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COVID-19 Tax Update: A Detailed Review of the Recent Changes to the Canada Emergency Wage Subsidy (CEWS)

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I. OVERVIEW

On July 27, 2020, Parliament enacted Bill C-20 which made sweeping amendments to the Canada Emergency Wage Subsidy (the "**CEWS**"). The final legislation passed into law can be found here.

The amendments represent a fundamental change to the CEWS framework. The subsidy amount is now based on a "sliding scale" proportionate to the employer's revenue decline. That is, whereas the initial framework used an employer's revenue decline to determine if they qualify for the wage subsidy, the new framework uses an employer's revenue decline to determine the amount of their wage subsidy. Thus, many employers who did not qualify for the CEWS for previous periods will now qualify. The amendments also make several technical changes retroactive to the beginning of the CEWS.

Given the breadth and complexity of the amendments, a full appreciation of the initial CEWS framework is critical to understanding the changes. Our earlier blog post providing an in-depth, detailed summary and analysis of the CEWS (our "**April 2020 Blog**") can be found here. For brevity, this blog limits analysis of the initial CEWS framework; readers are advised to refer to the April 2020 Blog for further details.

II. KEY TAKEAWAYS

Increased Complexity

The amendments are astoundingly complex. An employer's CEWS entitlement will depend on many variables. For example, an employer's analysis for a given period might have to factor in:

(a) multiple methodologies to calculating their *qualifying revenues*, some of which are binding on subsequent periods;

(b) multiple methodologies to calculating their revenue decline, with both monthly amounts and trailing three-month averages being relevant as well as the option to choose different *prior reference periods*;

(c) for certain "safe harbour periods", multiple methodologies to calculating their subsidy amount, with the possibility that different methodologies might be preferred for certain employees but not others;

(d) up to eight different formulae for each of their employees, depending on the *qualifying period* and the status of the employee as non-arm's length, furloughed, or reduced-pay; and

(e) multiple possible *baseline remuneration* periods, with such periods being selected on an employee-by-employee basis.

Many employers will undoubtedly have trouble navigating the new framework.

Less Subsidy to More Employers

Under the new framework, more employers will receive less subsidy on a per employee basis.

The new framework is advantageous to employers who have suffered revenue declines but could not meet the various revenue decline thresholds under the initial framework. Most employers who have incurred, or will incur, a revenue decline can now claim the base percentage subsidy.

Highly-impacted employers will be disappointed to the extent they expected the initial framework to apply to any CEWS extension. Starting in September, they will receive a lower wage subsidy amount on a per-employee basis that will gradually decline through the remaining qualifying periods.

Retroactivity and Fixing Legislative Gaps

The amendments apply retroactively. Many employers who were not previously eligible for the CEWS may want to revisit their CEWS eligibility for prior periods. That is particularly true for employers who utilized a separate payroll companies, were recently formed by an amalgamation or acquired a business though an asset acquisition.

Additionally, certain employers who have already filed their CEWS applications may want to ensure that the amendments have not increased (or potentially decreased) their claim amount retroactively. Initially it appeared that an employer could not amend a filed CEWS application, though the Canada Revenue Agency (the "**CRA**") now has a process for amending such applications.

Increased Importance of Qualifying Revenue Calculations

Under the initial framework, an employer who qualified for the CEWS generally did not need to consider the various elective revenue computational rules. Any incremental revenue decline realized as a result of the application of those rules would not impact the amount of that employer's wage subsidy claim.

Under the new framework, the various revenue computational rules will become more important since the application of those rules could increase the amount of the wage subsidy to which an employer is entitled. However, employers should also be cautioned that the miscalculation of their *qualifying revenues* could require the employer to refund a portion of their wage subsidy. In contrast, under the initial framework there would be no such consequence, provided that even with the miscalculation the employer still met the revenue decline test.

