SGR 2009/1EC - Compendium

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Ruling Compendium – SGR 2009/1

This is a compendium of responses to the issues raised by external parties to draft SGR 2008/D1 – Superannuation guarantee: payments made to sportspersons

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1	*Paragraph 1* 'Employer' is not actually defined in section 12(8)[1] so these two references could be removed.	*No change* Subsection 12(1) states that subsections 12(8) to (11) expands the meaning of employee and employer. For example subsection 12(8)(a) makes the person who is paid to perform … etc an employee of the person liable to make the payment (who is therefore defined as an employer).
2	*Paragraph 3* Suggested additional wording to sentence for clarity: These concepts are relevant for the purpose of determining if an employment relationship exists and therefore whether the payer has to make the minimum amount of superannuation contributions to a complying fund in order to avoid a liability to pay the superannuation guarantee charge (SGC) in respect of a sportsperson.	*No change* The former wording is preferred because subsection 12(8) does not require an employment relationship to exist – it states that a person *is* an employee for SG purposes in certain circumstances – see paragraph 9. Whether or not an employment relationship exists is irrelevant. It is the person's status as an employee that leads to the payer's obligation to make a minimum amount of super contributions to the complying fund.
3	*Paragraphs 8, 47, 53* The Commissioner had relied upon, in part, on the 'common law' definition of 'employer' and 'employee' as indicated by the reference found in Paragraph 8 and paragraph 47 respectively (and paragraph 53 which mentions *Hollis v. Vabu*).	*Change* Wording adjusted so that it is not implied that the legislation directly refers to the common law meaning of the terms.

[1] All legislative references in this Ruling Compendium are to the *Superannuation Guarantee (Administration) Act 1992* unless otherwise indicated.

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	All of these statements are erroneous at law, although I consider them to be made inadvertently. In terms of statutory interpretation, the 'ordinary meaning' is not the same as the 'common law 'meaning. It is submitted that the High Court Judgements, *Hollis v. Vabu* and *Stevens v. Brodribb Sawmilling Co Pty Ltd* are not the relevant Authorities to be applied in determining whether the provisions in the *(SGAA)* are applicable, as they consider the application of 'common law' principles. These are clearly not relevant.	Paragraph 8 now states: It is possible that a sportsperson could be an employee under subsection 12(1) if their relationship to the payer conforms to the indicators and factors that typify a common law employment relationship. Paragraph 47 for consistency with SGR 2005/1 now states: The SGAA defines 'employee' and 'employer' in section 12. Under subsection 12(1), if a person is an employee at common law, that person is an employee under the SGAA. Paragraph 54 and its heading have been changed as follows: **Who is an employee within the ordinary meaning of that term? – subsection 12(1)** 54. The courts have considered the meaning of 'employee' and 'employer' in cases such as *Hollis v. Vabu* and *Stevens v. Brodribb Sawmilling Co Pty Ltd*. The relationship between an employee and employer is contractual and is often referred to as a 'contract of service'. An independent contractor and principal relationship is often referred to as a 'contract for services'.
4	*Paragraph 10* The last sentence '*Further, under the terms of paragraph 12(8)(a), the sportsperson is required to actively participate in the sport and that participation must involve the sportsperson's physical or personal skills*.' is a bit of a stretch and should be deleted. The point could be better covered with the following modification of the first sentence: In order to fall within the scope of paragraph 12(8)(a), the payment made to the sportsperson must be referable to the person's participation in the performance or presentation of a sport or any similar activity involving the exercise of physical or other skills, regardless of the result achieved from that participation.	*No change* The first part of the sentence reflects the position taken in paragraph 84 of SGR 2005/1 and hence is consistent with the current ATO view on that provision. Paragraph 84 states: One clear limitation on these words is that the active participation of the artist or sportsperson is required. If not, it could not be said that the person is 'paid to perform or present' the activity. The second part of the sentence highlights that 12(8)(a) has a number of separate conditions that must be met in order for it to apply – the person must be paid to perform (that is they must have some active participation) *and* that performance must involve the exercise of physical or other personal skills of the sportsperson.

