SGR 2008/D1 - Superannuation guarantee: payments made to sportspersons

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Draft Superannuation Guarantee Ruling

Superannuation guarantee: payments made to sportspersons

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Preamble

This document is a draft for public comment. As such, it represents the preliminary, though considered, views of the Commissioner.

Superannuation Guarantee Rulings (whether draft or final) are not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than this ruling indicates, the fact that you acted in accordance with this ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion in regards to the imposition of penalties.

What this Ruling is about

1. This Ruling explains the Commissioner's view of how the definition of 'employee' and 'employer' contained in subsection 12(8) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) applies to sportspersons and persons providing services in connection with sporting activities. It further discusses whether prize monies and other payments made to sportspersons are 'salary or wages' under paragraph 11(1)(d) of the SGAA and are 'ordinary time earnings' under subsection 6(1) of the SGAA.

2. The Ruling also considers whether the definition of 'employee' and 'employer' in subsection 12(1) of the SGAA or the extended definition of 'employee' and 'employer' in subsection 12(3) of the SGAA may apply to sportspersons and persons providing services in connection with sporting activities.

3. These concepts are relevant for the purpose of determining 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.

4. This Ruling does not specifically deal with artists, musicians or other performers which are also referred to in section 12(8) of the SGAA.

5. Unless otherwise stated, all legislative references in this Ruling are to the SGAA.

Previous Rulings

6. The issues dealt with in this Ruling were previously addressed in Superannuation Guarantee Determination SGD 93/11 which was withdrawn on 5 December 2007.

Ruling

Definition of 'employee'

7. Section 12 provides a definition of 'employee' and 'employer' for the purposes of the SGAA. Under subsection 12(1), 'employee' and 'employer' are expressed to have their ordinary meaning and an expanded meaning. Where the relationship between the parties to a contract is not a common law employment relationship or there is doubt in respect of the status of a person, the expanded meaning of 'employee' must be taken into account. The expanded meaning of 'employee' is contained in subsections 12(2) to 12(9). Of particular relevance to sportspersons is subsection 12(8) and, to a lesser extent, subsection 12(3).

8. It is possible that a sportsperson could be a common law employee under subsection 12(1) if their relationship to the payer conforms to the indicators and factors that typify an employment contract. The relevant indicators for a common law employment relationship are comprehensively covered in Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee? If a common law employment relationship does not exist subsection 12(8) and subsection 12(3) must be considered.

Specific provision that apply in respect of sportspersons

Payments for participation or performance – paragraph 12(8)(a)

9. Subsection 12(8) applies on a payment by payment basis. In applying paragraph 12(8)(a), the character of the payments received by a sportsperson are determinative of whether that person will be treated as an employee of the payer for the purposes of the SGAA. In determining the character of the relevant payment, reference must be had to the substance of the arrangement, and not merely by reference to what the parties have agreed to label the payment. Each case must be examined on all the facts and circumstances.

10. 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 or performance in the sporting or similar activity, regardless of the result achieved from that participation. This causal link is apparent in the requirement that the sportsperson is 'paid *to* perform'. 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.

11. Therefore, a sportsperson paid 'appearance fees'[1] and similar payments to participate in sporting activity is an employee of the payer under the SGAA. However, a sportsperson paid 'prize money'[2] would not be an employee of the payer 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.

Payments for services provided in connection with a sporting activity – paragraph 12(8)(b)

12. In the context in which the term appears, services are provided 'in connection with' a sporting activity if the services are directly referrable to the sporting activity such that the services can be said to be 'bound up' or 'involved in' that activity. The provision will also cover persons providing services required so that the sporting activity can be played. Such services may be provided before, during or after the sporting activity. Hence, paragraph 12(8)(b) will include persons such as umpires, referees and other sporting officials and technicians who are not already under a common law employment relationship with the relevant payer. The terms of paragraph 12(8)(b) will not be satisfied where services are provided at the same time as the sporting event but are provided for some other purpose, such as for example, advertising. In such circumstances, the direct causal link required by paragraph 12(8)(b) will not exist.

Payments for provision of services in, or in connection with, any television or radio broadcast – paragraph 12(8)(c)

13. A sportsperson who is paid to appear on a television or radio broadcast will be an employee under paragraph 12(8)(c). 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. The term 'in connection with' is read in similarly narrow way as that under paragraph 12(8)(b) – that is the payment is made for services that are directly related to the making of a film, tape or disc or of any television or radio broadcast.

[1] See description at paragraph 85 of this draft Ruling for a description of the types of payments that constitute 'appearance fees'.
[2] See discussion at paragraphs 86 to 88 of this draft Ruling for a description of the types of payments that constitute 'prize money'.

Contracts 'wholly or principally for the labour of a person' – subsection 12(3)

14. Under subsection 12(3) a person who works under a contract that is wholly or principally for the person's labour is an employee of the other party to the contract. If a sportsperson enters into a contract for the endorsement of a product or a particular brand with a corporate or other sponsor, the operation of subsection 12(3) should be considered. Generally in the context of such sponsorship agreements, the contract is not 'wholly or principally' for the 'labour' of the sportsperson, but rather it is a contract for a result. However, each case must be examined on its facts.

Definition of 'salary or wages'

15. 'Salary or wages' is defined inclusively in section 11. Payments can be salary or wages under the ordinary, or common law, meaning of that term or they can be salary or wages by falling within the extended definition in subsection 11(1).

16. Paragraph 11(1)(d) expands the meaning of 'salary or wages' in the context of sportspersons by including payments for 'work' referred to in subsection 12(8). Only payments that come within the scope of subsection 12(8) will be taken to be salary or wages under paragraph 11(1)(d).

17. There is a distinction between the application of the salary or wages provisions to common law employment relationships and the application of subsection 12(8). Once a common law employment relationship is established the payments take their character from the employment relationship. For example, an amount of 'prize money'[3] paid to a sportsperson by their common law employer is characteristic of an incentive payment or bonus that arises from the course of normal employment. Such a payment would therefore form part of that sportsperson's salary or wages.

18. By contrast, where subsection 12(8) applies, a person is attributed a status with reference to the payments made to them for particular activities that they engage in. In these situations, the employment relationship is taken to exist provided the payments made to that person have a particular character – in the case of a sportsperson, for their performance or participation in a sporting activity. The payment of prize money in such a situation is for a result achieved and is not merely referrable to the sportsperson's performance or participation in the sport. Hence, because such payments do not fall within the scope of subsection 12(8), they will also not be salary or wages under paragraph 11(1)(d).

[3] See discussion at paragraphs 86 to 88 of this draft Ruling for a description of the types of payments that constitute 'prize money'

19. Where relevant, the exclusions from 'salary or wages' contained in section 27 should be considered to determine the amount of an individual superannuation guarantee shortfall and superannuation guarantee charge payable by an employer.

20. The SGAA will apply to non-resident sportspersons paid to participate in sport in Australia. A certificate of coverage made under a scheduled international social security agreement may have been provided such that the payer is not required to pay SGC if they do not make superannuation contributions to a complying fund on behalf of the sportsperson. Team officials and non-resident event organisers may also be excluded from the scope of the SGAA if they are a 'prescribed employee' within the terms of subregulation 7(1) of the Superannuation Guarantee (Administration) Regulations 1993 (SGAR 1993).

'Ordinary time earnings'

21. A sportsperson's ordinary hours of work for the purposes of calculating ordinary time earnings are generally the hours that they actually worked. A sportsperson's earnings will consist of the amounts paid to the person to perform or participate in the relevant activities listed in subsection 12(8) – that is the earnings will equal the amount recognised as salary or wages under paragraph 11(1)(d).

22. Prize money will not form part of ordinary time earnings because the entitlement to the prize money will only arise on achieving a specific result. That entitlement does not accrue during the sportsperson's participation in the relevant sporting activity.