III. PREVIOUSLY-ANNOUNCED CHANGES

Certain legislative provisions contained in Bill C-20, primarily intended to fix situations where the original legislation inappropriately denied the wage subsidy, were previously included in Bill C-17 (introduced on June 10, 2020). Due to lack of political support, that Bill did not pass. Nevertheless, Bill C-20 resurrected certain of the previously-proposed changes, the most significant of which are discussed below.

Payroll Service Providers / Payroll Account

Under the initial CEWS framework, an employer must have had a payroll account on March 15, 2020 to qualify for the subsidy. For employers with a separate entity within the group administering payroll (a "payroll service provider"), this proved highly problematic since the employers did not have their own payroll account, while the payroll service provider itself did not satisfy the revenue decline test. In other words, the initial CEWS framework failed to consider that a legal employer may not necessarily be the same entity that administers payroll.

The amendments provide that an employer without a payroll account as of March 15, 2020 can still be a *qualifying entity* if:

(a) on March 15, 2020:

(i) it had at least one employee;

(ii) the payroll for its employees was administered by another person or partnership; and

(iii) the payroll service provider had a payroll account at that time; and

(b) the payroll service provider used its payroll account to make remittances in respect of the employer's employees.

This amendment will undoubtedly be welcome news to many larger organizations and groups organized as cost sharing arrangements that utilize a dedicated payroll service provider.

Amalgamated Corporations

A corporation formed through an amalgamation is deemed to be a new corporation under the *Income Tax Act* (Canada). Accordingly, the amalgamated entity may technically not have any *qualifying revenues* for a *prior reference period*, even though each of its predecessors did. Thus, the amalgamated entity may not satisfy the revenue decline test.

The amendments address this issue by deeming the amalgamated entity to be the same entity as its predecessor entities for the purposes of the CEWS. The sole exception is if one of the main purposes of the amalgamation was to either: (i) cause the amalgamated entity to qualify for the CEWS; or (ii) increase the amount of an entity's subsidy.

Baseline Remuneration

An employee's *baseline remuneration* is, essentially, their "pre-pandemic" wages. The concept may increase the CEWS available (e.g., if an arm's length employee's remuneration has decreased) or decrease the CEWS otherwise available (e.g., if a non-arm's length employee's remuneration has increased).

Under the amendments, the employer can make an election for each *eligible employee* to choose a different *baseline remuneration* reference period. The available reference period, in turn, depends on the *qualifying period* to which the election relates, as summarised below.

Qualifying Period	Default Baseline Remuneration Period	Elective Baseline Remuneration Period
March 15 – April 11, 2020 April 12 – May 9, 2020 May 10 – June 6, 2020	January 1, 2020 - March 15, 2020	March 1, 2019 - May 31, 2019
June 7, 2020 - July 4, 2020	January 1, 2020 - March 15, 2020	March 1, 2019 - May 31, 2019 OR March 1, 2019 - June 30, 2019
July 5, 2020 - August 1, 2020 August 2, 2020 - August 29, 2020 August 30, 2020 - September 26, 2020 September 27, 2020 - October 24, 2020 October 25, 2020 - November 21, 2020	January 1, 2020 - March 15, 2020	July 1, 2019 – December 31, 2019

These changes appear intended to remedy situations where the previous *baseline remuneration* calculation would not accurately portray the employee's "pre-pandemic" remuneration – for example, if the employee was on leave between January 1 and March 15, 2020 or only works on a seasonal basis.

Harmonization of Trusts and Corporations

Under the initial framework, tax-exempt corporations or *public institutions* are generally ineligible for the CEWS. However, no similar restriction exists for tax-exempt entities or *public institutions* legally structured as trusts.

The amendments harmonize the treatment of corporations and trusts in this regard. Tax-exempt trusts and *public institutions* formed as trusts will thus no longer qualify for the CEWS (unless qualifying under another specific category).

