TR 2023/4EC2 - Compendium

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Public advice and guidance compendium – TR 2023/4

Relying on this Compendium

This Compendium of comments provides responses to comments received on Draft Taxation Ruling TR 2023/4DC1 *Income tax and superannuation guarantee: who is an employee?* It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

All legislative references in this Compendium are to the *Superannuation Guarantee (Administration) Act 1992* (SGAA), unless otherwise indicated.

Issue number	Issue raised	ATO response
1	The final consolidated Ruling should clarify the application of superannuation guarantee (SG) to directors (for example, non-executive directors on the board of a corporate entity) who contract with a company for director's services via an interposed company or family trust. It is noted that paragraph 4 of the draft Ruling appears to exclude payments to directors from the scope of the Ruling.	This Ruling does not directly deal with arrangements involving the use of a personal service entity (PSE). In the scenario described, the company is engaging the PSE to provide the director and therefore the company contractually has an obligation to pay the PSE. The individual director has no entitlement to SG from the company and, as stated in paragraph 152 of the final consolidated Ruling, the application of Part 2-42 of the *Income Tax Assessment Act 1997* does not make the individual an employee for SGAA purposes. Our views concerning the personal services income rules are outlined in Taxation Ruling TR 2022/3 *Income tax: personal services income and personal services businesses.* In the final consolidated Ruling, we have clarified paragraph 4 to state that while the sections of the Ruling that deal with income tax (being the sections titled *Ruling* and *Appendix 1 – Explanation*) do not deal with payments for work and services which are subject to withholding under other provisions (including payments to directors), the same exceptions don't apply to *Appendix 2 – Meaning of employee under section 12 of the SGAA*. Noting this clarification, we consider the final consolidated Ruling provides appropriate guidance as to the application of the SG to directors who contract directly with an engaging entity to provide their services and not

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		through a PSE (see paragraphs 91 and 92 of the final consolidated Ruling).
2	In the final consolidated Ruling, paragraph 110 of the draft Ruling should be clarified as currently it may imply that ZG Operations Australia Pty Ltd was found to be the employer of the workers in the matter of *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48 (*ZG Operations Remittal*).	In the final consolidated Ruling, we have clarified paragraph 110 to replace the word 'employer' with 'engaging entity'.
3	Paragraph 111 of the draft Ruling suggests that in all cases where a component of labour is part of a payment, a payer must undertake a quantitative or qualitative valuation to determine whether the payment is principally for labour, referencing paragraphs 62 and 63 of *ZG Operations Remittal* as support. The referenced paragraph 62 from *ZG Operations Remittal* does not sufficiently support the proposition that is asserted in paragraph 111 of the draft Ruling.	Paragraph 111 of the final consolidated Ruling reflects the practical reality faced by an engaging entity who bears the onus of proof in demonstrating that subsection 12(3) should not apply where a payment is made to a worker partly for the remuneration of labour. The reference in this paragraph to paragraphs 62 and 63 of *ZG Operations Remittal* reflects this reality where a quantitative valuation was considered by the Court as necessary to determine whether the contract in question was principally for a benefit other than the labour of the workers in the context of the facts specific to that matter. We consider that in certain factual situations, a qualitative analysis may be appropriate to determine whether a contract is principally for a benefit other than the labour of the worker. While the Full Federal Court undertook a quantitative valuation in *ZG Operations Remittal*, we do not consider that this decision precludes the use of a qualitative analysis in appropriate circumstances. As such, no change has been made to this paragraph in the final consolidated Ruling.
4	Paragraphs 108 to 111 of the draft Ruling, which set out relevant considerations in assessing if a contract is 'wholly or principally for labour' where the contract contains both labour and non-labour components, are unlikely to provide taxpayers with sufficient guidance in determining the purpose of the contract. To this extent the following is requested: • guidance on steps taxpayers should take in determining elements of the contract other than labour	As reflected in paragraph 108 of the final consolidated Ruling, we consider that to the extent that a contract is partly for labour and partly for something else, for example, the hire of plant or machinery, whether the contract is principally for the worker's labour will be a question of fact. It is necessary to evaluate the terms of the relevant contract or contracts and assess the benefit or benefits that the engaging entity receives.