Relevance of income tax treatment of payments

23. Various types of payments received by sportspersons, such as fees for public appearances, product promotion, prizes or endorsements may be considered 'assessable income' under the *Income Tax Assessment Act 1997.*[4] This would not make the entity making these payments liable to make superannuation contributions to a complying superannuation fund in respect of the sportsperson if that person is not an employee of that entity under either subsections 12(1), 12(3) or 12(8) of the SGAA. How the provisions of the SGAA apply to payments made to a sportsperson must be determined independently from the process of determining whether the relevant payments constitute 'assessable income' of the sportsperson.

[4] See Taxation Ruling TR 1999/17 Income tax: sportspeople - receipts and other benefits obtained from involvement in sport.

Date of effect

24. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute with the Commissioner agreed to before the date of issue of the Ruling.

Commissioner of Taxation
3 September 2008

Appendix 1 – Examples

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

Example 1: Common law employee; sponsorship agreements and award for 'best and fairest'

25. Kyle is an Australian footballer registered to participate in the national competition. Kyle plays on a full-time basis under a three year playing contract with one of the national football clubs. Kyle's playing fee for each year was $50,000. In addition, for each match for which Kyle is selected he is entitled to be paid $1,000 if the match lost or drawn and $4,000 for each match won. Kyle is required to attend training at the club grounds 4 times a week, and when participating in a match, Kyle is under the direction of the team coach. On one occasion Kyle is selected for a match and trains with the twenty man squad but is not selected in either the thirteen man starting line up or as one of the four interchange players because of a minor injury.

26. In addition to the match payments, Kyle received $1,000 under a sponsorship agreement with a sports clothing manufacturer, $5,000 to appear at certain promotional events held at a retail shopping centre over a 12 month period and $2,000 from a media network for an appearance on a television variety show. He also received $10,000 as an award for being judged 'best and fairest for 2007'. This amount was paid directly to Kyle by a corporate sponsor.

Contract with national football club

27. The three year playing contract that Kyle enters into with the club is a common law employment contract under the terms of subsection 12(1). This is because Kyle must perform the activities of training and playing in the match and cannot delegate to another person to fulfil those obligations. Further, Kyle is required to submit to the direction of the team coach. Therefore, superannuation contributions should be made on Kyle's behalf to avoid SGC being applicable to the playing fee and the match fees paid by the club.

28. If there is doubt that Kyle is in a common law relationship with the club, paragraph 12(8)(a) would apply to the match payments he received as they are paid for his participation in the sporting activity. Paragraph 12(8)(b) would apply to the $50,000 paid for his agreement to be available to play for the team each year over the next three years and the fee for the match that he was selected for but did not actually take the field as he is being paid to provide services in connection with a sporting activity. Those services are 'bound up' and 'involved with' his participation in the national football competition.

Best and fairest award

29. The $10,000 for the 'best and fairest' award is paid directly to Kyle by a corporate sponsor. There is no common law employment relationship between Kyle and that corporate sponsor, therefore the application of subsection 12(8) must be considered. The 'best and fairest' award is a payment by way of recognition of excellence. As such, the payment relates to a result achieved rather than for Kyle's participation in any particular football game or games. This will be the case despite the fact that the award was given to Kyle because of his participation in each of the games that he had played in. Kyle is being paid for a particular result arising from his participation in the sport, not just to perform or participate in the sport, therefore subsection 12(8) does not apply.

Sponsorship agreements

30. The payments made to Kyle from the sports clothing manufacturer are paid under a results based contract and cannot be said to have a real connection to his actual participation in the football matches. Rather, that contract was offered to him by reason of his status as a well recognised football player.

31. Under the terms of the agreement in respect of the retail shopping centre, Kyle is merely obliged to attend certain events and was paid a fee for those attendances. The substance of the contract is to provide a result to the payer and not the provision of 'labour' in the sense required by paragraph 12(3). Therefore, the payments from the retail shopping centre management for attendance at the promotional activities will not make Kyle an employee of the entity liable to make the payments because neither subsections 12(1), 12(3) nor 12(8) would apply.

Appearance on television show

32. The payment Kyle receives for his appearance on the televised variety show would make him an employee under paragraph 12(8)(c) because he is being paid to provide services in direct connection with the television broadcast.

Example 2: Appearance fee; prize money and grants

33. Aimee is a professional tennis player who has been invited to participate in an Australian women's tennis exhibition tournament by its organisers Auspromotions. Aimee's participation was secured prior to the tournament when Auspromotions agreed to pay her a guaranteed appearance fee of $10,000. Auspromotions also pays prize money to the players based on their overall placing as they progress through the competition. Aimee reaches the semi-finals and receives $50,000 in prize money from Auspromotions in addition to the $10,000 appearance fee.

34. During the year she also received incentive payments totalling $5,000 from the regional Olympic Committee as she will compete for a medal in the upcoming summer games.

Prize money paid by Auspromotions

35. Aimee is not in a common law employment relationship with Auspromotions. Indicators that support this conclusion include the fact that Aimee was required to provide her own equipment, and was free to determine her own training schedule and how she would participate in the tournament.

36. Therefore, subsection 12(8) must be considered. For the purpose of applying paragraph 12(8)(a), the character of the payments made to Aimee by Auspromotions must be ascertained. The appearance fee was paid for Aimee's participation in the tournament and must be paid by Auspromotions regardless of the result achieved. Therefore, Aimee will be an employee of Auspromotions under paragraph 12(8)(a), and her salary or wages and ordinary time earnings will comprise that $10,000 fee under paragraph 11(1)(d). The $50,000 prize money will not form part of Aimee's salary or wages nor her ordinary time earnings because the entitlement to this payment only arose once she had won each round (that is, achieved a specific result) and does not accrue to her during her actual participation in each tennis match.

Grants from the regional Olympic Committee

37. Aimee is not in a common law employment relationship with the regional Olympic Committee. Indicators that support this conclusion include the fact that Aimee will set her own training schedule, must provide her own equipment and is not at the direction of the Committee in relation to which tournaments she is to participate or how she will go about participating in such tournaments.

38. Therefore, the terms of subsection 12(8) must be considered. The purpose of the incentive payments made to Aimee was to provide financial support to Aimee so that she could further develop her sporting talent. The incentive payments are not made specifically so that Aimee would participate in the Auspromotions tournament or the upcoming summer games, even though a natural incident of the financial support provided by the incentive payments is to enable Aimee to be able to train and hence enhance her performance at those events. Therefore, Aimee is not an employee of the regional Olympic Committee by reason of the incentive payments.

Example 3: Sponsorship agreement; payment for hire of equipment

39. Vicki's Café is sponsoring motorcycle racing so that Vicki's business would benefit form the exposure in the form of advertising. The sponsorship money is paid to Jerry, a competition motorcycle rider, to cover his costs of racing such as fuel, repairs, spare parts and safety clothing. Jerry's motorcycle, support vehicle, clothing and caps carry Vicki's business name.

40. Jerry also received payment from the organisers of a Motor Show to display his motorcycle at the event.

Sponsorship agreement

41. 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, provision of advertising services). Although the payments cover the costs involved in racing, without which Jerry may have been unable to participate in the sport, the payments are not made for that participation. Rather, the payments are made for the right to display the Vicki's Café logo on the motorcycle and Jerry's clothing.

Payment for hire of motorcycle

42. Jerry is not an employee of the organisers of the Motor Show. The contract lacks the indictors required to establish a common law relationship between Jerry and the organisers of the Show. The payment received for displaying Jerry's motorcycle at the Motor Show is not for Jerry to perform in the promotional activity in the sense required by subsection 12(8). Rather, the payment is principally for the 'hire' of the motorcycle. Further, even though Jerry is required to appear with the motorcycle at the Motor Show, he is not providing 'labour' to the organisers of that Motor Show in the sense required by subsection 12(3).

