The Round Up

Keeping accountants & advisers on top of the important details

September 2020

Key dates

24 Aug – 3 Sept 2020 *Parliament sitting*
7 Sept 2020 *Super guarantee amnesty ends*
27 Sept 2020 JobKeeper 1.0 concludes
28 Sept 2020 – Jobkeeper 2.0 commences

Inside

JobKeeper dominates headlines but as yet, only the new 1 July 2020 employee test date has been confirmed.

Legislation to enact the extension of JobKeeper beyond 27 September is currently before the Senate. The legislation however is merely a framework for the rules. The detail of how JobKeeper 2.0 works in practice will require a legislative instrument to update the Rules. So we have some way to go before we see meaningful detail. As soon as the Rules are updated, we will send you an alert.

The Superannuation Guarantee Amnesty ends on 7 September 2020. The ATO is offering to work with businesses who want to take advantage of the amnesty but because of COVID-19, cannot afford to pay their outstanding SG liability.

If you have any questions about any of the information contained in the Round Up, please contact the help desk online (see Ask Us) or call us on 1800 800 232.

Andrew Matthews
Tax Adviser, Knowledge Shop

Coming up

Login and register for any Knowledge Shop events through the member website to access the discounted member rates.

Thursday live

3 September 2020 **Tax Consolidation Essentials Webinar** – How to form a tax consolidated group. The pros and cons of tax consolidation. Dealing with tax losses and capital losses.
More →

10, 17 & 24 September 2020 **Small Business CGT Concessions Webinar Series** – Step-by-step guide to working though the small business CGT concessions.
More →

15 October 2020 **Unpaid Trust Distributions** – The tax issues created by unpaid trust distributions and how to manage them.
More →

'Super' Wednesdays

23 September 2020 **– SMSF & Pensions**
30 September 2020 **– SMSF & Divorce**
7 & 14 October 2020 **- SMSF & Death Benefits Series**

Online Workshops

16 October 2020 **- SMSF Audit & Compliance Workshop**

From Government

New JobKeeper test date for employees

On 14 August 2020, the Treasurer released *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 7) 2020*, amending the date of eligibility for JobKeeper from 1 March 2020 to 1 July 2020. The amendment applies from 3 August 2020.

Under the original JobKeeper rules, an employee generally had to be employed by the entity as at 1 March 2020 and have met certain conditions at that date to qualify as an eligible employee (e.g., long-term casual employee requirements). For JobKeeper fortnights beginning on or after 3 August 2020, the amendments allow qualifying employers to receive JobKeeper payments for employees who meet the eligibility requirements on 1 July 2020.

Employees who met the conditions on 1 March 2020 will continue to be eligible assuming they are still employed by the entity.

In practical terms this means:

- If someone commenced employment with an entity after 1 March 2020 but by 1 July 2020 and they were an employee of the entity on that date then they can potentially be eligible for JobKeeper from 3 August 2020 onwards, assuming all other basic conditions are met.
- Casuals who hadn't been employed for at least 12 months leading up to 1 March 2020 can potentially be eligible for JobKeeper if they have been employed on a regular and systematic basis for at least 12 months leading up to 1 July 2020 (assuming all other basic conditions are met).
- Individuals who failed the age-related conditions or residency conditions at 1 March 2020 can potentially be eligible employees if they met those conditions on 1 July 2020.

Employers need to ensure that they identify all additional employees who could be eligible for JobKeeper to ensure that they comply with the "one in, all in" principle and that they meet the nomination requirements.

The ATO subsequently announced that the deadline for making payments for new eligible employees for JobKeeper fortnights starting on 3 August 2020 and 17 August 2020 had been extended to 31 August 2020 (i.e., to meet the

condition for employers to pay at least $1,500 to eligible employees in each JobKeeper fortnight).

The other key change to the Rules is that someone who was previously nominated for JobKeeper with an entity as an eligible employee or eligible business participant, can potentially be nominated for JobKeeper with a different entity if certain conditions are met. The individual must have ceased to be employed or actively engaged in the business (as a business participant) of the original entity after 1 March 2020 but before 1 July 2020. They must also meet the conditions to be treated as an eligible employee of the new employer on 1 July 2020.

These amendments focus on the eligibility rules for employees. No significant changes have been made in relation to the rules dealing with eligible business participants.

