TD 2021/9 - Income tax: JobKeeper payments received or expected as a result of research and development expenditure

There is a Compendium for this document: **TD 2021/9EC** .

Status: **legally binding**

Taxation Determination

Income tax: JobKeeper payments received or expected as a result of research and development expenditure

Relying on this Determination

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

Table of Contents **Paragraph**

What this Determination is about

1. This Determination sets out how the 'at risk' rule (section 355-405 of the *Income Tax Assessment Act 1997*[1]) applies to JobKeeper payments received by a research and development (R&D) entity (you) under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the CERP Rules).

[1] All legislative references in this Determination are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Status: **legally binding**

2. This Determination does not consider other applications of the 'at risk' rule, including to economic response measures taken by state or territory governments to COVID-19.

3. Taxation Ruling TR 2021/5 *Income tax: research and development tax offsets – the 'at risk' rule* considers the tests for determining whether your expenditure is 'at risk' more generally.

Ruling

4. If you received a JobKeeper payment:

- for your paid employees (under Division 2 of the CERP Rules), you trigger the 'at risk' rule and cannot notionally deduct[2] the portion of your wage expenditure incurred on R&D activities that has attracted the JobKeeper payment, or
- based on business participation (under Division 3 of the CERP Rules), you do not trigger the 'at risk' rule and are therefore not prevented[3] from notionally deducting expenditure[4] for having received a JobKeeper payment.

5. If you received a JobKeeper payment for an eligible employee who is wholly engaged in R&D activities[5] during a fortnight, you cannot notionally deduct so much of your wage expenditure paid to that employee as is equal to the JobKeeper payment rate.[6]

6. If you received a JobKeeper payment for an eligible employee who is partially engaged in R&D activities during a fortnight, your notional deduction is partially reduced. Your notional deduction is reduced by that portion of the JobKeeper payment as is in proportion with the time the employee spends on R&D activities during that fortnight.

7. Expenditure you incur on R&D activities that cannot be notionally deducted[7] does not give rise to a tax offset under section 355-100. Therefore, for the portion of JobKeeper payments you receive that trigger the 'at risk' rule, no extra income tax is payable under the R&D clawback rules.[8]

Date of effect

8. This Determination applies both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
22 December 2021

[2] Sections 355-205 or 355-480.
[3] Section 355-405.
[4] Sections 355-205 or 355-480.
[5] As defined in section 355-20.
[6] All references in this Determination to 'the JobKeeper payment rate' refer to the relevant JobKeeper payment rate applicable to the R&D entity at the time of incurring the wage expenditure.
[7] Sections 355-205 or 355-480.
[8] Subdivision 355-G.

Status: **not legally binding**

Appendix – Explanation

This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

The 'at risk' rule

9. Expenditure can be claimed for the R&D tax offset only when you can notionally deduct it under Division 355.[9]

10. The 'at risk' rule in section 355-405 denies or reduces a notional deduction if, at the time you incur the expenditure, you or one of your associates had received, or could reasonably be expected to receive, consideration:

- as a direct or indirect result of expenditure being incurred[10], and
- regardless of the results of the activities on which you incur the expenditure.[11]

11. The 'at risk' rule applies to only that portion of the total consideration which satisfies both requirements.

12. The term 'consideration' is not defined, so takes its ordinary meaning having regard to the statutory context in which it appears. It is the terms of section 355-405, shaped by the broader statutory context, which determine if there is 'consideration as a direct or indirect result of expenditure being incurred'. It is our view that the expression, as used in section 355-405 (a part of the R&D integrity rules[12]) incorporates a wider notion than consideration in a contractual sense, and the use of the preposition 'of' instead of the conjunction 'for' supports this position.[13]

13. There is no requirement that the consideration be received *for* you to incur the expenditure. The consideration also need not be received for, or as a result of, any activities being conducted. The respective subject matter of the nexus enquiry for application of the 'at risk' rule is expenditure.

