


PCG 2017/D11 (Withdrawn) - Tax treatment of payments for use and exploitation of a professional sportsperson's 'public fame' or 'image'

 This cover sheet is provided for information only. It does not form part of *PCG 2017/D11 (Withdrawn) - Tax treatment of payments for use and exploitation of a professional sportsperson's 'public fame' or 'image'*

 **This draft Guideline is withdrawn and will not be finalised.**

On 8 May 2018 the Government announced (2018 Budget Paper 2, page 45):

The Government will improve integrity in the tax system by ensuring that from 1 July 2019, high profile individuals are no longer able to take advantage of lower tax rates by licencing their fame or image to another entity.

We also have concerns about the tax effectiveness of at least some of the arrangements we have observed.

For the period up to 1 July 2020, the ATO will not seek to apply compliance resources to review an arrangement entered into prior to 24 August 2018 (the date of withdrawal of this draft Guideline), where that arrangement complies with the terms of this withdrawn draft Guideline, provided that the arrangement was entered into and carried out as a consequence of the taxpayer relying on this withdrawn draft Guideline in good faith.



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Tax treatment of payments for use and exploitation of a professional sportsperson's 'public fame' or 'image'

Relying on this draft Guideline

This draft Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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What this draft Guideline is about

1. This draft Guideline sets out a 'Safe Harbour' for apportioning lump sum payments for the provision of a professional sportsperson's services and the use and exploitation of their 'public fame' or 'image' under licence.¹
2. This draft Guideline can be relied upon where:
 - a professional sportsperson grants an associated resident third-party a non-exclusive licence to use and exploit the sportsperson's 'public fame' or 'image'
 - it is the resident third-party who is contractually entitled to receive the income from the use and exploitation of the professional sportsperson's 'public fame' or 'image', and
 - the payment is not referable to the use or exploitation of rights which are recognised and specifically protected under Australian law, such as copyright, trademarks or registered design rights.²

Safe Harbour

3. The Safe Harbour applies where:
 - payments are received pursuant to a professional sportsperson's:
 - playing contract and/or collective bargaining agreement where those agreements mandate the professional sportsperson's participation in appearances for the development and promotion of their sport or the use and exploitation of the professional sportsperson's 'public fame' or 'image' for the development and promotion of their sport, or
 - agreement to provide additional services where those services are provided in conjunction with the use and exploitation of the professional sportsperson's 'public fame' or 'image'.
 - the professional sportsperson has granted a licence for the use or exploitation of their 'public fame' or 'image' to an associated resident third-party, and
 - the associated resident third-party is contractually entitled to payments for the use and exploitation of the professional sportsperson's 'public fame' or 'image' pursuant to a playing contract, additional service agreement and/or collective bargaining agreement.
4. The exact proportion of any payment attributable to the sportsperson's 'public fame' or 'image' is to be determined by the marketability of the sportsperson's 'public fame' or 'image' measured, in part, by:
 - the demand for use of the sportsperson's 'public fame' or 'image' by sponsors, and

¹ Exploitation of public fame or image in other professional circumstances is not covered by this draft Practical Compliance Guideline.

² The use or exploitation of copyright, trademarks or registered design rights would generally be specifically paid for by way of royalty or other payment.

- community awareness of the sportsperson and the level of community association of that sportsperson with their sport.

The Commissioner accepts it can be difficult and costly to determine an appropriate basis for apportioning payments for the use and exploitation of a sportsperson's 'public fame' or 'image'.

5. It is also recognised that a sporting code's collective bargaining agreement can place restrictions on amounts that professional sportspeople can be paid (such as minimum terms and conditions) and that these restrictions can suppress the level of the sportsperson's remuneration. Therefore, the exact proportion that any payment that can be treated as referable to the use and of the professional sportspersons 'public fame' or 'image' under the associated resident third-party's licence needs to be determined in light of a sporting code's collective bargaining agreement restrictions.

6. As a consequence, the ATO will accept that up to 10% these payments can be treated as referable to the use and exploitation of the professional sportsperson's 'public fame' or 'image' under the associated resident third-party's licence and are therefore to be treated as the income of the associated resident third-party.

Example 1

7. *'Player A' is new to elite level sport. They were selected as an early draft pick and have played less than 10 career games at the elite level. The income paid to them under their playing contract, and in accordance with their sport's collective bargaining agreement, is necessarily reflective of 'Player A' being new to the game. Payments totalling \$110,000 are made.*

8. *'Player A' has also granted a licence for the use and exploitation of their 'public fame' or 'image' to an associated resident third-party and it is contractually entitled to receive the income from the use and exploitation of 'Player A's'; 'public fame' or 'image'. Player A has not entered into an additional services agreement.*

9. *Whilst 'Player A' is in the early stages of their career, their public fame' or 'image' will have been exploited as a result of their being an early stage draft pick. Consequently some portion of their remuneration is referable to use or exploitation of their 'public fame' or 'image' despite them being new to elite level sport.*