While the Government has announced that JobKeeper will be extended beyond 27 September 2020, the rules dealing with the expansion of the scheme have not been released as yet. Also, the ATO is yet to release information on the alternative tests that will be used for the decline in turnover test and the average working hours calculation which will be used in connection with the expanded JobKeeper rules.

More Information

- Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 7) 2020
- Media Release: JobKeeper Payment and income support extended

From the ATO

Tax treatment of State government COVID-19 assistance

The ATO has released guidance on the tax treatment of a range of State and Territory business support measures, including direct grants, payroll and other tax relief, and expense reimbursements.

Cash grants

The ATO has confirmed that these payments (both lump sums and ongoing payments) should be included in assessable income. However, these payments should not be subject to GST unless the business provides something of value in return for the payment (e.g., entering into a binding obligation to do something or refrain from doing something).

Other relief

In respect of other types of relief, such as payroll or land tax relief, the position will depend on how the relief if provided. For example, the ATO indicates refunds of payroll tax and land tax previously paid should simply reduce the amount of the deduction that is claimed, rather than giving rise to an assessable income amount. The refunds should not have any GST implications. Similarly, reductions of the State taxes payable should reduce the deductible amount.

The guidance in relation to other rebates provided – such as in relation to electricity for example – follows a similar principle. The ATO indicates that these rebates are not included in assessable income, but the rebate will reduce the deduction that is claimed by the business for the electricity.

More Information

- Government grants and payments during COVID-19

COVID and residential rental properties

The changing financial circumstances of many tenants (and landlords) have had a significant impact on many residential tenancy arrangements. The ATO has provided brief guidance on its approach to the most common changes, including:

- **Tenants** being unable to pay rent: In these cases the ATO indicates landlords can still claim deductions for rental expenses where tenants can't pay their rent under the lease agreement because their income has been affected by COVID-19 and the landlord received less rental income as a result but

continued to incur normal expenses on the property. The same principles apply if landlords reduce rent payable by tenants to allow them to stay in the property due to COVID-19 for commercial, arm's-length reasons.

- Interest deductibility: Interest should remain deductible on rental property loans if it continues to accumulate, because it is an expense that is still incurred, even if the bank defers the obligation to make loan repayments.
- Back payments of rent and insurance recoveries: The ATO confirms that a back payment of rent or an insurance payment for lost rental income should be declared as assessable income in the tax year in which it is received.
- **Short term rentals**: Many landlords offering short term rentals will have experienced reduced demand for the short-term rental accommodation, including cancellation of existing bookings, which may affect the income received. However, deductions may still be available. Where a client's ability to rent a property has been affected and nothing else changes, the ATO indicates the client can continue to deduct expenses, based on how they used the property in the equivalent period in earlier years. Clients can only claim a deduction for the portion of expenses that relate to income-producing use. For example, if clients use a short-term rental property for some private use, deductions would not be available for this period.

Another common scenario is that some landlords have ceased advertising their properties for rent (on the basis that holiday traffic etc has slowed / ceased). To claim deductions for periods when a property is vacant, clients generally must show that the property is genuinely available for rent. The ATO indicates that this factor alone will not determine the allowable proportion of deductions. Where clients have made a reasonable commercial decision to temporarily stop or reduce advertising for a property during a COVID-19 lockdown, they may still be able to claim deductions for this period, but this will need to be considered carefully.

More information

- COVID-19 and residential rental property

7 September 2020: Super guarantee amnesty reminder

To qualify for the amnesty, clients need to make a disclosure of their SG non-compliance and the SG shortfall in the approved form by 7 September 2020.

Generally, to be eligible for the amnesty, clients must pay their SG shortfalls as well as interest charges. The ATO recognises that some taxpayers may not be able to pay the shortfall by the applicable due date because of the impact of COVID-19. As a result, the ATO has provided an update indicating that if a taxpayer applies and is eligible for the amnesty, the ATO can work with them and their advisers to establish a payment plan, enabling the taxpayer to remain eligible. However, it is important to remember that deductions can only be claimed for SG shortfall amounts if they are actually paid during the amnesty period.

More information

- Super guarantee amnesty update

Car fringe benefits and COVID-19

The ATO has released specific guidance on fringe benefits and the impact of COVID-19, particularly in relation to car fringe benefits. For these benefits, the ATO confirms that the treatment will often depend on whether the taxable value is calculated using the operating cost method or the statutory formula method.