Example 4: Non-resident sportsperson

43. Jakeb is an international cricket player who has been invited to play a season with an Australian State side. Jakeb is a non-resident. The terms of this contract require him to attend training at specified times, attend each match on time and Jakeb is obliged to attend team functions and events as directed by the State team. These indicators establish that Jakeb is a common law employee of the State cricket side.

44. If there is doubt as to this status, Jakeb will be an 'employee' of the State side under paragraph 12(8)(a). This is because the payments made by the State side are for Jakeb's participation in the cricket matches regardless of the result achieved from that participation.

45. Although Jakeb is a non-resident, his country of origin does not have a scheduled international social security agreement with Australia, so SGC would be liable to his employers unless minimum superannuation contributions are made on his behalf to a complying fund. However, if Jakeb satisfies certain conditions he would be able to claim a departing Australia superannuation payment (DASP) when he leaves Australia at the end of the season.[5]

[5] More information about DASP can be found on the Tax Office website www.ato.gov.au

Appendix 2 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached.

Legislative context

46. The purpose of the SGAA is to encourage employers to provide a minimum level of superannuation contributions support for employees.[6] Such contributions must be made to a complying superannuation fund. If an employer does not provide the minimum level of contributions in respect of each of their employees, the employer will be liable to pay the superannuation guarantee charge (SGC). The terms 'employee' and 'employer' are defined in the SGAA. The concept of 'salary or wages' is also important to employers for superannuation guarantee purposes as salary or wages is used for calculating the individual superannuation guarantee shortfall of each of their employees.

47. The SGAA defines 'employee' and 'employer' in section 12. Subsection 12(1) defines the terms as having their ordinary meaning – that is their meaning under common law. For the purposes of the SGAA, subsections 12(2) to 12(11) expand the ordinary meaning of 'employee' and 'employer' and makes provision to avoid doubt as to the status of certain persons.[7] The extending provisions that are relevant to this Ruling are subsections 12(3) and 12(8).[8]

48. The term 'sportsperson' and 'sport' are not defined in the SGAA. [9] For the purposes of this Ruling a person who performs or participates in a sport or any similar activity involving physical or other personal skills will be referred to as a 'sportsperson'.

Meaning of 'sport' for the purposes of subsection 12(8)

49. 'Sport' is not defined for the purposes of the SGAA and so takes its ordinary meaning. The *Australian Oxford Dictionary* defines 'sport' as 'a game or competitive activity, especially an outdoor one involving physical exertion, for example cricket, football, racing, hunting'. The definition is an inclusive one.

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[6] See Explanatory Memorandum to the Superannuation Guarantee (Administration) Bill 1992.
[7] Except for subsections 12(9A) and 12(11) which restrict the meaning of those terms.
[8] Subsection 12(3) and subsection 12(8) are also discussed in SGR 2005/1 at paragraphs 64-78 and 83-88 respectively.
[9] Further, the term 'sportsperson' only appears in the heading for subsection 12(8) 'Artists, musicians, sports persons etc' which is not taken to be part of the Act according to subsection 13(3) of the *Acts Interpretation Act 1901*.

50. Games of skill exhibit many of the characteristics of physical sports, such as skill, sportsmanship, and at the highest levels, professional sponsorship which is usually associated with 'outdoor' physical sports. For example billiards, bridge and chess are all recognized as sports by the International Olympic Committee.[10]

51. The purpose of subsection 12(8) was to expand and make provision to avoid doubt as to the status of certain persons engaged in particular activities – in this case 'sport'. Subsection 12(8) by its terms applies to 'any …sport… or any similar activity …involving the exercise of intellectual, artistic, musical, physical or other personal skills…'.[11] In the context in which the term appears, it is considered that 'sport' should be given a broad meaning for the purposes of the SGAA and should not be read narrowly to limit the scope of subsection 12(8) to only activities that have a physical exertion element.[12]

Determining whether a sportsperson is an 'employee' for the purposes of the Superannuation Guarantee provisions

52. In order to establish whether a sportsperson is an employee for the purposes of the SGAA:

(i) Determine whether the sportsperson is a common law employee by considering the key indicators (see paragraph 55 of this draft Ruling). If, after an examination of the relevant factors, the relationship between the payer and the sportsperson is an employment relationship then subsection 12(1) applies and a liability for SGC may arise if the required contributions are not made.

(ii) If subsection 12(1) does not apply then the extended definition of 'employee' contained in subsection 12(8) should be considered (see paragraphs 60 to 95 of this draft Ruling).

(iii) If both subsections 12(1) and 12(8) do not apply then subsection 12(3) should be considered (see paragraphs 96 to 108 of this draft Ruling).

(iv) If the tests in subsections 12(1), 12(8) or 12(3) are satisfied then the general exclusions from salary or wages contained in sections 27 and 28 should be considered, if relevant, when calculating an employee's individual superannuation guarantee shortfall (see paragraphs 118 and 119 of this draft Ruling).

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[10] The world governing bodies are represented in the Association of the International Olympic Committee Recognised International Sports Federations.

[11] Further discussion on what constitutes a 'sport' or 'game' can be found in Taxation Ruling TR 97/22 at paragraphs 24 to 40.

[12] See also comments by the High Court in *FC of T v. Stone* 2005 ATC 4234 at 4237; (2005) 59 ATR 50 at 53.

Common law employee – general principles – subsection 12(1)

53. The meaning of 'employee' and 'employer' can be found in the common law in cases such as *Hollis v. Vabu*[13] and *Stevens v. Brodribb Sawmilling Co Pty Ltd.*[14] 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'.

54. In defining the relationship between the parties to the contract, the totality of the relationship must be considered against the indicators and factors identified in the relevant case law. These indicators are outlined and further discussed in SGR 2005/1.[15]

55. Briefly, indicators of a common law employment relationship are:

- The employer exercising, or having a right to exercise, control over the manner in which the work is performed by the worker.[16]
- The worker serving the employer in the employer's business rather than carrying on a trade or business of their own.[17]
- The substance of the contract under which the worker is engaged not providing for the production of a given result.[18]
- The worker being contractually required to personally perform the work, in contrast to having a power to delegate the work.[19]
- The worker bearing little or no risk of the costs arising out of injury or defect in carrying out their work.[20]
- The worker *not* providing significant assets, tools or equipment for their work, or being entitled to a reimbursement or some allowance for their cost if he or she does provide such significant assets, tools or equipment.[21]

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[13] (2001) 207 CLR 21.
[14] (1986) 160 CLR 16.
[15] At paragraphs 32 to 60.
[16] Paragraphs 33 to 38 of SGR 2005/1. See also *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.
[17] Paragraphs 39 to 41 of SGR 2005/1. See also *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21 at 44-45, endorsing Windeyer J in *Marshall v. Whittaker's Building Supply Co* (1963) 109 CLR 210.
[18] Paragraphs 42 to 47 of SGR 2005/1. See also *Neale (Deputy Commissioner of Taxation) v. Atlas Products (Vic) Proprietary Limited* (1955) 94 CLR 419; *World Book (Australia) Pty Ltd v. Commissioner of Taxation* (1992) 27 NSWLR 377; 92 ATC 4327; (1992) 23 ATR 412.
[19] Paragraphs 48 to 50 of SGR 2005/1.
[20] Paragraph 51 of SGR 2005/1.
[21] Paragraphs 52 to 57 of SGR 2005/1.