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	• where there are non-labour components identified, guidance on what taxpayers should consider in assessing if they are different services under the contract • clear and practical guidance on how a taxpayer should undertake the 'quantitative valuation' and 'qualitative analysis'.	
5	Paragraph 128 of the draft Ruling does not accurately reflect the operation of paragraph 12(8)(c), as it suggests that paragraph 12(8)(c) relates to activities described within paragraph 12(8)(a), such as participating in a performance, presentation, or other activity.	In the final consolidated Ruling, we have clarified the operation of paragraph 12(8)(c) in new paragraph 129.
6	The concepts and principles outlined in the draft Ruling would be better explained and supported by illustrative examples for all categories of deemed employees under subsections 12(2) to (10). Examples should be included for the more complicated categories of deemed employees.	While noting this comment, we consider that the principles outlined in Appendix 2 of the final consolidated Ruling provide sufficient guidance as to our view on the application of the relevant provisions. We continually consider the need for guidance around *Who is an employee?* in relation to different industries and provide that guidance through our range of different products.
7	It would be preferable for the final consolidated Ruling to be more clearly set out as a complete reference guide for entities seeking to understand the meaning of the meaning 'employee' for the purposes of section 12.	We have reviewed Appendix 2 of the draft Ruling and consider that it provides a clear and complete reference guide for entities seeking to understand the meaning of 'employee' for the purposes of section 12. As such, in the final consolidated Ruling, the format of Appendix 2 has not been changed from that of the draft Ruling.
8	Concepts and principles in Appendix 2 of the draft Ruling are largely cross-referenced to commentary in Appendix 1 of the Ruling. For better comprehension of the superannuation principles and concepts outlined, it is suggested that in the final consolidated Ruling, the number of cross-references be limited and instead that these key concepts be replicated in Appendix 2.	Appendix 2 of the Ruling was drafted to consolidate, and therefore reduce duplication between Taxation Ruling TR 2023/4 *Income tax: pay as you go withholding – who is an employee?* and Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?* (which was subsequently withdrawn). We consider that duplicating commentary in Appendix 2 of the final consolidated Ruling where that commentary is already present in either the body of the Ruling or Appendix 1 of the Ruling would undermine our broader intent in consolidating these rulings.
9	There are some references to the applicable tests being	We have only identified a single instance of the use of a test (or other

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	'straightforward' (such as in paragraph 118 of the draft Ruling) which is an oversimplification of a complex and nuanced interpretative analysis required for each worker.	consideration) being described as 'straightforward'. This instance is a direct reference to the identification of the relevant payment in the context of subsection 12(8). We are of the view this statement is not an oversimplification and we have retained it in the final consolidated Ruling.
10	The final consolidated Ruling should more prominently state that a worker who is an independent contractor under the ordinary definition of 'employee' can still be an employee for the purposes of the SGAA under the expanded definition of 'employee' in section 12.	Paragraph 88 of the draft Ruling, at the beginning of Appendix 2 of the Ruling, states that the classification of a person as an employee for the purposes of the SGAA is not solely dependent upon the existence of a common law employment relationship. In the final consolidated Ruling, further clarification has been provided in paragraph 88 as to when an independent contractor at common law may be a deemed an employee under section 12.
11	The definition provided by the Commissioner of what is 'delegation' (per paragraphs 54 to 58 of the draft Ruling) appears to be overly limited. Although likely unintended, it can be inferred that the Commissioner considers any limits placed on a worker's right to delegate would not be considered 'delegation', particularly given the comments in this paragraph that such a right cannot be limited in scope.	We consider that the drafting of paragraphs 54 to 58 of the draft Ruling appropriately reflected the law as it currently stands with respect to the meaning of delegation, and how a right to delegate, subcontract or assign affects the operation of subsection 12(3) following the decision in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76. No change has therefore been made in the final consolidated Ruling.
12	As currently drafted, the draft Ruling does not appear to consider to what extent (if any) subsection 12(8) can apply in a modern context.	We consider that the relevant content in Appendix 2 to the final consolidated Ruling appropriately addresses the application of subsection 12(8).
13	Paragraph 130 of the draft Ruling notes that the term 'in connection with' requires the services provided or performed must relate directly to the activities in question but goes on to say that paragraphs 12(8)(b) and (c) will cover services performed before and after the 'relevant activity' occurs and 'is intended to cover persons providing the "behind the scenes" services which enable the relevant activity to occur'. The paragraph goes on to provide an example of a sound technician for a concert being subject to superannuation guarantee under paragraph 12(8)(b).	We consider that this change is not necessary. Paragraph 131 of the final consolidated Ruling specifically provides that having regard to the context in which the term appears in the SGAA, 'in connection with' requires that the services a person provides or performs must relate directly to the relevant activity in question. Services provided or performed before or after the relevant activity occurs may fall within the scope of paragraphs 12(8)(b) or (c) as long as the services are 'bound up or involved in' that activity.

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	Although it appears the intention of this paragraph is to confirm that the scope of paragraph 12(8)(b) is limited only to those activities directly associated with activities caught by paragraph 12(8)(a), it is considered there is a risk that it could be misinterpreted and applied more broadly than intended. This is particularly the case where the party engaging the worker may be in the business of entertainment or other activities prescribed in paragraph 12(8)(a) and contracts with the worker.	
14	An example should be provided to clarify that SG would not apply in the context of tenant-doctor arrangements, which are described as a type of lease or bailment arrangement.	The issue of determining whether all tenant-doctor arrangements are a form of a lease or bailment arrangement is beyond the scope of this Ruling.