For example, under the statutory formula method, if a car is garaged at or near the home of an employee, then it is generally treated as being available for private use of the employee and can trigger a car fringe benefit, even if the car isn't actually being used by the employee.

If the statutory formula method is used then the "normal" calculation process needs to be

followed. When a car is garaged at or near the employee's home then this would be taken into account in determining the number of days that the car fringe benefit has been provided.

However, the ATO accepts that if the car is not driven at all or is only driven briefly for maintenance purposes, then it will not be taken to be a fringe benefit for the purpose of the operating cost method. This means that there should be no FBT liability for the period that the car is garaged at the employee's home and is not being driven under this method. The employer should ensure that they have odometer records to show that the car hasn't been used or has only been driven briefly to maintain the car.

Other areas of guidance include:

- Employers providing property for employees to work from home (e.g., laptops and other devices), including the operation of the minor benefits exemption;
- Emergency transport;
- Provision of personal protective equipment (i.e. masks etc) to employees and when this may be an exempt benefit; and
- Expenses incurred in COVID-19 testing for employees.

More Information

- COVID-19 and fringe benefits tax

Super contribution age limit changes

From 1 July 2020, updated superannuation regulations (*Superannuation Legislation Amendment (2020 Measures No. 1*) Regulations 2020) allow members to:

- Make voluntary concessional and non-concessional super contributions without meeting the work test if they are younger than 67 (up from 65); and/or
- Receive spouse contributions if they are 75 years old or younger.

More Information

- Change to age limits on super contributions

Trusts, COVID-19 and the section 100A integrity rules

The ATO has published guidance for situations where trustees of trusts may not be able to physically pay trust distributions to beneficiaries (i.e., satisfy present entitlements to trust income from 2020) due to liquidity issues caused by COVID-19. The example used in the guidance relates to situations where financial institutions impose restrictions that affect the way a trustee can deal with its assets (i.e., prevent assets from being disposed of or borrowed against to fund cash obligations).

Section 100A ITAA 1936 is a specific integrity provision, which can operate to tax the trustee on income appointed to a beneficiary where the benefit of those funds is provided to someone else. The rules can also potentially apply in situations where the trustee appointed income to a beneficiary but had no genuine intention of ever actually paying the distributions to that beneficiary. The ATO's comments on this issue appear to be aimed at the second scenario, potentially on the basis that where entitlements are not physically paid there could be an argument that this was the reason instead of COVID-19 related restrictions.

The ATO states that where a present entitlement arose before any effect of COVID-19, then the mere fact that the trustee may need to make subsequent arrangements to meet the requirements of a financial institution should not of itself cause the entitlement to be invalid or trigger section 100A.

Further, the guidance includes a commitment to not undertake compliance action to consider the validity of a present entitlement or the application of section 100A in circumstances where a trustee is affected by liquidity issues due to COVID-19 and is unable to satisfy the entitlement.

More Information:

- Trust liquidity issues due to COVID-19

Rulings

Thin capitalisation and the arm's length debt test

TR 2020/4 and PCG 2020/7

This new ruling and the associated practical compliance guide provide detail on the operation of the arm's length debt test for the thin capitalisation rules, and more specifically, guidance on technical issues arising in determining an entity's arm's length debt amount.

In broad terms, the arm's length debt test looks at the amount that the Australian business would have been able to borrow from independent commercial lending institutions on arm's length terms and conditions.

At a high level, the test involves developing / ascertaining the scenario that would arise if the entity had been dealing with independent commercial lending institutions, without credit support of related parties.

This is a complex area and the ruling sets out in detail the relevant factual assumptions that must be considered and the application of key phrases in the legislation.

Capital gains and the foreign income tax offset

TD 2020/7

There have been several recent cases looking at how the foreign income tax offset rules apply in cases involving foreign sourced capital gains. For example, the Burton case confirmed that taxpayers can only claim a foreign income tax offset (FITO) for foreign tax paid on a capital to the extent that the capital gain is assessable in Australia. If the gain qualifies for the 50% CGT discount then generally only half the foreign tax paid in relation to the capital gain can be taken into account under the FITO rules.

This determination outlines the technical basis for calculating the FITO limit in circumstances involving multiple foreign capital gains, on which tax was paid only on some of the gains. This is something of an extension of the principles outlined in the cases albeit focussing on how the capital gains are taken into account in relation to calculating the FITO limit and cases involving multiple gains.

