Senior Tax Counsel's Report

Bob Deutsch, CTA

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JobKeeper – the gift that keeps on giving!

JobKeeper remains the major issue of current practitioner focus and the picture is fuzzy because the rules are being developed, by necessity, on the run. Critically, the key dates have been pushed back, mainly because much of the detail is only now emerging.

This week I plan to discuss the recently released alternative decline in turnover tests.

Relevantly, the ATO have made a determination ("the Determination") under section 20(4) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* which provides alternative tests for a class of entities to satisfy the decline in turnover test for the purposes of seeking to be a qualifying employer for JobKeeper payment purposes.

Before looking at the alternative tests, a reminder of the basic test. In order for an employer to be eligible for JobKeeper payments, it has to satisfy a number of requirements one of which is the decline in turnover test. The basic test is that an employer satisfies the decline in turnover test if its projected GST turnover for an applicable turnover test period is 30%* less than its current GST turnover for a relevant comparison period.

The applicable turnover test period is either:

- Any the following – a calendar month ending 31 March, 30 April, 31May, 30 June, 31 July, 31 August, 30 September 2020;
- Either – the quarter ending 30 June or 30 September 2020.

The relevant comparison period is the period in 2019 that corresponds to the applicable turnover test period.

All that sounds complex, but to put it simply, it just means you can pick any period listed above as the applicable turnover test period and compare it to the same period in 2019. For example, if the month to March 2020 is chosen as the applicable turnover test period, compare it to the month to 31 March 2019. If the former was $60,000 and the latter $100,000, the basic test would be satisfied as it is a greater than 30% decline.

Under the relevant legislation, the Commissioner can determine alternative decline in turnover tests and that is exactly what he has done with the Determination

To be clear, these are alternative tests such that if an employer satisfies the basic test, it does not need to satisfy any of the alternative tests even if the employer happens to fall into a class covered by one of the alternatives. By parity of reasoning, if an employer fails the basic test but falls into two of the classes covered by the alternative tests, it need only satisfy one of the alternative tests. If it happens to also fail the other alternative test, that is of no consequence.

There are seven (7) alternative tests which cover certain specified situations and give rise to some reasonably complex consequences. I will first consider the situations and then the consequences.

Situations Covered

1. Entities that recently commenced businesses - entities that commenced business before 1 March 2020 but after the relevant comparison period;
2. Entities that recently acquired or disposed of part of their business - entities that acquired or disposed of part of their business after the relevant comparison period but before the applicable turnover test period where the acquisition or disposal changed the entities turnover;
3. Entities that recently restructured - entities that restructure their business or part thereof after the relevant comparison period and before the applicable turnover test period and the restructure changed the entity’s turnover;
4. Entities that have had a recent significant turnover - entities that experience a significant increase in turnover in the 3, 6 or 12 month period immediately before the applicable turnover test period;
5. Entities that recently operated in a declared drought or natural disaster zone - entities that conducted at least some of its business in a declared drought or natural disaster zone during the relevant comparison period and the drought or natural disaster changed the entities turnover;

6. Entities that recently had a year of irregular income – entities which in the 4 quarters in the 12 months prior to the applicable turnover test period, had at least one quarter in which turnover was no more than 50% of the quarter with the highest turnover provided that the entity’s income is not cyclical;
7. Entities that are sole traders or small partnerships with recent sickness, injury or leave – entities that are sole traders or small partnerships with no employees where the sole trader or at least one partner did not work for all or part of the relevant comparison period due to sickness, injury or leave and the turnover of the entity was affected by the sole trader or partner not working for all or part of that period.

Consequences

The consequences differ with each situation but there are some common threads.