Notwithstanding these amendments, the initial definitions still apply for the first two *qualifying periods* (i.e., March 15 – April 11, 2020 and April 12 – May 9, 2020). Therefore, these changes will only affect CEWS entitlements for the third *qualifying period* and beyond.

IV. NEW QUALIFYING PERIODS

The amendments extend the CEWS by creating five new *qualifying periods* – that is, five successive four-week periods commencing on July 5, 2020 and ending on November 21, 2020. The CEWS calculation rules for those new periods is substantially different than for previous periods. The table below summarizes the principal characteristics for each of the nine *qualifying periods*.

The new *qualifying periods* include a current period (July 5 – August 1, 2020) and a period that will begin shortly (August 2 – August 29, 2020). Thus, the new legislation includes "safe harbour" provisions for those two transitional periods. The *qualifying periods* can thus be grouped into three separate categories:

(a) *qualifying periods* #1 through #4 (the "**Initial Qualifying Periods**"), which are generally unaffected by the amendments (other than the previously-announced measures summarised above);

(b) *qualifying periods* #5 and #6 (the "**Transitional Qualifying Periods**"), which entitle the employer to the greater of the wage subsidy calculated under the formula in place for the Initial Qualifying Periods (the "**Initial Formula**") and that calculated under the new formula (the "**New Formula**"); and

(c) *qualifying periods* #7 through #9 (the "**New Qualifying Periods**"), where only the New Formula calculates the employer's wage subsidy entitlement.

	Qualifying Period	Current Reference Period	Default Prior Reference Period*	Initial / New Formula	Revenue Percentage	Maximum Base %
#1	March 15 – April 11, 2020	March 2020	March 2019	Initial	85% (15% decline)	N/A
#2	April 12 – May 9, 2020	April 2020	April 2019	Initial	70% (30% decline)	N/A
#3	May 10 – June 6, 2020	May 2020	May 2019	Initial	70% (30% decline)	N/A
#4	June 7 – July 4, 2020	June 2020	June 2019	Initial	70% (30% decline)	N/A
#5	July 5 – August 1, 2020	July 2020	July 2019	Both	(30% decline)	60%
#6	August 2 – August 29, 2020	August 2020	August 2019	Both	(30% decline)	60%
#7	August 30 – September 26, 2020	September 2020	September 2019	New	N/A	50%
#8	September 27 – October 24, 2020	October 2020	October 2019	New	N/A	40%
#9	October 25 – November 21, 2020	November 2020	November 2019	New	N/A	20%

** An employer may be permitted to elect to compare their qualifying revenues using a monthly average of January and February 2020 instead.*

V. NEW CALCULATION OF WAGE SUBSIDY

Overview

The New Formula represents a significant structural change to the CEWS. An employer's entitlement to the CEWS is now calculated on a "sliding scale". That is, an employer's revenue decline previously determined their eligibility for the CEWS, while now the employer's revenue decline determines the amount of CEWS to which they are entitled. Any employer with a revenue decline is thus entitled to some level of wage subsidy.

The New Formula has two distinct, but related, components: a *base percentage* and a *top-up percentage*. Both are based on revenue decline, though with *base percentage* measuring revenue decline similar to the Old Formula and *top-up percentage* measuring revenue decline based on a rolling three-month average.

Any employer who has experienced a revenue decline will be eligible for a wage subsidy based on the *base percentage* concept (the "**base percentage subsidy**"). Those employers with a revenue decline greater than 50% will be entitled to a greater subsidy based on their *top-up percentage* (the "**top-up subsidy**"). Notably, while the base percentage subsidy gradually declines over time, the top-up subsidy remains constant (subject to the employer's revenue decline).

These features reflect the stated public policy objectives of increasing the number of employers eligible for the CEWS while providing greater assistance to highly-impacted employers. Further, given the timing of these amendments and recognition by the Department of Finance ("**Finance**") that employers may have already made business decisions based on the availability of the CEWS, employers will retain their existing subsidy entitlement until the end of August.