- The employer having the right to suspend or dismiss the worker.[22]
- The employer having the right to the exclusive services of the worker such that the worker does not perform work for others.[23]
- The worker being provided with employee benefits such as annual leave, sick leave and long service leave and otherwise being treated as an employee for regulatory purposes.[24]
- The worker being required to market the employer by bearing that entity's livery, for example, by wearing a uniform.[25]

56. Not all of the indicators outlined above must be satisfied in order to establish a common law employment relationship. In *Kelly v. FC of T* (*Kelly*),[26] it was held that a university student that also played for a league football club was an employee of the football club. In that case, the taxpayer was paid a set amount for each game that he played for the football club. In addition to those payments, he also received a cash award of $20,000 from a television station as a result of winning the Sandover Medal for being voted by the umpires as the best and fairest player during the season. In determining that the receipt of the $20,000 was assessable income of the taxpayer, the court found that the taxpayer was an employee of the football club. Franklyn J found that the following factors were relevant in finding the taxpayer was an employee of the club:[27]

> His income tax return for the year 1979 as well as his oral evidence shows that he considered himself an employee and that the club deducted income tax instalments from payments made to him as an employee. He was obliged to attend club functions and other functions as directed by the club and to attend the club's training sessions unless excused, and when playing a game was subject to the direction of the club's coach. On his own evidence he was required to submit to the rules of the club and his obligation, as he understood it, was to play his best at all times.

57. As evidenced by the decision in *Kelly*, in determining whether a common law employment relationship exists between a sportsperson and the payer, what is required is a weighing up of the relevant facts and circumstances of each case, having regard to the indicators as outlined in paragraph 55 of this draft Ruling.

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[22] Paragraph 58 of SGR 2005/1. See also *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 36 per Wilson and Dawson JJ.
[23] Paragraph 58 of SGR 2005/1. See also *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 36 per Wilson and Dawson JJ.
[24] Paragraph 58 of SGR 2005/1. See also *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24 per Mason J.
[25] Paragraph 59 of SGR 2005/1. See also *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21 at 42 per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.
[26] *Kelly* v. *FC of T* (1985) 80 FLR 155, 85 ATC 4283, 16 ATR 478.
[27] *Kelly v. FC of T* 85 ATC 4283 at 4287; 16 ATR 478 at 482.

58. Once a common law employment relationship is established, the majority of payments made by the employer will be salary or wages paid to the employee. This is because those payments derive their character from the employment relationship between the parties.[28]

59. Where there is a doubt as to the status of the sportsperson, or where the relationship is concluded to be one of independent contractor and principal, consideration must be had to the extended meaning of 'employee' in subsections 12(3) and 12(8).

Payment for performance or participation in performance of sport – extended definition of 'employee' – paragraph 12(8)(a)

60. Paragraph 12(8)(a) provides:

> (a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;

61. The features discussed below are considered to be the key requirements for a sportsperson to be an employee for SG purposes under paragraph 12(8)(a). A natural reading of the provision requires that the payment in question has certain characteristics for the terms of paragraph 12(8)(a) to apply.

62. Payments to sportspersons can be divided into three broad categories:

(a) Payments for participation or performance in sporting activities or events – for example, appearance fees and match payments.

(b) Payments for more passive activities – for example, sponsorships, endorsements, public appearances and grants.

(c) Payments for achieving a result – for example, prize money paid for high rankings in a tournament and player-of-the-match awards.

The characterisation of payments is discussed further in this draft Ruling at paragraphs 83 to 95.

[28] There are some limited circumstances in which certain payments made by a common law employer will not be salary or wages, for example amounts paid to the employee as a reimbursement (see paragraph 20-21 of SGR 94/4: Superannuation guarantee: salary or wages).

Meaning of the term 'paid to perform or present, or participate in the performance or presentation of'

Requirement for active participation in the sport

63. One clear limitation on the extended meaning of 'employee' in paragraph 12(8)(a) is that the sportsperson is required to actively participate in the sport. This is implicit in the statement that a person is 'paid to perform… or participate in the performance' of that activity.[29]

64. There may be some payments made to the sportsperson which arise out of the circumstances of that person's involvement in sport rather than the person's active participation in a sporting event. Common examples are grants made to sportspersons. Often grants are provided to certain sportspersons because of their proven ability to pursue sporting excellence. Although eligibility for the grant is referable to the sportspersons participation in sport, such payments are not for actual participation in particular sporting events. Rather, the purpose of such payments is often directed at ensuring that the sportsperson is able to maintain and further develop their sporting ability through on-going participation in their chosen field of sport.

Requirement that participation must relate to physical and/or intellectual skills

65. Another requirement of the extended meaning of 'employee' in paragraph 12(8)(a) is that the participation in the sporting activity must involve '*the exercise of intellectual … physical or other personal skills*.' That is, the cause of the payment must relate to the sportsperson's active participation in a sport that involves the exercise of their specific personal skills.

66. In sports such as car racing the equipment used in the performance of the sport may develop a certain amount of public prominence in its own right. It is not unusual to have 'exhibition' or promotional events where the purpose of the event is to display the relevant object, rather than involve any real exercise of the relevant sportsperson's personal skills. For example, a promotional event may have as its purpose public display of a particular motor vehicle and to make available a well know driver for autographs.

67. In such cases, although the driver is participating in a promotional activity, that participation does not require the driver to use their specific physical or personal skills in the course of that participation. Such a circumstance will not satisfy the requirement in paragraph 12(8)(a). However, the other provisions in section 12 must also be considered in determining whether in such circumstances the driver is an 'employee' for SGAA purposes.

[29] See also SGR 2005/1 at paragraphs 83-84.

Requirement for causal link between payment and participation

68. A payment made to an individual must be directly referrable to that individual's performance or participation in a sport. The requirement to establish this causal link is implicit in the use of the word 'to', as in 'paid *to* perform'.[30] 'Performance' in this context refers to the execution of the physical or personal skills of the sportsperson and does not focus on the level of success achieved. Amounts that fall within the scope of paragraph 12(8)(a) are payments which are dependant the sportsperson's active involvement in the sport regardless of the result arising from that participation. Such a payment may be made under a contract whereby the sportsperson undertakes to the payer that they will participate in the relevant sporting event. Depending on the terms of the agreement, such an undertaking will often be enforceable under the contract.

69. Payments that are dependant on the result achieved from the sportsperson's participation are not payments made for a person 'to perform' but rather are payment made 'because of' that performance. For example, prize money is a payment made to a sportsperson for their success in a sporting event. However, although participation in the sport is a condition precedent to the receipt of the prize money, the sportsperson must produce a specific result in order to receive the prize money.

70. The same analysis applies to other rewards, such as Player of the Match or Sportsperson of the Year awards that are offered by the payer as part of a promotional exercise (for example the Sandover Medal payment in *Kelly*).[31]

What is the relevant 'payment'?

71. Identifying the relevant payment to which the test in paragraph 12(8)(a) must be applied will often be straightforward. Each payment should be examined separately to determine the character of that payment.

[30] Paragraph 12(8)(a).
[31] See paragraph 56 of this draft Ruling.

72. Particular sporting competitions may provide for a final lump sum amount to be paid to participating sportspersons which is referable to a number of different purposes. For example, a sportsperson may be entitled to a guaranteed amount provided they attend and participate in the competition, regardless of the result achieved in that competition (commonly referred to as an appearance fee). The framework of such competitions may be that where the sportsperson achieves a certain level of success, for which the prize money to be awarded will exceed the appearance fee, then the parties agree that payment of the prize money will also discharge the obligation to pay the appearance fee. In such cases when determining whether the payment received relates entirely to a single cause (that is, the success achieved) or a number of different causes (that is, the success achieved plus the guaranteed amount for merely participating) will depend on the substance of the arrangement.[32]

73. Where, having regard all the facts and circumstances and the substance of the arrangement, a lump sum payment is comprised of component parts that represent both prize money and an appearance fee, the lump sum should be apportioned appropriately and subsection 12(8) should be applied to each component separately.

Will paragraph 12(8)(a) apply differently to amateur and professional sportspersons?