In particular, in situation 2,3 and 7, if the relevant comparison period is a month, the entity is to use the current GST turnover from the month immediately after the month in which the acquisition or disposal or the restructure occurred or the sole trader or partner returned to work instead of the entity’s current GST turnover

In situation 1, there are two alternatives, either –

- use the current GST turnover for each whole month after the entity commenced business and before 1 March 2020 added together and divided by the number of whole months (times 3 if a quarterly relevant comparison period is used); or
- use the total current GST turnover in the 3 months immediately before 1 March 2020 divided by 3 (don’t divide by three if a quarterly relevant comparison period is used)

In situation 4, use the total current GST turnover in the 3 months immediately before the applicable turnover test period divided by 3 (don’t divide by 3 if a quarterly relevant comparison period is used).

In situation 5, use the entity’s current GST turnover for the same period in the year immediately before the declaration as a drought zone or a natural disaster zone is made.

In situation 6, use the current GST turnover for each whole month in the 12 months immediately before the applicable turnover test period added together and divided by 12 (times 3 if a quarterly relevant comparison period is used).

In each situation other than situation 5 where it is not needed, months

In each situation other than situation 5 where it is not needed, months covered by the Bushfires 2019-2020 lodgement and payment deferrals and the Drought Help concessions are excluded with some modifications and qualifications etc.

Some possible ambiguities

There are some interesting ambiguities in all this, such as:

- Can situation 1 apply to a business run by a sole trader that is moved into a company say in November 2019 i.e. has the company commenced business before 1 March 2020 but after the relevant comparison period?
- In situations 2, 3 and 5, the event needs to have changed the entity's turnover. It is not entirely clear what that means; the change does not have to be material or significant so presumably Any change is sufficient; is it to be read as requiring cause and effect or something less?
- In situation 3 what is a restructure? – looking at the context and the example provided in the accompanying Explanatory Statement, it seems that it applies more to internal restructures within a company (e.g. merging 2 or more businesses) rather than external restructures such as a merger of companies or a takeover (not sure if they can be described as restructures)
- In situation 6, when is an entity's turnover cyclical or not cyclical? – a farm business; a travel agency; a supermarket in a beachside resort town; a menswear store?
- In situation 7, what exactly needs to be shown in terms of the turnover being affected by the sole trader or partner not working for all or part of the relevant period?; what does "leave" mean? – just not working or something more formal.

Part 4 of our Stimulus Package webinar series takes an in-depth look at the Determination. The webinar is available to all members here.

Some practical advice

In a practical sense, what is the best way to deal with all this complexity and ambiguity. My advice is to document, document, document. In other words, write up the whole story with as much explanation as possible as to why the basic test was satisfied or how an alternative test was decided upon and why it is satisfied. Incorporate some analysis of the other requirements as to how the employer has satisfied the requirements to be eligible for JobKeeper. The document should almost speak for itself so that if asked questions later, the contemporaneous document will have the answers.

It is useful to do this for another reason – looking at the document once completed, you can better evaluate on a more objective basis, just how convincing your position really is. If you don't think it sounds compelling, it probably isn't!

Why so complex?

All this sounds very complex, but, in this case, the complexity is driven by a desire to accommodate as many employers as possible within the JobKeeper arrangements. We should be thankful for and embrace this complexity as it is expanding the range of people who will benefit from JobKeeper. It would have been far easier and certainly less costly for the ATO to have done nothing, so it is to their credit that a wide range of circumstances have been provided for. The work done by the NTLG in particular to assist in the development of these rules have been outstanding and the participants from both the ATO and non-ATO sectors are to be commended.

The range of situations that are covered is bold and this represents a genuine attempt to include as many varied business circumstances as possible. The job is not yet done, and the Treasurer has announced some further measures regarding, among other things, service companies that will significantly expand the coverage. I will consider some of those further changes next week when the details are available.

*50% for entities with aggregate turnover in excess of $1 billion; 15% for ACNC-registered charities excluding non-government schools (government schools are excluded from JobKeeper anyway) and broadly universities

As always, I welcome your thoughts and comments via the TaxVine feedback inbox: vinefeedback@taxinstitute.com.au.

Kind regards,

Bob Deutsch, CTA