

Employer Support Payment Scheme Advisory Notice

Is a business operating?

Last Updated 4 Jun 13

ESPS Advisory Notices provide advice or more detailed explanations concerning aspects of the Employer Support Payments Scheme (ESPS). The content of this advisory notice has been approved by the Service ESPS delegates.

OPERATING REQUIREMENT

Section 32 of *Defence Determination 2012/68* prohibits employer support payments to claimants who are self-employed members if their employing entity **does not operate** during specific periods of service.

Self-employed claimants may be sole traders, employees of family members who are sole traders, partners in partnerships, directors of companies, employees of companies (when the member has a controlling interest in the company) or employees of trusts (when the member is a trustee or appointer).

ADVICE

The following advice is provided to assist ESPS staff in determining whether a business is operating.

Summary

There seems to be no single indicator ('factor') that can be used to determine if a business is operating. Assessments are judgmental in nature and various factors should be considered.

Detailed Advice

A search for rules that govern or define 'continue to operate' was undertaken and no information was found to suggest that any specific rules exist. In the absence of formal rules, the following guidance is provided.

Businesses do not work on every day (e.g. a factory may not work on weekends, public holidays or for an extended period over Dec/Jan). Similarly a business operator (e.g. a barrister) may be on a holiday for several weeks. This does not necessarily mean that the business ceases to operate.

It may be reasonable to assume operations can continue for short durations of absence, such as one or two weeks. However, more prolonged periods of absence may bring into question whether there has been a cessation of operations.

A range of factors may be considered in assessing whether a business is operating. A suggested list is provided below. Further comments on these factors, and the weight that might be applied to individual factors, are detailed at Appendices 1 and 2.

- a. Does the business have an active ABN.
- b. Does it have the intention to generate profit.
- c. Is there repetition and regularity of activities.
- d. Is the business still set up to facilitate trading ie. not dormant, has not been deregistered or wound up.
- e. Is the employing entity a single employee business or sole trader.
- f. What is the duration of absence from the business.
- g. Is the Reservist a registered, active member with a professional association or body (such as College of Surgeons or Society of Real Estate Agents etc).
- h. Is the business providing PAYG withholding tax? If yes, has the business provided PAYG withholding tax in the most recent quarter or month.
- i. Is the business continuing to submit BAS returns.
- j. Is the business continuing to lodge a tax return with the ATO.
- k. Does the business have premises identified for business purposes.
- j. Is the business continuing to employ staff apart from the Reservist.
- l. Is the business continuing to have any expenses.
- m. Does the business generate income.

Some factors may be given considerable weight. For example, if the business continues to employ staff apart from the Reservist or continues to generate income or have expenses, these circumstances may be sufficient on their own to determine that a business is continuing to operate.

Other factors may not be sufficient on their own to show a business is continuing to operate and might require other factors to exist to strengthen the case.

Single Employee Businesses

Self-employed businesses with a single employee have a higher likelihood of not operating while a self-employed member is absent on Defence service. These two factors are particularly important:

- is the employing entity a single employee business; and
- duration of service (the longer the service, the higher likelihood of 'not operating').

When uncertain as to whether a business is continuing to operate, ESPS staff should seek further information from the claimant. This might address questions such as:

- a. Does the business have a plan to deal with the 'key employee' issue?
- b. Who is now operating the business?
- c. Has the business employed any personnel since the Reservist went on Defence service?
- d. Has the business been deregistered or wound up?
- e. Has the business continued to perform activities with the intention to profit or generate a future benefit?
- f. Has the business continued to generate income and/or incur any costs or expenses (supported by BAS statements)?

EXAMPLE SCENARIOS

Some examples of how this advice might be applied are:

EXAMPLE 1

A doctor (GP) is on 3 months Defence service in Afghanistan and he owns his own medical practice here in Australia. Appointments are being made by his receptionist, while he is away, to undertake upon his return.

Analysis

The involvement of the receptionist is strong evidence that the business continues to operate. The activities undertaken by the receptionist appear to be commercial in nature with intent to generate profit or income.

Conclusion - The business continues to operate.

EXAMPLE 2

A Consultant is working with a client one week and then undertakes 2 weeks Defence service to undertake a Defence training exercise in a remote part of Australia. He resumes working with the client in the following week. He does not have any business premises (he works out of his own home) and he employs no other staff. While he is away, he cannot be contacted about business matters (no mobile reception).