74. The scope of paragraph 12(8)(a) is expressed to apply to *any* person '…who is paid to perform or present, or to participate…' or '…is paid to provide services in connection with an activity…'. The application of the test is dependant on the character of the payments made to the sportsperson and the status of the person as either a 'professional' or an 'amateur' is irrelevant to the analysis.

75. Apart from situations where a common law employment relationship is established, a sportsperson may engage in other activities that arise from the commercial exploitation of his or her public fame or image. Whether or not these activities amount to a 'business' is also irrelevant for SGAA purposes – each of the specific rules in subsection 12(8) must be applied on their terms to each payment made.

Payments for persons providing services in connection with sport – paragraphs 12(8)(b) and 12(8)(c)

76. The scope of subsection 12(8) is further extended by paragraphs 12(8)(b) and 12(8)(c). These paragraphs state:

> (b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

[32] See also *McLaurin v. Federal Commissioner of Taxation* (1961) 104 CLR 381.

(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.

77. Both these paragraphs do not require a person to actively participate or perform in the sport or broadcast or other activity. However, it is a requirement of both provisions that a person actually provide services 'in connection with' the sport or broadcast, and not for some other purpose.

78. The words 'in connection with' are not technical words and should take on their ordinary meaning having regard to the context in which they appear. The term 'in connection with' has been considered by the courts in the context of the income tax legislation and as far as those cases discuss the ordinary meaning of the term are useful references for the purposes of the SGAA. A summary of the relevant case law was undertaken by Wilcox J in *Our Town FM Pty Ltd v. Australian Broadcasting Tribunal*:[33]

> The words 'in connexion with'... do not necessarily require a causal relationship between the two things: see *Commissioner for Superannuation v. Miller* (1985) 63 ALR 237 at 238, 244, 247. They may be used to describe a relationship with a contemplated future event: see *Koppen v. Commissioner for Community Relations* (1986) 67 ALR 215 at 220; *Johnson v. Johnson* [1952] p 47 at 50-1. In the latter case the United Kingdom Court of Appeal applied a decision of the British Columbia Court of Appeal, *Re Nanaimo Community Hotel Ltd* [1945] 3 DLR 225, in which the question was whether a particular court, which was given 'jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act', had jurisdiction to deal with a matter which preceded the issue of an assessment. The trial judge held that it did, that the phrase 'in connection with' covered matters leading up to, or which might lead up to, an assessment. He said (at 639)
>
> > 'One of the very generally accepted meanings of "connection" is "*relation between things one of which is bound up with or involved in another*"; or, again "having to do with". *The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing.* The phrase "having to do with" perhaps gives as good a suggestion of the meaning as could be had.'
>
> This statement was upheld on appeal. (emphasis added)

[33] (1987) 16 FCR 465 at 479-480; (1987) 77 ALR 577, at 591-2.

79. As can be seen from the statement above, the term 'in connection with' could be given a relatively wide meaning, depending on the context in which that term appears. However, having regard to the context in which the term appears in the SGAA, 'in connection with' requires that the services a person provides must relate directly to the sporting activity or broadcast in question. Services provided before or after the sport or broadcast occurs would fall within the scope of paragraphs 12(8)(b) or 12(8)(c) so long as the services are 'bound up or involved in' that activity. That is, the use of the term 'in connection with' in paragraphs 12(8)(b) and 12(8)(c) is intended to cover persons providing the 'behind the scene' services which enable the sport to be played or the broadcast to be shown. Therefore referees, umpires, team officials and event commentators who participate or provide services before, during and after the sporting activity would be employees under subsection 12(8).[34]

80. Sportspersons may enter into sponsorship agreements whereby they are required to display the sponsor's logo during their participation in the sport. In such a case, the sportsperson is not providing a service 'in connection with' the sporting activity, but rather is being paid to produce a result – that is, advertise the sponsor's brand.

81. In contrast, a sportsperson may be paid to appear on a television show to provide commentary on their chosen sport. Payments made for services provided by the sportsperson in this context may fall within the scope of paragraph 12(8)(c). Similar to paragraph 12(8)(b), the terms of paragraph 12(8)(c) apply where services are provided directly in or in connection with the making of any film, tape or disc or of any television or radio broadcast. That is, persons paid to appear in the relevant broadcast or to provide the 'behind the scenes' services that directly relate to the making of that broadcast will be employees under paragraph 12(8)(c) for the purposes of the SGAA. Unlike paragraph 12(8)(a), the services provided by the sportsperson in such circumstances does not have to involve the actual exercise of their physical or other personal skills.

Who is the 'employer' for the purposes of subsection 12(8)?

82. Subsection 12(8) treats certain persons as 'employees' for SGAA purposes if they are paid for participation in or provision of services in connection with certain activities. Read contextually, having regard to the terms of subsection 12(1), where subsection 12(8) applies the effect of that subsection is to treat the person making the payment as an 'employer' for the purposes of the SGAA. Therefore, if a sportsperson is an employee under subsection 12(8), then the person or entity making the payment will be their employer and that person or entity will have to make the minimum amount of superannuation contributions to a complying fund in order to avoid a liability to pay the SGC.

[34] See also SGR 2005/1 at paragraphs 83-88.

Characteristics of different types of payments to sportspersons in relation to their involvement in sport

83. Whether a payment to a sportsperson is of the type covered by subsection 12(8) is determined by reference to the character of the payment made to the sportsperson. Establishing whether subsection 12(8) applies in a particular situation requires an examination of all the relevant facts and circumstances. Some common types of payments that sportspersons may receive are discussed below.

Match Payments

84. A payment made to a person from a club that the player is contracted to play for would be a payment that is made for participation in a sporting event as the player and club are often considered to be in a common law employment relationship. Examples of this type of arrangement are common in team sports such as football, rugby, netball and basketball.

Appearance fees

85. Sportspersons are often paid an 'appearance fee' to induce them to appear in certain competitions. The fee may be described in a number of ways in the contract between the competition organisers and the sportspersons. The description used by the parties to the agreement is not determinative of the true character of the payment. However described, where the substance of such arrangements is that the payment is made for the purpose of ensuring the sportsperson's participation in the sport regardless of the result achieved, then they will be an 'employee' of the payer under paragraph 12(8)(a) for the purposes of the SGAA. For 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).

Prize money

86. At first instance, in *Stone v. Federal Commissioner of Taxation*[35] Hill J drew a distinction between genuine prize money and appearance money. He said:[36]

> However, the reference to income producing activity does not refer to something that is neither a business, nor an employment or where the reward is not for services rendered in the sense that s 26(e) requires.

[35] [2002] FCA 1492; (2002) 196 ALR 221; 2002 ATC 5085; (2002) 51 ATR 297.
[36] (2002) 51 ATR 297 at 316; 2002 ATC 5085 at 5102.

> No doubt prize money would likewise be an incident or product of any business which an athlete carried on as a professional athlete. But, with respect to the submissions, I do not think that merely because an amateur athlete wins a prize as a result of sporting prowess that the amount in question is income. Whether it is income will turn on the nature of the activity which the athlete pursues, not the fact that it is a prize as such. The question is different, however, where the athlete receives an amount for participating, whether or not the athlete secures a place. In my view such amounts are not prizes, but reflect a receipt which is dependant upon services, in the sense of merely showing up to participate.

87. Hence, a distinction is to be drawn between payments that are made because of a result achieved due to the person's 'sporting prowess' and payments made in order to secure the sportsperson's participation regardless of whether they secure a place.[37]

88. Prize money is paid to a sportsperson on achieving a certain level of success in a competition. Although participation in the sport using the sportsperson's physical or personal skills is a prerequisite to achieving the relevant result, the entitlement to the prize money arises because of the result achieved. Mere participation in the sport does not give rise to the entitlement to be paid the prize money. Therefore, where the purpose for the payment is to reward or acknowledge a result achieved, the sportsperson receiving the payment would not be an employee under paragraph 12(8)(a).