Critically, the New Formula distinguishes between *eligible employees* who are on paid leave ("**furloughed employees**") and those who remain actively employed ("**active employees**"). Furloughed employees are specially accommodated to ensure the support they receive generally "aligns" with benefits under the Canada Emergency Response Benefit ("**CERB**") and/or employment insurance ("**EI**").

Key Terminology

The New Formula incorporates four new definitions: *revenue reduction percentage, base percentage, top-up revenue reduction percentage,* and *top-up percentage*.

Revenue Reduction Percentage

Revenue reduction percentage is analogous to the previous concept of *specified percentage*. In basic terms, it measures an employer's monthly revenue decline, as compared between the employer's *current reference period* and *prior reference period*. As analyzed below, employers are permitted to use either the *revenue reduction percentage* for the prevailing *qualifying period* or the immediately preceding *qualifying period*, whichever is greater.

As an example, if an employer earned \$150 of revenue in August 2019 but only \$100 in August 2020, then the employer's *revenue reduction percentage* would be 33.33% (1 - \$100/\$150).

An employer's *revenue reduction percentage* is primarily relevant to determining their base percentage subsidy (discussed further below). In addition, in respect of the Transitional Qualifying Periods only, employers who realize a *revenue reduction percentage* greater than 30% are eligible to calculate their wage subsidy amount for active employees using the Old Formula. Finally, in respect of all of the New Qualifying Periods, only employers with a positive *revenue reduction percentage* or *top-up percentage* are:

(a) eligible to claim the wage subsidy with respect to furloughed employees; and

(b) eligible to claim a refund of employer premiums paid under the *Employment Insurance Act* or employer contributions paid under the *Canada Pension Plan* or provincial equivalent.

Base Percentage

An employer's *base percentage* determines their base percentage subsidy entitlement. Conceptually, it represents the basic subsidy under the CEWS, up to a maximum limit.

Base percentage is effectively the lesser of two amounts:

(a) if the employer's *revenue reduction percentage* for the *qualifying period* exceeds 50%, a fixed (declining) percentage; and

(b) if the employer's *revenue reduction percentage* for the *qualifying period* does not exceed 50%, then that employer's *revenue reduction percentage* multiplied by a fixed multiple.

The fixed percentages and multiples decrease each successive *qualifying period*. Therefore, all other things being equal, an employer's base percentage subsidy amount declines each successive New Qualifying Period. The following table summarizes the relevant calculations by *qualifying period*.

	Qualifying Period	Base Percentage
#5	July 5 – August 1, 2020	**60%** if *Revenue Reduction Percentage* ≥50% **OTHERWISE** **1.2x** *Revenue Reduction Percentage*
#6	August 2 – August 29, 2020	**60%** if *Revenue Reduction Percentage* ≥ 50% **OTHERWISE** **1.2x** *Revenue Reduction Percentage*
#7	August 30 – September 26, 2020	**50%** if *Revenue Reduction Percentage* ≥ 50% **OTHERWISE** **1.0**x *Revenue Reduction Percentage*
#8	September 27 – October 24, 2020	**40%** if *Revenue Reduction Percentage* ≥ 50% **OTHERWISE** **0.8**x *Revenue Reduction Percentage*
#9	October 25 – November 21, 2020	**20%** if *Revenue Reduction Percentage* ≥ 50% **OTHERWISE** **0.4**x *Revenue Reduction Percentage*

Top-Up Revenue Reduction Percentage

An employer's *top-up revenue reduction percentage* is similar to their *revenue reduction percentage*, except that the employer's revenue decline is based on a rolling three-month average. It is relevant only to determining the employer's *top-up percentage*.

As an example, assume that an *eligible entity* earned the following *qualifying revenues* for the three months preceding the August 2 – August 29, 2020 *qualifying period*. Their *top-up revenue percentage* would be calculated as follows:

Year	May	June	July	Monthly Average	
2020	$100	$90	$80	$90	**A**
2019	$120	$110	$130	$120	**B**
top-up revenue reduction percentage =				**25%**	**= 1-A/B**

That employer's *top-up revenue reduction percentage* for the August 2 – August 29,2020 *qualifying period* would thus be 25%.