The FITO limit calculation involves a comparison between Australian tax actually payable and the Australian tax that would be payable if certain income and deductions reasonably related to that income were disregarded.

The ATO takes this view primarily because a net capital gain does not have a source (i.e., it does not have an Australian source and does not have a foreign source). As a result, the FITO limit will generally be lower than it would be otherwise.

Using interposed entities to avoid interest withholding tax

TA 2020/3

A taxpayer alert has been issued for arrangements where a non-resident derives Australian-sourced income through an Australian trust and utilising an interposed non-resident entity as a beneficiary. The beneficiary incurs (typically inflated) interest expenses on loans from the non-resident 'head entity' (instead of the Australian trust being financed by the debt) which allows interest withholding tax to be avoided.

The ATO's description of the arrangement provides:

"A resident trust derives income which the trustee distributes to an offshore interposed beneficiary, with the trustee paying tax on the distribution at the corporate rate pursuant to subsection 98(3) of the Income Tax Assessment Act 1936 (ITAA 1936). The beneficiary is partially funded with high interest rate related-party debt, usually with no traceable third-party debt. This creates significant interest deductions for the beneficiary against its Australian income in the tax return, giving rise to a refundable credit for all or almost all the tax already paid by the trustee. The non-resident beneficiary is claimed not to be carrying on business through a permanent establishment in Australia."

The major concern with these types of arrangements is the fact that there appears to be no commercial rationale for interposing a non-resident beneficiary or for the debt used for Australian business purposes to be borne by the non-resident beneficiary. The ATO is also concerned that as a result, the effective tax rate on Australian-sourced income is minimal or zero and the arrangements involve related-party debt at a significant premium to arm's length third-party debt.

If clients have arrangements similar to the ATO's description, it would be prudent to obtain specific advice or contact the ATO to clarify whether the arrangement is appropriate. The ATO indicates in the alert that these arrangements may be subject to the transfer pricing provisions, thin capitalisation rules, and the general anti-avoidance rules (Part IVA).

Cases

The unrelated clients test and obtaining work through intermediaries

Commissioner of Taxation v Fortunatow [2020] FCAFC 139

This case considered whether the 'unrelated clients test' operated to ensure a taxpayer was carrying on a personal services business in circumstances where the taxpayer 'advertised' through LinkedIn but in practice, exclusively obtained work through intermediaries such as labour hire firms – including those who contacted the taxpayer through LinkedIn.

Broadly, in order to pass the 'unrelated clients test' the taxpayer needs to have generated PSI from two or more unrelated clients during the year and the services need to have been provided as a "direct result" of the taxpayer making offers or invitations to the public or a section of the public.

When it comes to determining whether the services are provided as a result of offers or invitations to the public there is an exclusion which applies when the taxpayer provides services through an intermediary such as a recruitment agency or labour hire firm. Broadly, the exclusion operates such that the individual is not taken to have made offers or invitations to the public merely because they are available to provide services through the intermediary.

Originally, the AAT found that the unrelated clients test was not satisfied, broadly on the basis that none of the clients engaged the taxpayer as a result of the LinkedIn page or relied upon any form of advertising by the taxpayer in relation to any of the services he provided.

On appeal the Federal Court overturned the AAT decision and held that the exception has no application where there is evidence that the taxpayer advertises their services to the public or a segment of the public and also obtains work through the involvement of a recruitment or other similar intermediary company. That is, the fact that someone has undertaken work obtained through an intermediary does not automatically prevent the unrelated clients test from being satisfied.

The ATO subsequently appealed the decision to the Full Federal Court. The Full Court found that the unrelated clients test was not satisfied (agreeing with the AAT) although considered that the AAT's reasoning was still in error (i.e. the result was correct but for a different reason).

The Full Court said that the phrase "as a direct result" means there must be "a causal connection between the services provided and the offer or invitation to the public or a section of the public" and that the causal connection must be "direct". This will "invariably involve an inquiry about what caused the client's decision to obtain the services". That is, if the client's decision to obtain the services from the taxpayer was "a direct result of the making of offers or invitations", then the unrelated clients test would be met.

If, however, an offer or invitation is only made to an intermediary and it plays no part in the client's decision to engage the relevant individual (or personal services entity), the offer or invitation does not directly result in the provision of the relevant services. This was

found to be the case here, where none of the eventual clients had obtained the taxpayer's services as a result of seeing the advertising on LinkedIn, but rather through their use of the intermediaries.