'Player of the match' awards

89. A 'player of the match' award paid by a corporate sponsor is generally characterised as a payment by way of recognition of excellence. This suggests that the payment was made for a particular result arising from the sportsperson's participation in the sport, not made for that person to just participate or perform the sport. Such awards are often based on the quality of the person's participation – for example, the most possessions in a football match or the highest score in a basketball game.

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[37] The Full Federal Court decision provided similar analysis on the character of prize money in its decision *Stone v. Federal Commissioner of Taxation* (2003) 53 ATR 214 at 228-229; 2003 ATC 4584 at 4596-4598. The decision of the High Court in *FC of T v. Stone* 2005 ATC 4234; (2005) 59 ATR 50 did not focus on the character of the prize money, because it was regarded as merely part of Ms Stone's business income.

Bonuses

90. In some situations a sportsperson will be paid a bonus on achieving a certain result – such as a bonus paid to members of a team on winning a particular competition. It is a common arrangement in team sports to vary the match payments according to the outcome. For example a football club may pay players $3,000 per match if they win the match and $2,000 if they lose or draw the match. The question may arise whether the additional $1,000 paid on winning a match could be characterised as 'prize money' which is not a payment for participation in sporting activity,[38] and therefore not salary or wages or ordinary time earnings under the SGAA. The character of this type of payment is distinct from a prize. It is considered that where a common law relationship exists, the additional amount paid to the football player is more characteristic of an incentive payment or bonus that arises from the course of normal employment.[39] Such an analysis is equally applicable to prize money paid to a sportsperson by their common law employer. An example of this type of payment is a 'player of the year' or 'best and fairest' award paid by a club to one of their employee sportspersons. That 'prize money' is an incentive payment that arises from the sportsperson's course of normal employment.

91. Provided that an employment relationship exists between the sportsperson and the payer, these bonus payments would form part of the sportsperson's salary or wages. This is because these payments take their character from that employment relationship. They are analogous with end-of-year bonuses paid to, for example, stock brokers.[40]

92. In the absence of a common law employment relationship, the general principle outlined in paragraphs 68 to 70 of this draft Ruling should be applied. That is, in order for the sportsperson to be an employee under subsection 12(8), the payment must be for that person's performance in the sport regardless of the result achieved. The facts of the case may require that a lump sum payment be apportioned between payments for a result and payments for the sportsperson's participation regardless of that result.[41] However, the mere fact that a sportsperson is entitled to a larger sum provided they win a particular sporting event, when compared to losing that event, does not of itself mean that the excess over the lesser losing sum is akin to a bonus paid to an employee. It is often the case that the larger sum is directly referrable to the specific result achieved.

[38] See discussion at paragraphs 86 to 88 of this draft Ruling.
[39] See Superannuation Guarantee Ruling SGR 94/4 at paragraphs 24 to 26.
[40] See also paragraphs 11-12 of Superannuation Guarantee Ruling SGR 94/5.
[41] See discussion at paragraph 71 to 73 of this draft Ruling.

Grants

93. The receipt of grants was considered in *FC of T v. Stone*[42] when the Full High Court determined whether payments from the Australian Olympic Committee (AOC) under the Medal Incentive Scheme and a payment from the Queensland Academy of Sport (QAS) for being selected in the Commonwealth Games Team was assessable income. The AOC Team Agreement was examined and it was noted 'The agreement stated that it was not an employment agreement and that the taxpayer was not required to provide services to the AOC'.[43] The Full High Court also restated what Hill J noted in the Federal Court judgement:[44]

> The primary judge found that this payment was not income, unlike payments under the Medal Incentive Scheme which were. Of the payments under the Medal Incentive Scheme the primary judge said:
>
> > ... [T]hat having regard to the terms of the award, its periodicity and its purpose of encouraging athletes towards medal status it does have the character of income. And this is so, notwithstanding that the award was *not the product of any employment or an incident of any employment* or business.
>
> By contrast, the primary judge said that the QAS grant:
>
> > ... is in a different category in that it is not periodical in the sense which that word was used by the Full Court in *Harris*.... I do not think that this amount can be seen to have been paid as consideration for being a member of the Australian Commonwealth games squad, in the sense that it constituted a product of some service rendered or some employment of [the taxpayer]. (emphasis added)

94. The conclusion that the relationship between the sportsperson and the body providing the grant is not of common law employment is also confirmed in various Class Rulings.[45]

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[42] [2005] HCA 21; (2002) 222 CLR 289; (2002) 215 ALR 61; 2005 ATC 4234; (2005) 59 ATR 50.
[43] 2005 ATC 4234 at 27; (2005) 59 ATR 50 at 56
[44] 2005 ATC 4234 at 4244; (2005) 59 ATR 50 at 62.
[45] For example CR 2007/36: Income tax: Medal Incentive Funding payments provided by the Australian Olympic Committee at paragraph 42 and CR 2007/57: Income tax: Education and Training Grant payments provided by the Australian Cricketers Association at paragraph 34.

95. The purpose of the grants as described in Hill J's judgment is indicative of the purpose of such payments more generally. That is, grants are usually paid to encourage sportspersons towards further developing and enhancing their personal sporting skills. Although the High Court considered the payments made by the QAS and the Medal Incentive Scheme as 'reward' for Ms Stone's athletic success,[46] the payment was not reward for a particular result achieved but rather was made with reference to the success achieved so far in her career. Hence, grants paid to sportspersons are not payments for achieving a particular result but are intended to provide the sportsperson with financial support in order for them to pursue sporting excellence. Generally, the payment of a grant will not make the sportsperson an employee under paragraph 12(8)(a) or 12(8)(b).

Contract that is wholly or principally for the person's labour – extended definition of 'employee' – Subsection 12(3)

96. Under subsection 12(3) a person who works under a contract that is 'wholly or principally for the person's labour' is an employee of the other party to the contract. Subsection 12(3) must be considered where there is no common law employment relationship or where there is doubt as to the common law status of an individual.

97. Where an individual who has been engaged under a contract, and the subsequent conduct of the parties indicates that:

- the individual is renumerated wholly or principally for their personal labour and skills;
- the individual performs the contractual work personally (there is no right of delegation); and
- the individual is not paid to achieve a result,

then the contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under subsection 12(3).[47]

98. Where a sportsperson performs in a sporting event under a contract which stipulates that a payment (for example, prize money) will only be made where the sportsperson wins or places in that event, then subsection 12(3) would not apply to treat the sportsperson as an employee for SGAA purposes.

[46] *FC of T v. Stone* 2005 ATC 4234 at 4245; (2005) 59 ATR 50 at 63.
[47] The scope and operation of subsection 12(3) is discussed in more detail in SGR 2005/1 at paragraphs 64-78.

99. If the payment were for the sportsperson's participation in the sport, there is a question as to whether such a contract would be 'wholly or principally for the person's labour'. In *DCT v. Bolwell*[48] an entrepreneur had contracted with various musicians and entertainers to perform regularly at a hotel. The Commissioner has assessed the entrepreneur on the basis that he had been liable to make pay-as-you-earn (PAYE) withholding deductions from the amounts paid to these individuals. The relevant provision in the PAYE withholding provisions required that an amount be withheld from payments that were 'salary and wages'. 'Salary and wages' were defined to include payments made under a 'contract which is wholly or substantially for the labour of the person to whom the payments were made'.[49]

100. Lush J concluded that a 'contract which is wholly or substantially for the labour of a person' did not seem to cover artists or a person whose results are defined by his or her personal talent. More specifically, Lush J stated:

> The final question, therefore, is whether the contracts made with the musicians and entertainers can be described as contracts 'for labour'.
>
> …
>
> I think that the expression 'contract for the labour of a person' imports that the 'person' is engaged to work for the purpose of achieving a result determined or defined by someone else, to supply a component required for the attainment of an object conceived by someone else. The work involved may be physical, mental, or, if it is a separate category, artistic. It may be skilled or unskilled. It may be performed under a contract of service or under a contract for services.
>
> If this is a correct appreciation of the meaning of the expression 'contract for the labour of a person' it does not appear to me to cover the case of the artiste or for that matter the professional man whose efforts result in something of his own creation, defined and limited according to his talents, and, at the risk of repetition, I think that this remains true, even in cases where the relevant contract is a contract of service. [50]

101. Such a conclusion could also be applied in the context of a sportsperson that is contracted to participate in a sporting competition[51] – the result achieved arises from the sportsperson's own physical and mental ability.