Note that an employer can elect to use their average earnings over January and February 2020, rather than the three-month period in the preceding year, in calculating their *top-up revenue reduction percentage*.

Top-Up Percentage

The top-up subsidy represents an incremental subsidy over and above the base percentage subsidy. It is available only to employers with more significant revenue declines (i.e., at least 50%).

The formula to calculate an employer's *top-up percentage* is complex. Nevertheless, it can be summarised as follows:

(a) employers with a *top-up revenue reduction percentage* of less than 50%, will not be entitled to a top-up subsidy;

(b) employers with a *top-up revenue reduction percentage* greater than 50% but less than 70%, will be entitled to a prorated top-up subsidy of up to 25%; and

(c) employers with a *top-up revenue reduction percentage* greater than 70%, are entitled to a top-up subsidy of 25%.

New Formula for Calculating Wage Subsidy

The April 2020 Blog details the initial formula for calculating a *qualifying entity*'s CEWS entitlement. In general, the subsidy in respect of an *eligible employee* is the lesser of $847 per week and 75% of the *eligible remuneration* paid. The subsidy is then reduced by any amounts received under the "Temporary Wage Subsidy" (the "**TWS**") program or as a work-sharing benefit under the *Employment Insurance Act*.

Formula for Initial Qualifying Periods (March 15 - July 4, 2020)

The formula remains largely unchanged for the first four *qualifying periods*. Thus, employers who previously applied for the CEWS are not generally affected by the New Formula.

One notable amendment, however, is that only remuneration paid by the entity claiming the subsidy is included in the wage subsidy calculation. Where a payroll service provider entity merely passes funds through to employees as agent or nominee on behalf of the *qualifying entity*, presumably this amendment will not raise issues. However, it may cause some uncertainty in other atypical scenarios or situations where an employee's wages are paid by an entity that is not their employer. The retroactivity of this amendment, and potential impact on applications already submitted, is especially concerning in such scenarios.

Formula for Transitional Qualifying Periods (July 5, 2020 - August 29, 2020)

The New Formula (discussed further below) generally applies to calculating an employer's subsidy entitlement for the Transitional Qualifying Periods. However, as discussed above, given timing concerns the legislation includes transitional "safe harbour" rules permitting (though not obligating) certain employers to use the Initial Formula if the New Formula would result in a diminished subsidy.

In this regard, employers can decide which formula to use on an employee-by-employee basis. In certain cases, an employer's wage subsidy might be greater by applying the Initial Formula to certain employees and the New Formula to other employees. That could be the case if, for example, the remuneration paid to some, but not all, employees is less than their *baseline remuneration*.

Formula for New Qualifying Periods (August 30, 2020 - November 21, 2020)

Subsidy calculations for the New Qualifying Periods are based solely on the New Formula. Fundamentally, that formula is still based on the total *eligible remuneration* paid to *eligible employees* each week during the relevant *qualifying period*. Adjustments based on other benefits received (e.g., under the TWS) and the special rule for remuneration paid to non-arm's length employees (and tying such amounts to the employee's *baseline remuneration*, if any) have also been maintained.

In contrast, the New Formula departs from the Initial Formula by basing the wage subsidy entitlement per employee on the employer's unique revenue decline metrics. Specifically, under the New Formula the weekly wage subsidy for an arm's length, active employee is equal to the product of:

(a) the sum of the employer's *base percentage* and *top-up percentage*; and

(b) the lesser of the *eligible remuneration* paid to the employee and $1,129.

At first glance, one might think the New Formula results in a greater subsidy since the upper limit per employee is $1,129 (rather than $847 under the Initial Formula). However, that will only be true for employers with a revenue decline of at least 50% and only in the Transitional Qualifying Periods.