10. *Under the Safe Harbour, up to 10% (\$11,000) of the total contracted payment could be included in the associated resident third-party's income tax return. 'Player A' would return the balance of the payment in their personal income tax return.*

Example 2

11. *'Player B' has been playing elite level sport for some years and has become a player who is regularly selected in his chosen sport's elite team. 'Player B' has recently completed their contract period and has entered into a new contract with their club under which they will be paid \$300,000, which is approximately the average for individuals with 'Player B's' experience and skill. 'Player B' has also granted a licence for the use and exploitation of their 'public fame' or 'image' to an associated resident third-party but has not entered into an additional services agreement.*

12. *Under the Safe Harbour up to 10% (\$30,000) of the contracted payment could be included in the associated resident third-party's income tax return. 'Player B' would return the balance of the payment in their personal income tax return.*

13. *'Player B' has relied on the Safe Harbour because they cannot substantiate a higher proportion of their contract payment as being for the use of their 'public fame' or 'image' under the associated resident third-party's licence by reference to a*

commercial market value and/or those matters listed at paragraphs 5 and 6 of this draft Guideline.

14. The Safe Harbour provided by this draft Guideline is not intended to apply to arrangements which evidence a commercial market value basis for determining the quantum of any payment for the use and exploitation of the professional sportsperson's 'public fame' or 'image' and are supported by contemporaneous documentation.

Example 3

15. *'Player C' is an elite level sportsperson of repute solely within Australia. They have played a significant number of Australian domestic games in their chosen sport. 'Player C' has entered into a playing contract, granted a licence for the use or exploitation of their 'public fame' or 'image' to an associated Australian resident third-party as well as being a party to a 'tailored' additional services agreement and independent service agreements to which their associated resident third-party is also a party.*

16. *Given the significant recognition of their sporting prowess, 'public fame' and 'image' 'Player C's' additional services agreement and independent service agreements provide for separate payments, at genuine commercial market rates, to the Player for both their personal services and to their associated resident third-party for the use and exploitation of their 'public fame' or 'image'. No apportionment of payments is required. 'Player C' returns the payments received for their personal services in their individual tax return. Their associated resident third-party returns the payments received by it for the use of the licence for exploitation of Player C's 'public fame' or 'image' in its tax return.*

17. The Safe Harbour provided by this draft Guideline is not intended to apply to payments specifically for the use and exploitation of the professional sportsperson's 'public fame' or 'image' such as:

- payments made under an Additional Service Agreement where such payments are made in connection with the use of a player's image and do not require additional personal services
- payments made in connection with the use of a player's image in programs for licensed products, and
- payments received for testimonial programs where the use of a player's image is featured rather than requiring any further personal services.

Date of effect

18. This draft Guideline is proposed to apply on and from 1 July 2017.

Context

19. To complain of, or stop, the reproduction of an individual's 'image' or use of their 'public fame' that reproduction or use must infringe a right that is recognised by law and which is owned by the complainant.

20. Whilst an individual's 'public fame' or 'image' may, in part, be constituted by recognised copyright, trademark or registered design rights and thus protected from unauthorised exploitation or use under those statutory laws, the common law of Australia has not developed either an enforceable right to privacy, nor does it recognise a right of action for appropriation of a person's name, image, reputation or likeness. As such these types of common law rights do not exist and therefore cannot be licensed or assigned.

21. However, an individual may have a more limited cause of action in the tort of passing-off, or under section 18 of the *Competition and Consumer Act 2010* (Cth)

(CCA 2010)³, if their image or likeness is used in a manner which misleads the public or a significant portion of the public into thinking there is some form of association, licence or endorsement between the sportsperson and the product or services of another trader.

22. The execution of an instrument which authorises action which might otherwise have led to a cause of action creates a 'licence' in the grantee. A licence is a 'permit to do something which without a licence would be unlawful. The granting of a licence vests property in the grantee which did not previously exist. This licence is an asset of the grantee.⁴

23. Consequently, where a professional sportsperson grants an associated resident third-party a non-exclusive licence to use and exploit the sportsperson's 'public fame' or 'image', the sportsperson creates a right in the third-party which:

- is recognised by law
- is an asset of the third-party, and
- has a commercial value to the third-party which can be exploited by the third-party through other contractual arrangements.⁵

Background

24. Individuals involved in sport can receive income and non-cash benefits pursuant to the contracts that regulate their sporting involvement. These individuals may either be participants or officials such as referees or coaches. The income and benefits they receive may either be employment or business income.

25. Activities which generate that business income can include the commercial exploitation of:

- skills developed and used in the pursuit of sporting excellence developed as an amateur prior to becoming a professional
- their 'public fame' or 'image'⁶, and
- skills developed and used in the pursuit of activities connected to the individual's sporting excellence, for example, motivational or public speaking.

26. While all of the income from these activities is assessable, the distinction between payments for employment, exploitation of skills and exploitation of image can be important for tax treatment.