102. Further, the Senate Select Committee on Superannuation noted that subsection 12(3) was 'designed to include a person who may not be an employee in the normal sense but who is in fact not very distinguishable from an employee'.[52]

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[48] (1967) 1 ATR 862.
[49] Former paragraph 221A(2)(a) of the *Income Tax Assessment Act 1936.*
[50] *DCT v. Bolwell* (1967) 1 ATR 862 at 873.
[51] This conclusion is consistent with SGR 2005/1 – see paragraphs 64 to 78.
[52] See Second Report of the Senate Select Committee on Superannuation, *Superannuation Guarantee Bills*, at page 146.

103. Hence, subsection 12(3) would not apply to treat sportspersons that are paid for their participation in sporting or other similar activities as employees.

Corporate sponsorship

104. A sportsperson may enter into an agreement with a corporate sponsor to endorse particular products or the sponsor's brand. The corporate sponsor may require the sportsperson to attend certain events or to otherwise promote its products including attending particular promotional functions. The contract that applies in such situations is sometimes referred to as a 'sponsorship' or 'endorsement' agreement. However, whether such a contract and the parties' conduct under the contract is one 'wholly or principally for the person's labour' for the purposes of subsection 12(3) must be determined in the facts and circumstances of each case.

105. The High Court in *FC of T v. Stone* (*Stone*), made the following observations in relation to the sponsorship agreement that the taxpayer had entered into:[53]

> Agreeing to provide services to or for a sponsor in return for payment was to make a commercial agreement. What the taxpayer received from her sponsors were fees for the services she provided. … No doubt, as the taxpayer pointed out, pursuit of her athletic activities was expensive. And it must be accepted that her principal motivations were the pursuit of excellence and the pursuit of honour for herself and her country. But the sponsorship arrangements show not only that the taxpayer made those arrangements to assist her pursuit of athletic activities but also that she was able to make them *because* of her pursuit of those activities.

106. The observations of the High Court in *Stone* suggests that under the commercial agreements entered into by Ms Stone there were services provided for the fees paid. Those services are undertaken pursuant to an agreement that arises from her 'public fame'. The question is whether the terms of the sponsorship contracts were 'wholly or principally' for Ms Stone's 'labour'. The requirements under the sponsorship contracts ranged from wearing advertising material on her sports clothing to attending some promotional functions.[54]

107. 'Labour' in the context of subsection 12(3) includes mental and artistic effort as well as physical toil.[55] The various sponsorship contracts the subject of discussion in *Stone* were intended to produce a result – the services provided by Ms Stone were to ensure that the sponsor's brand was advertised in the manner agreed by the parties. Hence, the sponsorship contracts were not 'wholly or principally for labour' but rather were directed at achieving a result.

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[53] *FC of T v. Stone* 2005 ATC 4234 at 4242-4243; (2005) 59 ATR 50 at 60.
[54] See *FC of T v. Stone* 2005 ATC 4234 at 4241; (2005) 59 ATR 50 at 58.
[55] *Deputy Commissioner of Taxation v. Bolwell* (1967) 1 ATR 862 at 873.

108. Whether a sponsorship agreement is 'wholly or principally for labour' will depend on the facts and circumstances of each case. The terms of a particular sponsorship agreement may be such that the relationship between the sportsperson and the payer is in fact not very distinguishable from a common law employment relationship such that the terms of subsection 12(3) would be satisfied.

Sportsperson paid through third parties

109. It is noted that in many situations sportspersons are engaged via a company or trust, in which case, it will often be the company or trust which is paid so that the sportsperson will play or compete. In such situations due to the interposition of the third party (the company or trust) between the payer and the sportsperson, the result may be that no employment relationship exists under the SGAA between that payer and the sportsperson.[56]

Salary or wages – extended definition in paragraph 11(1)(d)

110. In calculating whether there is an individual superannuation guarantee shortfall, the employer will need to consider the formula in section 19 and the 'total salary or wages paid by the employer to the employee for the quarter'.[57] 'Salary or wages' is defined inclusively in section 11. Payments can be salary or wages under the ordinary, or common law meaning of that term, or they can be salary or wages by falling within the extended definition in section 11.

111. At common law, 'salary or wages' is generally accepted as constituting remuneration paid to employees for their services as employees. That is, it presupposes an employment relationship. The common law meaning of 'salary or wages' turns also on common law concepts of employment.

112. The common law meaning of 'salary or wages' is expanded in subsection 11(1) for the purposes of the SGAA to include payments made to sportspersons. Specifically the provision states that salary or wages includes:

> (d) payments to a person for work referred to in subsection 12(8).

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[56] See also paragraph 13 of SGR 2005/1.

[57] An employer's ***individual superannuation guarantee shortfall*** for an employee for a quarter is the amount worked out using the formula:

$$\text{Total salary or wages paid by the employer to the employee for the quarter} \times \frac{\text{Charge percentage for the employer for the quarter}}{100}$$

113. Paragraph 11(1)(d) requires that for a payment to fall within the scope of the extended definition of 'salary or wages' that payment must be 'for work' referred to in subsection 12(8). 'Work' is not a defined term in the SGAA and hence must be given its ordinary meaning within the context in which it appears. The *Australian Oxford Dictionary* defines work as '**1.** the application of mental or physical effort to a purpose; the use of energy **4.** a person's employment or occupation etc., especially as a means of earning income'.

114. In the context in which it appears, 'work' must refer to the involvement of a person in the activities specified in subsection 12(8). Paragraphs 12(8)(a) to (c) specify a particular type of involvement, namely 'to perform or present', 'to participate in the performance or presentation of' or 'to provide services in connection with', in relation to the activities described in paragraph (a), and 'to perform services in, or in connection with' the activities described in paragraph (c). Participation in a sporting activity satisfies the definition of 'work' because such participation or performance is an application of the sportsperson's mental or physical effort to a purpose – that purpose being to obtain the best outcome in the competition as possible.

115. The Explanatory Memorandum (EM) to the Superannuation Guarantee (Administration) Bill 1992 provides some support for the view that where a payment is made to a person that is an employee by virtue of the application of subsection 12(8), that payment will be 'salary or wages' under paragraph 11(1)(d). The relevant passages of the EM state that the following payments will be included in salary or wages:

- payments to persons who perform, present, participate in or provide services in connection with any music, play, dance, entertainment, sport, display, or promotional activity involving the exercise of creative talents;
- payments to persons who perform or provide services in connection with the making of any film, tape or disc or of any television or radio broadcast.'

116. Further, the calculation of an 'individual superannuation guarantee shortfall'[58] refers only to the total salary or wages paid *by the employer to the employee*. Therefore, taking into account the scheme of the superannuation guarantee legislation, if an employment relationship is established under subsection 12(8), then such payments are 'salary or wages' under paragraph 11(1)(d).

[58] Section 19.