14. The notional deduction is denied in full where that amount (or portion) of consideration is equal to or greater than the expenditure.[14]

15. Where the amount (or portion) of consideration is less than the expenditure, the notional deduction is reduced by that amount.[15]

16. You must apply the 'at risk' rule at the time you incur the expenditure that you seek to notionally deduct. In considering the application of the 'at risk' rule, you must have regard to anything that happened or existed before or at the time the expenditure is incurred, and anything that is likely to happen or exist after that time.[16]

[9] Sections 355-100, 355-205 and 355-480.
[10] Subparagraphs 355-405(1)(a)(i) and (2)(a)(i).
[11] Subparagraphs 355-405(1)(a)(ii) and (2)(a)(ii).
[12] Subdivision 355-F.
[13] See paragraphs 11 to 22 of TR 2021/5.
[14] Subsection 355-405(1).
[15] Subsection 355-405(2).
[16] Subsection 355-405(3).

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JobKeeper scheme

17. The JobKeeper scheme is provided for under Part 2 of the CERP Rules:

- Division 2 sets out the rules for when an employer with eligible employees is entitled to the JobKeeper payment.
- Division 3 sets out the rules for when a business owner is entitled to a JobKeeper payment.

18. The JobKeeper scheme provided financial support to entities that had been affected by the economic impacts of COVID-19.[17] The JobKeeper payment under Division 2 was designed to help businesses retain employees during the COVID-19 outbreak by covering the costs of employees' wages, allowing entities to recommence or scale up operations once conditions allow.[18] The extension of JobKeeper payments under Division 3 to certain participants of a qualifying business recognised that such business participants were also affected by the economic downturn caused by COVID-19.[19]

Application of the 'at risk' rule to JobKeeper payments based on paid employees (Division 2)

19. The CERP Rules require an employer to have satisfied a series of eligibility criteria in order to be entitled to a JobKeeper payment under Division 2 for payments made to employees.[20]

20. One of these criteria is the 'wage condition', which requires the employer to pay each eligible employee at least the JobKeeper payment rate per fortnight (regardless of whether the employee ordinarily receives more or less than that amount).[21] The component amounts that together must equal or exceed the JobKeeper payment rate include amounts paid by the employer to the employee by way of salary, wages, commission, bonus or allowances.[22]

21. Having regard to the component amounts covered by the wage condition, the JobKeeper payment is received as a result of the employer incurring wage expenditure. That the employer must also satisfy other eligibility criteria does not alter this conclusion.[23]

22. JobKeeper payments are received after an employer has incurred its wage expenditure for each fortnight. At the time the employer incurred its wage expenditure, the employer could reasonably be expected to receive the JobKeeper payment. This is because at the time of incurring the expenditure, the employer would have enrolled in the JobKeeper scheme and having regard to anything likely to happen or exist after that time, the employer would be aware as to whether it would be entitled to receive the JobKeeper payment for that fortnight for its eligible employees.

23. It has been put to the Commissioner that because JobKeeper payments are not 'consideration for a taxable supply' as defined for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999*, JobKeeper payments should not be captured by the 'at risk' rule. We do not accept that view. As noted at paragraph 12 of this Determination, the expression in section 355-405 is informed by the statutory context and therefore

[17] The Explanatory Statement to the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Explanatory Statement).
[18] See the Explanatory Statement.
[19] See the Explanatory Statement.
[20] Subsection 6(1) of the CERP Rules.
[21] Subsection 10(1) of the CERP Rules.
[22] Paragraph 10(2)(a) of the CERP Rules.
[23] See paragraph 27 of TR 2021/5.

'consideration' as used in section 355-405 does not correspond to 'consideration for a supply' in the goods and services tax context.[24]

24. If you paid wages to an eligible employee[25] undertaking eligible R&D activities, the JobKeeper payment is consideration received as a direct or indirect result of the R&D expenditure incurred.

25. JobKeeper payments under Division 2 of the CERP Rules are receivable regardless of the results of any R&D activities on which the wage (or other) expenditure is incurred. There are no eligibility criteria that would link the receipt of JobKeeper payments in any way to the results of the R&D activities that you may be conducting.

26. Therefore, to the extent you received the JobKeeper payment for your paid employees, you are not at risk for the wage expenditure and cannot get a notional deduction.