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5	*Paragraph 11* It is stated clearly and plainly up front, but I think there are areas where you are not making obvious the requirement to always consider 12(1) before disregarding a payment. I think a reminder along the lines of the example in paragraph 11 as I have copied would make this clear, but also potentially in paragraphs 22 and 128 and possibly elsewhere. 11. Therefore, a sportsperson paid 'appearance fees' and similar payments to participate in sporting activity is an employee of the payer under the SGAA. However, a sportsperson paid 'prize money' would not be an employee of the payer (unless they are a common law employee) because the prize money is not paid for the sportsperson's participation in a sporting activity. Prize money is only payable if a specific result has been achieved.	*Change* *The phrase '(unless they are an employee at common law)* inserted in paragraphs 11, 22 and 128.
6	*Paragraph 13* The second sentence *'*The terms of paragraph 12(8)(c) do not require that the sportsperson participate or perform in such a broadcast using their physical or personal skills.*'* is not necessary here.	*No change* This is similar to issue 4 above as the point made in the sentence is also made in paragraph 88 of SGR 2005/1 and considered significant enough to mention. It highlights and clarifies the difference between paragraphs 12(8)(a) and 12(8)(b) and (c).
7	*Paragraph 17* Refer to paragraph 11 of SGR 94/5 which provides a better summary of a bonus.	*No change* The comments in paragraph 11 of SGR 94/5 are not referring to the same issue that is discussed at paragraph 17 of the Ruling. The issue discussed in paragraphs 17 and 18 draws out the difference between prize money being paid from a common law employer – which is akin to a bonus because the payment arises from that relationship – and prize money being paid to a sportsperson who is not in a common law employment relationship with the payer. In the second scenario the payment arises because of the results achieved from the sportsperson's participation and not from any relationship that may exists between the payer and the sportsperson.

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		This is an important point to make because this tells the reader that the change in ATO view from that taken in SGD 93/11 only relates to sportspersons receiving prize money in the latter scenario (covered in paragraph 18). The position taken in paragraph 17 is consistent with the *outcome* achieved under withdrawn SGD 93/11 but not for the same reasons given in that SGD. Note that SGR 2008/D2: Superannuation guarantee: meaning of the terms 'ordinary time earnings' and 'salary or wages' provides a more comprehensive explanation of the situations in which a bonus will form part of an employee's salary or wages and ordinary time earnings.
8	*Paragraph 19* As the draft ruling mentions the exclusions from salary or wages contained in sections 27 and 28 of the SGAA, for completeness it seems appropriate to also mention the maximum contributions base under paragraph 6(1)(b) [definition of 'ordinary time earnings'] and subsection 14(4).	*No change* Although the provisions outlined should be taken into account in determining the employer's liability (if any) to SGC, it is considered that to include a sufficient discussion on those provisions would have introduced too much detail for the purposes of this Ruling. The reference to sections 27 and 28 are included because even if subsection 12(8) may apply, the fact that the sportsperson is a prescribed employee or falls into one of the other categories means that there will be no shortfall, whereas the reference to the ordinary times earnings (OTE) paragraphs apply where there is a shortfall and operate to limit the amount of the SGC that is payable. Further, SGR 2008/D2 provides further guidance in relation to the 'maximum contributions base' requirements.
9	*Paragraph 20* First sentence amended for further clarity: The SGAA <u>also applies</u> to non-resident sportspersons paid <u>by non-resident employers</u> to participate in sport in Australia.	*Change* The first sentence now states: The SGAA <u>also applies</u> to non-resident sportspersons paid to participate in sport in Australia <u>regardless of whether the payer is an Australian resident or foreign resident.</u>