Analysis

The evidence of 'pre' and 'post' operations combined with the relatively short duration of service would appear to be strong evidence to suggest the business continues to operate. Without explicit guidance from the Determination on how to address these 'single employee' situations, a common sense analysis of the situation might be applied. The duration of service does not appear lengthy and parallels could be drawn to employee leave situations including recreational, sick or long service leave. Common sense suggests it would be unreasonable to assume that 'because an employee goes on two weeks recreation leave' the business does not continue to operate. In which case, it would not appear equitable to treat the business otherwise for the purposes of ESPS.

Conclusion - The business continues to operate.

EXAMPLE 3

A sole trader is working with a client one week and then undertakes 12 months Defence service. His work for that client is complete, although he hopes/plans to do future work for the client and for other clients. He will need to submit tender responses and win future work when he finishes his Defence service period. During his service, he continues to have an active ABN and submit BAS statements/tax returns. He does not have any business premises and he employs no other staff over the 12 month period.

Analysis

The 'sole employee' issue must be considered. It would appear that there is intent to continue the business post Defence service, but whether the business continues to operate without this employee for such a lengthy duration is difficult to assess.

It is unclear from the above example what steps the employing entity has taken to continue to operate. It may be that another employee, family member or administrative assistant has been engaged to support the business whilst the Reservist is on Defence service.

It would appear that a conclusive assessment cannot be reached without further information. Some factors that might be considered when gathering further information are:

- a. Does the business have a plan to deal with the 'key employee' issue?

- b. Who is now operating the business?
- c. Has the business employed personnel since the Reservist went on Defence service?
- d. Is there evidence that activities are being performed with intent to profit or generate future benefit?
- e. Does the business still trade or generate income? If so, with what frequency (repetition and regularity)?
- f. Does the business still incur expense? If so, with what frequency (repetition and regularity)?
- g. If the business continues to generate income and/ or incur expense, can the business provide evidence to support this, i.e. BAS statements covering the most recent month or quarter?

Conclusion - There is not sufficient information to support a conclusive assessment as to whether the business continues to operate. Recommend seek further information.

FURTHER QUERIES

If ESPS staff have any queries about this topic (or about any aspect of the ESPS), they are encouraged to ring the ESPS Directorate on 1800 001 696.

Appendices:

1. Factors specific to single-employee businesses
2. Factors for all Self-Employed Reservists

FACTORS SPECIFIC TO SINGLE-EMPLOYEE BUSINESSES

Is the service period less than 3 months?

- If yes, low likelihood of not continuing to operate.
- If no, see next question:

Is the service period 3 – 12 months?

- If yes, is there a business plan or other evidence to support continued operations during service period?
- If yes, does the plan include the involvement of additional staff or employees?
- If yes, low likelihood of not continuing to operate.
- If no, high likelihood of not continuing to operate.
- If no, high likelihood of not continuing to operate.
- If no, see next question:

Is the service period > 12months?

- If yes, is there a **robust** business plan or other evidence to support continued operations during service period which involves additional staffing / employee arrangements for duration of service?
- If yes, currently assessed as low likelihood of not continuing to operate. If deemed appropriate, schedule update assessment with Reservist.
- If no, high likelihood of not continuing to operate.
- If no, high likelihood of not continuing to operate.

FACTORS FOR ALL SELF-EMPLOYED RESERVISTS

APPENDIX 2

If 'Yes'			If 'No'	
Factor	Supports continuing to operate	Comments	Supports not continuing to operate	Comments
Is the Reservist the sole employee of the business	Weak	See "Factors for Single Employee Businesses" of Appendix 1	Strong	See "Factors for Single Employee Businesses" of Appendix 1
Does the Reservist intend to return to work upon completion of service?	Weak	This factor is targeted more toward identifying when a business is considered to be 'no longer operating'.	Strong	If the Reservist does not intend to return to work, it brings into question whether the employing entity intends to continue to operate. If this is a business with multiple employees, this might not be strong evidence.
Does the Reservist believe the business will continue to operate whilst on service?	Weak	This factor is targeted more toward identifying when a business is considered to be 'no longer operating'.	Strong	This would be virtually all the evidence required to assess the business as 'no longer operating'.
Does the business have a plan to deal with the Reservist being away on service?	Weak	This factor is targeted more toward identifying when a business is considered to be 'no longer operating'.	Strong	If there is no business plan, this would suggest the business has no intention of operating during service.
Does the business	Weak	This factor is targeted more toward	Strong	Business plans would need to have a