27. The following examples do not, and are not intended to, consider the application of Division 355 more generally, including whether or not the underlying activities would be R&D activities[26] or the subject expenditure otherwise notionally deductible. They also assume that, apart from the JobKeeper payment, there is no other consideration that the entity had received, or could reasonably be expected to receive, that would attract the application of the 'at risk' rule.

Example 1 – employee wholly engaged in R&D activities

28. *Amaranth Pty Ltd (APL) conducts research into the development of stress and drought-resistant plants. APL employs Ana, a biology graduate, to conduct R&D activities for a wage of $1,000 per fortnight. Ana's time is spent wholly on those activities.*

29. *APL enrols in the JobKeeper scheme under Division 2 of the CERP Rules and pays Ana $1,500 per fortnight in order to satisfy the wage condition. At the end of the JobKeeper fortnight, APL receives a JobKeeper payment of $1,500.*

30. *Assuming APL would otherwise satisfy all the requirements in section 355-205 to claim a notional deduction for the wages of $1,500 paid to Ana during the fortnight, it is nevertheless prevented from notionally deducting that expenditure as a consequence of the application of the 'at risk' rule in section 355-405. This is because:*

- *at the time APL incurred Ana's wages, it could reasonably expect to receive a JobKeeper payment of $1,500 as a result of that expenditure being incurred, and*
- *the JobKeeper payment is received regardless of the results of the R&D activities on which that expenditure is incurred.*

31. *APL is not at risk for any of the R&D wage expenditure paid to Ana.*

Example 2 – employee wholly engaged in R&D activities and wage is more than the JobKeeper payment

32. *Burgundy Pty Ltd (BPL) is engaged in the R&D of pharmaceutical goods. BPL employs Cameron, a biomedical scientist, for a wage of $2,000 per fortnight. Cameron's time is spent wholly on R&D activities.*

[24] See paragraph 13 of TR 2021/5.
[25] Section 9 of the CERP Rules.
[26] Within the meaning of section 355-20.

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33. *BPL enrols in the JobKeeper scheme under Division 2 of the CERP Rules and continues to pay Cameron $2,000 per fortnight. At the end of the JobKeeper fortnight, BPL receives a JobKeeper payment of $1,500.*

34. *Assuming BPL would otherwise satisfy all the requirements in section 355-205 to claim a notional deduction for the wages of $2,000 paid to Cameron during the fortnight, it is nevertheless prevented from notionally deducting $1,500 of that expenditure as a consequence of the application of the 'at risk' rule in section 355-405. This is because:*

- *at the time BPL incurred Cameron's wages, it could reasonably expect to receive a JobKeeper payment of $1,500 as a result of that expenditure being incurred, and*
- *the JobKeeper payment is received regardless of the results of the R&D activities on which that expenditure is incurred.*

35. *BPL is not at risk for $1,500 of the R&D wage expenditure paid to Cameron. However, BPL continues to be entitled to a notional deduction of $500 under section 355-205 for that R&D wage expenditure still at risk.*

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36. Where an employee is only partially engaged in R&D activities, the Commissioner is of the opinion that the 'at risk' rule only applies to reduce your notional deduction for that portion of the JobKeeper payment that is received as a result of incurring wage expenditure on R&D activities. This is because your notional deduction for expenditure under either section 355-205 or section 355-480 is limited to expenditure incurred on R&D activities, and the consideration captured by section 355-405 is that which is received as a result of having incurred that expenditure.

37. The Commissioner is of the view that a fair and reasonable basis for determining that portion of the JobKeeper payment received as a result of incurring expenditure on R&D activities is the amount of time your eligible employee spends on R&D activities. Therefore, if you received a JobKeeper payment for an eligible employee who is partially engaged in R&D activities during a fortnight, your notional deduction is partially reduced by that portion of the JobKeeper payment as is in proportion with the time the employee spends on R&D activities during that fortnight.