The Full Federal Court's decision confirms that it is not sufficient to advertise your services. In order to pass the unrelated clients test there needs to be a direct link between the advertising and the provision of the services.

Validity of the "backpacker tax"

Commissioner of Taxation v Addy [2020] FCAFC 135

The ATO appealed an earlier decision in the Full Federal Court.

In the previous case, the Court first held that the taxpayer was a resident of Australia for tax purposes under the 183 day test, noting that the taxpayer's parents' house in the UK was no longer her place of abode. This was an important point as it meant the taxpayer would have been entitled to the tax-free threshold but for the working holiday maker provisions. Very briefly, the Court further found that Article 25 of the Australia – UK double tax agreement (DTA), which prohibits discrimination between individuals being "nationals" of one country or the other, operated such that the tax rates imposed on working holiday makers, who could only be "nationals" of the other country for the purposes of the treaty (the UK in this particular case), were invalid and prohibited by the DTA.

The Full Federal Court firstly upheld the Federal Court decision relating to residency, indicating that the Commissioner could not be satisfied that the taxpayer's usual place of abode was outside Australia and that she did not intend to take up residence here because it had failed to consider those questions.

However, the ATO was successful in arguing that the working holiday maker tax rates were valid and not prevented from applying to the taxpayer by the provisions of the DTA. In a split decision the majority found that there was no discrimination on grounds of nationality as the taxpayer's nationality did not compel the taxpayer to apply for a working holiday visa. As there was a wide range of available visas that would permit a British national to enter Australia and earn income and, at least temporarily, attain the status of a resident, the taxpayer's decision to apply for a working holiday visa was a matter of choice, and the provision of the DTA could not apply.

The ATO previously indicated that these cases can only arise in relation to a small number of DTAs and would also be restricted to circumstances in which the relevant taxpayer is both a resident of Australia (which would not generally be the case for working holiday makers) and a "national" or similar of the other country under the DTA. It is worth noting that the decision in this case has not completely confirmed the "validity" of the "backpacker tax" as it would appear to leave open the possibility of non-discrimination clauses in DTA's applying where there is no other choice of visa for a taxpayer – which could potentially be the case for taxpayers from countries other than the UK.

Residency and establishing a permanent place of abode overseas

Joubert and Commissioner of Taxation (Taxation) [2020] AATA 2645

This case involved a set of facts similar to the recent Harding case (see the March 2019 Round Up for details – KS login required first) where the Full Federal Court found that the fact the accommodation of the taxpayer in the overseas country was of a temporary nature did not necessarily mean that the taxpayer had not established the overseas location as a "permanent" place of abode. In Harding the Court found that the taxpayer was not a resident of Australia.

However, the facts in this case supported the conclusion that the taxpayer was a resident of Australia. That is, while the taxpayer had similarly moved overseas for work and commenced occupying temporary style accommodation, the fact that the taxpayer's family had remained in Australia, there was no intention to remain overseas, and the taxpayer had maintained a home in Australia to which he regularly returned to his spouse and family were

all strong indicators of the client remaining a resident for tax purposes.

As the Court noted in the reasons for decision, this case emphasises that it is not generally possible to rely on decisions made in relation to other taxpayers, be they private rulings or Court decisions. While high level principles can be established each case needs to be determined based on its specific facts.

Legislation

JobKeeper extension

Coronavirus Economic Response Package (JobKeeper Payments) Amendment Bill 2020
The Government has introduced legislation allowing the JobKeeper scheme to be extended through to 28 March 2021. The extended period would end on 28 March 2021 rather than 31 December 2020.

The Bill doesn't actually set out the specific details of the expanded JobKeeper scheme. We assume that once this Bill is passed the Treasurer will publish a new legislative instrument setting out full details of JobKeeper 2.0 which would run from 28 September 2020 to 28 March 2021.

At the time of writing this Bill is before the Senate.

Choice of fund rules expanded

Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019
This Bill, which is now law, amends the superannuation guarantee provisions to ensure employees under workplace determinations or enterprise agreements have the right to choose their superannuation fund.

Currently, many of these workers can be required to use a superannuation specified under the agreement, for example an industry fund based on the area of employment.

This should also minimise issues which can arise whereby employees may have multiple superannuation accounts due to working in different areas (i.e. by taking new employment their contributions could be required to go to a different fund).