For other employers, the New Formula will generally yield a lower amount. The table below sets out the maximum weekly subsidy for employers based on varying *base percentages* and *top-up percentages.*

MAXIMUM WEEKLY SUBSIDY PER EMPLOYEE					
		Base Percentage			
		60%	50%	40%	20%
Top-up Percentage	0%	$677.40	$564.50	$451.60	$225.80
	5%	$733.85	$620.95	$508.05	$282.25
	10%	$790.30	$677.40	$564.50	$338.70
	15%	$846.75	$733.85	$620.95	$395.15
	20%	$903.20	$790.30	$677.40	$451.60
	25%	$959.65	$846.75	$733.85	$508.05

Thus, employers not eligible for the top-up subsidy will generally receive a maximum of $677 per employee under the New Formula in the Transitional Qualifying Periods. That amount will decline to a maximum of $225 per employee in the last *qualifying period* (October 25 – November 21, 2020). Only employers who experience the most severe revenue declines in the Transitional Qualifying Periods will be entitled to more than they would have previously received.

New Special Computational Rules for Certain Employees

The initial CEWS framework distinguishes between arm's length and non-arm's length employees, and provides a modified subsidy calculation for employees whose current remuneration is less than their pre-pandemic wages ("**reduced-pay employees**"). The amendments maintain the former distinction, but eliminates special treatment for reduced-pay employees. In addition, the amendments introduce a key distinction between active and furloughed employees.

The addition of multiple special categories of employees (which partly overlap) will invariably complicate the wage subsidy calculation, particularly for large employers. As the below table illustrates, going forward an employer may have eight different formulae to choose from depending on the type of employee. One can readily imagine larger employers needing to make thousands of calculations in total.

Type of Employee	Qualifying Period	Formula
Active	Transitional Qualifying Periods	Old Formula or New Formula
Active	New Qualifying Periods	New Formula
Furloughed	Transitional Qualifying Periods	Old Formula (subject to any revenue decline)
Furloughed	New Qualifying Periods	Lesser of (i) *eligible remuneration* and (ii) prescribed amount
Non-Arm's Length	Transitional Qualifying Periods	Old Formula or New Formula Limited by *Baseline Remuneration*
Non-Arm's Length	New Qualifying Periods	New Formula Limited by *Baseline Remuneration*
Reduced-Pay	Transitional Qualifying Periods	Old Formula or New Formula
Reduced-Pay	New Qualifying Periods	New Formula

Furloughed Employees

The initial rules do not distinguish between active and furloughed employees. Going forward, however, the amendments make a clear distinction between these two classes of employees. The stated policy rationale is to align the support for furloughed employees with the benefits provided through the CERB and EI.

Notably, the subsidy applicable to furloughed employees does not vary based on the employer's revenue. Further, any qualifying employer who has suffered a revenue decline of any magnitude is entitled to that subsidy (subject to the comments below on exceptions for the New Qualifying Periods). Thus, employers will presumably be more inclined to keep furloughed employees on their payroll rather than terminating them.

Two exceptions apply for the New Qualifying Periods. First, no subsidy will be available in respect of non-arm's length furloughed employees or those who have no *baseline remuneration* (i.e., new employees). Second, the subsidy is subject to a maximum cap to be set forth in regulations. As of the date of writing, neither Finance nor CRA has provided any indication of what the "upper limit" will be for such furloughed employees.

Non-Arm's Length Employees

Under the initial CEWS framework, an employer's subsidy entitlement for non-arm's length employees is limited to the employee's *baseline remuneration* (regardless of the *eligible remuneration* currently paid to that employee).

The New Formula maintains this approach. For active non-arm's length employees, the subsidy remains limited to the employee's *baseline remuneration*. For furloughed non-arm's length employees, the employer is not entitled to any wage subsidy unless the employee had some level of pre-pandemic wages. Thus, employers are still generally prevented from increasing their non-arm's length employees' remuneration and benefitting from a greater wage subsidy.