Example 3 – employee partly engaged in R&D activities

38. *Cordovan Pty Ltd (CPL) is engaged in the R&D of textiles. CPL employs Damon, a chemical engineer, for a wage of $4,000 per fortnight.*

39. *CPL is a small business with few employees. Damon spends 75% of his time engaged in R&D activities and 25% of his time on marketing and sales of CPL's goods (non-R&D activities).*

40. *CPL enrols in the JobKeeper scheme under Division 2 of the CERP Rules and continues to pay Damon $4,000 per fortnight. At the end of the JobKeeper fortnight, CPL receives a JobKeeper payment of $1,500.*

41. *Assume CPL would otherwise satisfy all the requirements in section 355-205 to claim a notional deduction for $3,000 (75%) of the $4,000 wages paid to Damon during the fortnight, being the extent to which CPL's wage expenditure is incurred on R&D activities.*

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However, the 'at risk' rule in section 355-405 will apply to reduce the amount of CPL's notional deduction. This is because:

- *at the time CPL incurred the wage expenditure paid to Damon, it could reasonably expect to receive the JobKeeper payment as a result of that expenditure being incurred, and*
- *the JobKeeper payment is received regardless of the results of the R&D activities on which that expenditure is incurred.*

42. *To the extent that CPL receives 75% of its JobKeeper payment as a result of the total wages paid to Damon ($1,125, being 75% of $1,500), it cannot be said that CPL is at risk for its R&D wage expenditure. However, CPL continues to be at risk and is entitled to a notional deduction of $1,875 under section 355-205 for the wage expenditure incurred by it on its R&D activities (that is, $3,000 less $1,125).*

Application of the 'at risk' rule to JobKeeper payments based on business participation (Division 3)

43. An entity may be eligible for a JobKeeper payment under Division 3 of the CERP Rules if it meets certain eligibility criteria and has an 'eligible business participant'.[27]

44. Broadly, an eligible business participant is an individual who is actively engaged in the operation of the business and is not an employee.[28] Eligible business participants of a company are limited to its directors or shareholders.[29]

45. An entity can only have one eligible business participant and claim one JobKeeper payment per fortnight for that individual.[30]

46. In contrast to JobKeeper payments received for employees under Division 2, there is:

- no wage condition that needs to be satisfied to be entitled to a JobKeeper payment for an eligible business participant, and
- nothing in the eligibility criteria for receiving a JobKeeper payment for an eligible business participant to conclude it is received as a direct or indirect result, consequence, outcome or effect of incurring any expenditure.

47. Therefore, a JobKeeper payment for an eligible business participant is not received as a direct or indirect result of incurring any R&D expenditure. This is the case even after having regard to anything that might have happened or existed before any expenditure is incurred, and anything likely to happen or exist after that time.

48. Therefore, no portion of a JobKeeper payment based on business participation will reduce your notional deduction for expenditure incurred on R&D activities.

[27] Subsection 11(1) of the CERP Rules.
[28] Section 12 of the CERP Rules.
[29] Table item 4 of subsection 12(2) of the CERP Rules.
[30] Subsection 11(3) of the CERP Rules.

Status: **not legally binding**

References

Previous draft:

TD 2020/D1

Related Rulings/Determinations:

TR 2006/10; TR 2021/5

Legislative references:

- ANTS(GST)A 1999
- CERP Rules 2020
- CERP Rules 2020 Pt 2
- CERP Rules 2020 Div 2
- CERP Rules 2020 Div 3
- CERP Rules 2020 6(1)
- CERP Rules 2020 9
- CERP Rules 2020 10(1)
- CERP Rules 2020 10(2)(a)
- CERP Rules 2020 11(1)
- CERP Rules 2020 11(3)
- CERP Rules 2020 12
- CERP Rules 2020 12(2)
- ITAA 1997 Div 355
- ITAA 1997 Subdiv 355-F
- ITAA 1997 Subdiv 355-G
- ITAA 1997 355-20
- ITAA 1997 355-100
- ITAA 1997 355-205
- ITAA 1997 355-405
- ITAA 1997 355-405(1)
- ITAA 1997 355-405(1)(a)(i)
- ITAA 1997 355-405(1)(a)(ii)
- ITAA 1997 355-405(2)
- ITAA 1997 355-405(2)(a)(i)
- ITAA 1997 355-405(2)(a)(ii)
- ITAA 1997 355-405(3)
- ITAA 1997 355-480

Other references:

- Explanatory Statement to the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020

ATO references

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