117. Therefore, where a payment is made to a person that does not satisfy the terms of subsection 12(8) so that the recipient is not an employee under that extended meaning, that payment will also not be 'salary or wages' for the purposes of paragraph 11(1)(d). For example, as was explained at paragraphs 68 to 70 of this draft Ruling, the payment of prize money will not make the recipient an employee under subsection 12(8). Therefore, that payment of prize money is not 'salary or wages' under paragraph 11(1)(d).[59]

Exclusions from 'salary or wages'

118. Where an employment relationship is established (either under common law or as a result of the application of subsection 12(8)), in calculating whether an individual superannuation guarantee shortfall exists the exclusions from the definition of 'salary or wages' should be considered. A specific exclusion, which may be relevant for persons engaged on a casual basis, is contained in subsection 27(2). Under that provision, where an employer pays an employee less than $450 by way of salary or wages per month, then those salary or wages are to be ignored for the purposes of calculating whether there is an individual superannuation guarantee shortfall.

119. There are other provisions which exclude from the definition of salary or wages certain payments made to certain persons. These include exclusions for employees who are 70 years of age or over[60] and the exclusion for part-time employees who are under 18 years of age.[61]

Visiting non-resident sportspersons

120. For the purposes of subsection 12(8), if a non-resident employer pays a non-resident employee for work done in Australia they are also required to pay SGC unless minimum superannuation contributions are made on the employee's behalf to a complying fund. Under the SGAA, employers are required to make contributions for non-resident employees performing work in Australia unless a valid certificate of coverage made under a 'scheduled international social security agreement' (generally referred to as a 'bilateral agreement') is provided.[62] Whether a sportsperson must be covered by a certificate of coverage must be determined on the facts of each case. If contributions must be made in respect of the non-resident sportsperson, if they satisfy certain conditions, they would be able to claim a departing Australia superannuation payment (DASP).[63]

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[59] By contrast, 'prize money' paid to a sportsperson by their common law employer will form part of salary or wages – see discussion at paragraphs 91-90 of this draft Ruling.
[60] Paragraph 27(1)(a).
[61] Section 28.
[62] Section 15C.
[63] More information about bilateral agreements and the DASP can be found at the Tax Office website www.ato.gov.au.

121. It should be noted that certain payments to 'prescribed employees' are excluded from the definition of salary or wages by paragraph 27(1)(d) and subregulation 7(1) of the SGAR 1993. A 'prescribed employee' is required to be a holder of one of the listed visas in subregulation 7(1). The exemption mainly covers certain visiting senior executives and may have some application for visiting team officials and event organisers.

Ordinary time earnings

122. 'Ordinary time earnings' (OTE) is the amount an employee earns for their ordinary hours of work.[64] It is used as a default earnings base if there are no other acceptable earnings bases relevant to a particular employee. However, the SGAA has been amended to simplify an employee's earnings base so that from 1 July 2008, all employers must use ordinary time earnings to calculate the level of superannuation contributions necessary in order to meet their SG obligations in respect of an employee.[65] 'Ordinary time earnings' is defined in subsection 6(1) 'in relation to an employee'. Therefore, for payments to constitute ordinary time earnings they must be made to a person who is an employee in accordance with section 12. 'Earnings' generally means money gained as a result of labour, work or services.

123. If a person or entity is an 'employer' because of the application of subsections 12(3) or 12(8), they will need to take into account the payments that they have made to the sportsperson that is their employee in establishing the relevant amount of OTE for that employee.

What are a sportsperson's ordinary hours of work?

124. For the purposes of determining what an employee's ordinary hours of work are, where there are agreed hours of work, 'ordinary hours of work' are those agreed hours.[66] Where there are no agreed hours of work, the 'ordinary hours of work' are the hours actually worked.[67] Where a sportsperson is employed under a contract, their ordinary hours of work will be the agreed hours of work under that contract. In other cases, the actual hours worked by the sportsperson will be their ordinary hours of work.

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[64] Subsection 6(1). For a full explanation of ordinary time earnings see SGR 94/4.
[65] See amendments made to the SGAA by *Superannuation Laws Amendment (2004 Measures No 2) Act 2004.*
[66] See also paragraph 8 of SGR 94/4.
[67] See also paragraph 9 of SGR 94/4.

What payments constitute 'earnings' for the purposes of the ordinary time earnings definition?

125. For the purposes of the definition of OTE, it must be determined whether the earnings in question are *in respect of* ordinary hours of work. The term 'in respect of' means to have some connection.[68] A payment will be taken to be earnings in respect of ordinary hours of work if it is made:

- for attendance, or for work done, in those hours; or
- to satisfy an entitlement that accrued as a result of attending, or working, in those hours.

126. In the context of sportspersons that are employees, payments made to a sportsperson for their participation or performance in the sporting activity are earned as a direct result of the ordinary hours worked. These amounts will be OTE. Examples of such payments are match payments, appearance fees and bonuses paid to sportspersons that are either common law employees or employees under subsection 12(8).[69]

127. A person or entity may make several payments to a sportsperson in respect of their participation in a particular tournament or event. For example, there may be an agreement to pay both an appearance fee, and additionally if successful in the tournament, prize money. The payment of the appearance fee would make the payer an employer of the sportsperson for SGAA purposes. The mere fact that the same person may later pay the sportsperson prize money does not of itself make that payment OTE. This is because subsection 12(8) applies on a payment by payment basis – the mere fact that the same person is making another payment to the sportsperson is not of itself enough to satisfy the conditions of subsection 12(8).

128. Further, as was noted above, earnings will only be OTE if it is paid to satisfy an entitlement that accrued as a result of attending or working their ordinary hours of work. In such a situation, the sportsperson's entitlement to the prize money would not be OTE because the entitlement to such a payment only arises after the relevant 'work' is completed. That is, the prize money is only payable once a result from the sportsperson's participation is achieved. No entitlement accrues in the sense required for the prize money to be OTE.

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[68] See also paragraph 11 of SGR 94/4.

[69] See also Superannuation Guarantee Determination SGD 2006/2 which deals with the issue of whether a SG employee, covered by subsections 12(3) or 12(8), could enter into a valid salary sacrifice arrangement in relation to superannuation contributions.

Appendix 3 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.

Alternative view: SGD 93/11 view

129. An alternative interpretation of the application of paragraph 12(8)(a) is to make any sportsperson who is paid any money to perform, present, play, compete or participate in a sport, a SGAA employee of the person who pays them. This was the interpretation adopted in Superannuation Guarantee Determination SGD 93/11: Are a professional sportsperson's appearance fees, prize monies or player awards either 'ordinary time earnings' or 'salary or wages'?

130. SGD 93/11 was issued on 22 July 1993 and withdrawn on 5 December 2007. The SGD 93/11 view provided that prize money and appearance fees (but not 'player of the match' awards) paid to sportspersons was both salary or wages and ordinary time earnings under the SGAA.

Why this is not the preferred view of subsection 12(8)

131. The Commissioner does not consider this to be a correct interpretation of the legislation. The better view is to take account of the character of each payment in order to determine whether the recipient is an employee under subsection 12(8). For example a sportsperson who is paid 'prize money' would not be an employee of the payer because prize money is not paid to make the sportsperson participate in a sporting activity. Prize money is paid for achieving a result, and only becomes due once a result has been produced. In contrast, an appearance fee is paid to a sportsperson to attend a particular event and participate regardless of the result achieved. Paragraph 12(8)(a) would apply to such payments to make the sportsperson an employee of the payer for SGAA purposes.

Appendix 4 – Your comments

132. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

133. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**17 October 2008**
Contact officer:	**Jonathan Purcell**
Email address:	**jonathan.purcell@ato.gov.au**
Telephone:	**(02) 9374 8231**
Facsimile:	**(02) 9374 2693**
Address:	**GPO Box 9977** **Sydney NSW 2001**

Appendix 5 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

SGR 94/4; SGR 94/5; SGR 2005/1; SGD 2006/2; TR 1999/17; TR 97/22; CR 2007/36; CR 2007/57

Previous Rulings/Determinations:

SGD 93/11

Subject references:

- contractors
- contract for labour
- employees
- employers
- non-residents
- PAYG withholding
- performers
- excluded definition - salary or wages
- sport
- sportspersons

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