Reduced-Pay Employees

The initial CEWS framework provides preferential treatment in respect of reduced-pay employees. Specifically, the wage subsidy for their employer may exceed the normal limit of 75% of their current *eligible remuneration*.

The New Formula discontinues that approach. The wage subsidy in respect of such employees is now based solely on their remuneration, regardless of their *baseline remuneration*. Certain employers may thus be advised to use the Old Formula for the Transitional Qualifying Periods in respect of reduced-pay employees since it may result in an increased subsidy.

VI. NEW BUSINESS ACQUISITION RULES

Overview

Entities that acquire a business through an asset purchase may not have initially qualified for the CEWS since their *qualifying revenues* in the *prior reference period*, which are used to calculate their revenue decline, would not include revenues relating to the newly acquired assets. The amendments eliminate that issue by introducing an elective rule available where an employer (the "**buyer**") acquires a business from another entity (the "**seller**"). In such instances, the buyer and seller can jointly elect for the seller's *qualifying revenues* in respect of the acquired business to be included in the *qualifying revenue*s of the buyer for the relevant *prior* or *current reference period.*

These rules are relieving in nature and appear to fix the legislative gap identified above. However, certain situations may fall outside the scope of this rule – for example, where less than 90% of the fair market value of all assets used by the seller in the business were acquired, or where the business was carried on outside Canada. Additionally, the election requires the seller's consent, which may not be forthcoming if it jeopardizes the seller's CEWS eligibility or previous claims. Commercial counsel drafting asset purchase agreements would be well-advised to keep this issue in mind.

Conditions of Election

The asset acquisition election is only available if the following conditions are satisfied:

(a) the buyer acquired assets (the "**acquired assets**") from the seller during, or at any time before, the *qualifying period*;

(b) immediately prior to the acquisition, the fair market value of the acquired assets constituted all or substantially all (generally, 90% or more) of the fair market value of all property used by the seller in the course of carrying on the relevant business;

(c) the acquired assets were used by the seller in the course of a business carried on in Canada;

(d) none of the main purposes of the acquisition was to increase an entity's CEWS entitlement; and

(e) the buyer and seller jointly elect for the rules to apply (or the buyer alone if the seller no longer exists).

Effect of Election

If a valid asset sale election is made, the buyer essentially inherits the seller's *qualifying revenues* for both the current and prior reference periods. Specifically:

(a) the seller's *qualifying revenue* reasonably attributable to the acquired assets ("**assigned revenue**") is included in the buyer's *qualifying revenue* for each relevant period;

(b) the assigned revenue is subtracted from the seller's *qualifying revenue* for each relevant period;

(c) any portion of the assigned revenue derived from a person who does not deal at arm's length with the seller but does deal at arm's length with the buyer is deemed not to be derived from non-arm's length persons for purposes of the *qualifying revenue* calculation; and

(d) the buyer is deemed to satisfy the payroll account requirement in the *qualifying entity* definition if the seller satisfied that condition.

VII. MISCELLANEOUS ADMINISTRATIVE AND CONSEQUENTIAL CHANGES

Prior Reference Period Election

Under the initial framework, an *eligible entity* may choose a blended average of their *qualifying revenues* in January and February 2020 to calculate their revenue decline. This election primarily benefitted "rapid growth" employers that had a minimal year-over-year revenue decline (or even an increase) but nevertheless suffered significant revenue declines after the start of 2020.

Previously, an employer who made this election was required to use their blended January/February 2020 revenues for all *qualifying periods*. The amendments permit an employer to forego following that election for new *qualifying periods*. However, an employer who elects to use that methodology in any of the final five *qualifying periods* is bound to use that methodology for all of those *qualifying periods*.

Application Filing Date

Previously, an *eligible entity* must have applied by October 1, 2020 to access the CEWS. The amendments extend that deadline to February 1, 2021 for all *qualifying periods*.