Personal Services Business

27. Typically the exploitation of an individual's 'public fame' or 'image' will be connected to activities that primarily involve the exploitation of the professional skills of the individual. Consequently, payments received from these activities will generally involve the provision of their personal services and be considered to be within the definition of

³ Section 18 of the CCA 2010 applies to a person, in trade or commerce engaging in conduct that is misleading and deceptive.

⁴ See ATO Interpretative Decision ATO ID 2004/511 *Income tax: Licence to use image granted to a family trust*.

⁵ Note: there may be capital gains tax consequences arising from the grant of a license for the use or exploitation of a sportsperson's 'public fame' or 'image'.

⁶ See Taxation Ruling TR 1999/17 *Income tax: sportspeople – receipts and other benefits obtained from involvement in sport*.

'Personal services income' under subsection 84-5(1) of Part 2-42 of the ITAA 1997 because it is income that is mainly a reward for the individual's personal efforts or skills.⁷

Example 4

28. 'Player D' is an elite level sportsperson. They are contracted to a club to play their chosen sport each season. As part of their role with the club they participate in 'Members Day' events and junior members' coaching clinic. 'Player D' also undertakes school visits to promote their sport more generally. As these activities primarily involve the exploitation of 'Player D's' professional skills, any payments they receive for attending these events is considered to be a reward for their individual personal effort and skills and 'Player D' will need to include those payments in their individual income tax return.

Apportionment of payment for the use of assets and the provision of personal services

29. Where a professional sportsperson undertakes the commercial exploitation of their 'public fame' or 'image' through an associated entity, to which they have also granted a licence to use and exploit their 'public fame' or 'image', they or their associated entity may receive a single payment representing:

- payment for use of the entity's assets, being their contractual licence to use and exploit the professional sportsperson's 'public fame' or 'image' – this portion of the payment will be assessable to the entity as income, and
- a reward for the efforts or skills of the professional sportsperson – this portion of the payment will be assessable to the sportsperson as income.⁸

30. Recipients of combined payments for both the provision of a professional sportsperson's services and use and exploitation of the professional sportsperson's 'public fame' or 'image' need to apportion those payments between use of the entity's assets and the reward for the efforts or skills of the professional sportsperson.

31. The Commissioner accepts it can be difficult and costly to determine an appropriate basis for apportioning payments for the use and exploitation of a sportsperson's 'public fame' or 'image', particularly where:

- no external market exists for the provision of such services, or
- the use or exploitation of the professional sportsperson's 'public fame' or 'image' are subject to restraint of trade clauses.

32. To apply the Safe Harbour, payments under the relevant agreements are to be treated as a total sum comprising:

- a payment for personal services which includes playing, appearances and attendances, and
- a payment for the use of the player's 'public fame' or 'image' that is no greater than 10% of the total sum.

To rely on the Safe Harbour, the apportionment must be applied regardless of whether the relevant agreements specify a distinct amount for the use of a player's 'public fame' and 'image'.

⁷ See for example *Brisbane Bears – Fitzroy Football Club Ltd v Commissioner of State Revenue* [2016] QSC 231, 2016 ATC 20-584.

⁸ See paragraph 20 of Taxation Ruling TR 2001/7 *Income tax: the meaning of personal services income*.

Goods and Services Tax

33. The GST and PAYG withholding consequences of applying the Safe Harbour are as follows:

- Unless the relevant agreement allows GST to be added to the component of the payment referable to the sportsperson's 'public fame' or 'image', that amount will be treated as a GST inclusive amount.
- If the component of the payment referable to the sportsperson's 'public fame' or 'image' meets or exceeds the GST registration turnover threshold (currently \$75,000), GST must be charged for the supply of the use of the right to use the player's 'public fame' and 'image' and a tax invoice must be rendered by the supplier of that right to the recipient of the supply. The same GST outcome will apply if the supplier of the right has chosen to register for GST even though they are not required to be registered for GST.
- PAYG Withholding in respect of the personal services element (which typically will be salary or wages) will be calculated on the net amount after taking into account the GST inclusive amount taken to be charged for the supply of the right to use player's 'public fame' and 'image'.

Commissioner of Taxation

19 July 2017

Your comments

34. You are invited to comment on this draft Practical Compliance Guideline including the proposed date of effect. Please forward your comments to the contact officer by the due date.

Due date: 1 September 2017

Contact officer: Contact officer details have been removed as this draft Guideline has been withdrawn.

References

ATOlaw topic(s)	Income tax ~~ Assessable income ~~ Personal services income
Legislative references	CCA 2010 CCA 2010 18 ITAA 1997 ITAA 1997 84-5(1)
Related Rulings/Determinations	TR 1999/17 TR 2001/7 ATO ID 2004/511
Case references	Brisbane Bears – Fitzroy Football Club Ltd v Commissioner of State Revenue [2016] QSC 231, 2016 ATC 20-584.
ATO references	1-B12ILGB
BSL	IND

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