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10	*Paragraph 21* Insert reference to OTE ruling (SGR 94/4)	*Change* Reference to SGR 94/4 added as a footnote to the heading 'ordinary time earnings'.
11	*Paragraphs 25-28* 'To perform or present, or to participate in the performance or presentation of, any…sport…or any similar activity…' may involve training and other group activities as is the case with the player under a common-law employment contract mentioned in Example 1. To that extent a payment to a sportsperson must then also be referable to the person's participation in any training and other group activities if such participation is a requirement under the contract. For completeness, I think this point should be mentioned in paragraph 10 as well.	*Change* Participation in training activities would fall within the scope of 'other activities'. It would be a bit specific to refer to this kind of activity in isolation in paragraph 10. See new paragraph 52 below which discusses what the Tax Office consider 'similar activity' to mean. Further, it is considered that the word 'similar' is used to show that 'activity' is limited to things of a like kind. It is considered that activities covered by paragraph 12(8)(a) are those which derive their sporting content from the performance or presentation because that is the common thread running through the listed activities. For example, a sportsperson who is paid to participate in training sessions as part of a team is participating in a 'similar activity' for the purposes of paragraph 12(8)(a).
12	*Paragraph 28* Disagree with interpretation of paragraph 12(8)(b). The section is more directed at umpires, coaches, officials etc. not these circumstances.	*No change* Although the scope of paragraph 12(8)(b) would include persons such as umpires, coaches, officials etc, the terms of that provision are not limited to only that class of persons. There appears to be nothing in the relevant statutory context or legislative history of the provision to support a narrower reading than that adopted in the Ruling.
13	*Paragraph 30* It is not clear what 'results-based contract' means. It may be appropriate to define it.	*Change* Footnote inserted in paragraph 30: See also paragraphs 42 to 47 of SGR 2005/1.

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14	*Paragraph 41* The words '(that is, provision of advertising services)' may raise the question of whether the motorcycle racer mentioned in Example 3 is 'paid to perform…display or promotional activity…' and, in turn, may defeat the purpose of this paragraph, which purports to explain that the racer is not an employee of the café because a fee is 'paid for a result' (see paragraph 80 and 107).	*Change* Paragraph 41, first sentence now reads: Jerry is not an employee of Vicki's Café under subsections 12(1), 12(3) or 12(8) because the sponsorship payment is made under an arrangement by which a fee is paid for a result (that is, to advertise Vicki's Café at various motorcycling events).
15	*Paragraph 42* It is arguable that subsection 12(8) can apply here as the motor show is 'entertainment' and Jerry's attendance could therefore fall within section 12(8)(a).	*Change* Paragraph 42, third sentence now reads: The payment received for displaying Jerry's motorcycle at the Motor Show is not for Jerry to participate in the promotional activity in the sense required by subsection 12(8) – that is his participation does not involve the exercise of his personal sporting skills. This example now illustrates more clearly the principle in paragraphs 10 and 67 that section 12(8)(a) requires 'involving the exercise of… skills' of the person. Therefore just appearing with the motorbike at a show is not sufficient for section 12(8)(a). In this scenario where the payment is principally for the hire of the bike the payment does not come under section 12. The purpose of the example is to illustrate that the payment has to be for labour or services rather than hire or something else.
16	*Paragraph 48* As the terms 'sportsperson' and 'sport' are not defined they are not part of the legislative context, suggest moving this paragraph to after paragraph 51.	*Change* Paragraph 48 moved under the next heading *'Meaning of 'sport' for the purposes of subsection 12(8)'* and the first sentence of paragraph 49 deleted.

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17	*Paragraph 65-67* This whole section needs re-writing. The person's participation is either in sport or a similar activity, or is the exercise of physical or other personal skills (this is not an and condition).	*No change* The interpretation adopted in the Ruling of paragraph 12(8)(a) is the better view. The 'or's in the text are only expanding the activities that are subject to the requirement of the exercise of physical… and other personal skills. On a natural reading of the provision, both requirements must be met – there must be performance or participation in the performance of the sport *and* that performance must involve the sportsperson's physical or personal skills. It is not enough for the person to participate; they must exercise the requisite 'skills' to satisfy paragraph 12(8)(a). For example, a person simply providing drinks to competitors at a sports match will not satisfy 12(8)(a) because they are not using the requisite skills; although they may satisfy 12(8)(b) where there is no such requirement.
18	*Paragraphs 72-73* The point you are making in paragraphs 72 and 73 could be illustrated better, perhaps with an example. An international competition may have trouble drawing the line between appearance money and prize money that goes all the way down to, for example, 64 of 64 competitors. I am not sure they would know now where to draw the line.	*Change* Footnote added to refer to paragraph 85 which contains the following example; … in an open sporting competition which has no qualification requirements, if the sportsperson is guaranteed a payment of 'prize money' irrespective of what result they achieve, then that payment would be of a similar character to an 'appearance fee' and the person will be an employee of the payer under paragraph 12(8)(a).