Qualifying Revenue for Prescribed Public Institutions

Special computational rules exist for calculating the *qualifying revenues* of a registered charity or enumerated tax-exempt entity – including those added by Regulation on May 15 (see our earlier Tax Alert here). Among other things, such entities may include gifts but exclude government-sourced funding in calculating their *qualifying revenues*.

Under the initial framework, prescribed eligible entities that are also *public institutions* – such as universities and school boards – are not eligible to use those computational rules. The amendments permit these prescribed *public institutions* to benefit from the special computation rules, if otherwise qualifying.

Additional Eligible Employees

Only remuneration paid by an employer to an *eligible employee* is eligible for the CEWS. The initial framework provided that an *eligible employee* excludes any individual who is without remuneration by the *eligible entity* in respect of 14 or more consecutive days in the qualifying period. That exclusion was widely regarded as preventing a given employee from benefitting from the CERB while their employer benefitted from the CEWS.

The amendments remove that exclusion for *qualifying periods* starting after July 4, 2020. This may reflect Finance's intention to phase-out or eliminate the CERB, and/or align with recent amendments to the CERB which permit claimants to earn certain remuneration without jeopardizing their CERB entitlement.

Accrual Method Election

Under the initial framework, an employer may elect to calculate their *qualifying revenues* based on the cash method. The amendments extend equivalent treatment to employers who ordinarily use the cash method to compute their revenues (for example, farmers and fishers). Those employers may now elect to calculate their *qualifying revenues* using the accrual method.

Anti-Avoidance Rule

As analyzed in more detail in the April 2020 Blog, the CEWS legislation contains a broad anti-avoidance rule. The preconditions to its application are that:

(a) an employer, or a person not dealing at arm's length with the employer, enters into a transaction or series of transactions, or takes any other action (or fails to take an action), that has the effect of reducing the *qualifying revenues* of the employer for the *current reference period*; and

(b) it is reasonable to conclude that one of the main purposes of that transaction, series, or (in)action was to cause the employer to qualify for the CEWS.

If that anti-avoidance rule applies, the employer is deemed to have no revenue decline. In addition, the employer is liable to a new penalty equal to 25% of the CEWS claimed.

The amendments broaden the anti-avoidance rule. It can now apply if it is reasonable to conclude that one of the main purposes of the transaction was to increase the amount of CEWS claimed by the employer (separate from any *qualifying revenue* modifications). This amendment applies only with respect to the Transitional Qualifying Periods (i.e., retroactively to July 5, 2020) and New Qualifying Periods.

Deemed Entitlement Rule

Under the initial framework, an employer is deemed to meet the requisite revenue decline test in a *qualifying period* if they met that test in the immediately preceding period. The amendments provide for a similar rule for the Transitional Qualifying Periods and New Qualifying Periods. Specifically, if an employer's *revenue reduction percentage* in a given month is lower than its *revenue reduction percentage* for the immediately preceding *qualifying period* – that is, it realizes less revenue decline – the employer is deemed to have realised the prior period *revenue reduction percentage* in its current *qualifying period*.

Notice of Determination

The amendments provide the Minister of National Revenue with the statutory authority to determine the amount, if any, of an employer's CEWS entitlement and issue a notice of determination accordingly. This mechanism appears designed to enable employers to challenge any denied CEWS claim without needing to await receipt of a formal assessment after filing their annual return. Employers who receive such a notice of determination must be mindful of the statutory deadlines to filing a notice of objection.

Coming into Force

All of the above amendments are retroactively deemed to have come into force on April 11, 2020. In most cases, such retroactivity is either inconsequential (e.g., in setting forth rules for the New Qualifying Periods) or taxpayer-friendly. However, certain employers – for example, tax-exempt trusts – may be disadvantaged by such retroactivity. Regardless, all employers may wish to revisit their existing CEWS claims to consider whether they are now eligible for a greater subsidy.

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