May 22, and his/her name will appear in next quarter's newsletter.

The winner of last quarter's Detroit Pistons tickets drawing was Chuck Reader of Baseline Constructors.

Congratulations, Chuck!

The Lighter Side

Wife's Cat

A man absolutely hated his wife's cat and decided to get rid of him one day by driving him 20 blocks from his home and leaving him at the park. As he arrived back home, the cat was walking up the driveway.

The next day he decided to drive the cat 40 blocks away. He put the cat out and headed home. Driving back up his driveway, there was the cat!

He kept taking the cat further and further, and the cat would always beat him home. At last he decided to drive a few miles away, turn right, then left, past the bridge, then right again, and another right until he reached what he thought was a safe distance from his home and left the cat there.

Hours later the man calls home to his wife: "Jen, is the cat there?"

"Yes," the wife answers, "Why do you ask?" Frustrated, the man answered, "Put him on the phone, I'm lost and need directions."

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Other methods for calculating lost productivity damages include:

Total Cost Method. Under this method, the appraiser calculates lost productivity damages by taking actual contract costs and subtracting the bid amount (taking into account agreed-upon change orders). Although this method's simplicity may be appealing, it fails to reflect productivity losses caused by bidding mistakes or otherwise attributable to the contractor. It also ignores the reasonableness of costs the contractor incurred. A "modified total cost method" attempts to address these problems by requiring adjustments to account for unreasonable bids or other cost overruns that are the contractor's responsibility.

Actual Cost Method. This method, which relies on actual cost and productivity numbers, is the most accurate, but it may not be practical. First, the labor-intensive nature of the method may render it cost prohibitive. And second, it demands detailed, accurate records that include productivity measurements – something few contractors possess.

Jury Verdict Method. Essentially, this method involves an educated guess on the part of the trier of fact. Some courts have allowed this method when it's clear that a contractor suffered lost productivity damages but there's no other reliable method of quantifying those damages.

How do you build a case?

Proving lost productivity damages requires lawyers and damages experts to work together closely to establish lost productivity. They also need to identify its causes, document the additional costs involved, and select the most appropriate method for measuring it.

If you think you may have a claim for lost productivity, please call our office today at (248) 244-3000 and ask to speak with one of our Construction Group professionals. We can help you determine your best course for action.