plan have commercial intent? i.e. intent to profit etc.		identifying when a business is considered to be 'no longer operating'.		commercial intent, otherwise it is difficult to identify that the business still 'exists' or 'operates'. Just having an employee for the 'purposes' of meeting the 'operate' criteria would not be deemed an acceptable business plan.
Is there evidence the level of activity within the business will continue similar to that prior to reservist service?	Strong	This would suggest that the business continues to operate, however evidence would need to be assessed as reliable.	Weak	This would suggest that the business continues to operate, however evidence would need to be assessed as reliable.
Is the business expected to continue to generating income during reservist service?	Strong	Revenue generation is a strong suggestion the business will continue to operate.	Weak-Moderate	It is possible that activities are being performed to generate income for when the reservist returns to work.
Does the business have an active ABN?	Moderate	Although an ABN is a good indication that a business exists, it is possible that the business has not updated its status, i.e. operating vs ceased. As such, a business could have an ABN when it is not 'operating'.	Moderate-Strong	If the organisation does not have an ABN, it is a moderate to strong factor that the entity is not 'operating'. It is possible that low revenue businesses do not have an ABN. However, this may be an indicator that the Reservist is not receiving the minimum wage, therefore creating ineligibility to claim payments.
Is the business still set up to facilitate trading i.e. not dormant, has not been deregistered or wound up?	Weak	This is a stronger indicator that a business exists, but not whether it is 'operating'.	Strong	If a business is not properly set up, the employer is not eligible to claim. Prior payments should potentially be assessed. If the business status is dormant, deregistered, wound up or some other

				inactive form, this would be a strong support of 'not operating'.
Is the Reservist a registered, active member with a professional association or body (such as College of Surgeons or Society of Real Estate Agents etc)?	Weak	It is possible to be a member of a body without having a business, or 'operating' a business. Although this provides comfort that the Reservist may have skills required to perform business activities and be active within their profession, it may not be reflective of level of operations of their business.	Weak-Strong	Although there are many connotations to consider, we provide the following scenarios where memberships or licences could be used as indicators/factors of business 'operation'. 1. Where a membership/licence is required to operate a business, cessation of that membership/licence would be strong support of 'not operating'; 2. Where a membership/licence is <u>not</u> required to operate a business, should the Reservist discontinue their membership during service, this might support that the business is no longer operating but should be considered with other factors.
Is the business providing PAYG withholding tax? If yes, has the business provided PAYG withholding tax in the most recent quarter or month?	Strong	This indicates that employees continue to be employed which is a strong indicator or 'operating'.	Weak-Strong	If the business previously provided for PAYG withholding tax and will no longer continue to do so, this is a strong indicator of 'no longer operating'. If this business previously did not provide PAYG this may be weak support for 'no longer operating' as this might be more indicative of the PAYG rules relating to the business type or structure.
Is the business continuing to submit BAS returns?	Moderate-Strong	Continued submissions of BAS statements might suggest that a business 'continues to operate'. It is	Moderate	If the business has been provided a waiver by the ATO, this would imply the business applied for a waiver and

		<p>possible that a quarterly return with reported activity could mask a period during where no 'operations' have occurred.</p> <p>A nil BAS return is a moderate indicator of 'not operating' and would need to be supported by other indicators or 'no longer operating'.</p>		<p>anticipated a slow down or cessation of operations for the period of service. This could be considered moderate evidence to support 'not operating'.</p>
Is the business continuing to lodge a tax return with the ATO?	Weak	Tax returns can be a nil return or relate to the portion of the financial year prior or post service by Reservist.	Strong	If 'no', is answered, unless a waiver has been granted by the ATO, this would imply the business is 'not operating'.
Does the business have premises identified for business purposes?	Strong	This is a strong indicator of 'operations', assuming the premise is external/commercial facility (not home residence of reservist), specifically for the business.	Weak-Moderate	If not distinct business facility exists, it could be an indicator that a business is 'not operating'. Further investigation may be necessary to understand the circumstances at hand.
Is the business continuing to employ staff apart from the Reservist?	Strong	As long as commercial in nature, this appears to be strong evidence.	Strong	If there are no employees apart from the Reservist, this brings into account a number of uncertainties regarding continuation of 'operations'. See 'Assessment of Examples Provided'.
Is the business continuing to have any expenses?	Strong	So long as commercial in nature and of sufficient value, volume, repetition and/or regularity, this appears to be strong evidence of 'operations'. Exclusions to this would be wind up costs and other such expenditure which is not in the normal course of operating a business with intent to profit.	Strong	This is strong support for 'not operating'.

		Low value and not clearly, commercial lends weak support to the business 'operating'. High value/volume and clearly commercial lends strong support to the business 'operating'.		
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