


# ***TD 2022/D3 - Income tax: use of an individual's fame by related entities***

 This cover sheet is provided for information only. It does not form part of *TD 2022/D3 - Income tax: use of an individual's fame by related entities*

This document has been finalised by TD 2023/4.



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## Draft Taxation Determination

# Income tax: use of an individual's fame by related entities

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### **ⓘ Relying on this draft Determination**

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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### **What this draft Determination is about**

1. This draft Determination<sup>1</sup> applies to arrangements where an individual with fame establishes an entity (referred to as the 'related entity'; for example, a family trust or company) and enters into an agreement with that entity for the use of their name, image, likeness, identity, reputation and signature (referred to as 'fame' for the purposes of this Determination).
2. The related entity then agrees with other entities for their authorised use of the individual's fame in return for a fee.
3. This Determination explains the Commissioner's views on the application of section 6-5 of the *Income Tax Assessment Act 1997* in these circumstances.<sup>2</sup>
4. All legislative references in this Determination are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.
5. This Determination is only concerned with income from use of the individual's fame. It does not apply to income from the provision of services (such as where the individual is engaged by a related entity to provide services to a third party), nor does it apply to fees

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<sup>1</sup> All further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.

<sup>2</sup> While not within the scope of this Determination, consideration also needs to be given to the potential application of the personal services income rules in Part 2-42.

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earned by a related entity from exploiting copyright, trademark or registered design rights licensed to the related entity.

## Ruling

6. In Australian law, an individual with fame has no property in that fame<sup>3</sup> and therefore cannot vest or transfer any property in their fame to another entity. Exploitation of an individual's fame can be done by way of agreement for a fee. Where a related entity is a party to such an agreement, it is incapable of authorising the use of the individual's fame by other entities as the agreement does not vest any property in the related entity. The fees paid for use of the individual's fame will be ordinary income of the individual and assessable to them under section 6-5.

7. The common law of Australia does not recognise as a proprietary right an individual's ability to exploit their fame separately from an accompanying business.<sup>4</sup> Consequently, there is no recognised proprietary right (common law or otherwise) in an individual's fame that is capable of transfer or assignment.<sup>5</sup>

8. While an individual does not have a recognised proprietary right in their fame, they may have a limited cause of action<sup>6</sup> if their fame is used in a manner which misleads the public or a significant portion of the public into thinking some form of association or endorsement exists between the individual and the product or services of another.

9. Under an action for 'passing off'<sup>7</sup>, the relevant property that is protected is the goodwill<sup>8</sup> of the individual's business that would likely be injured due to improper use.<sup>9</sup> Goodwill cannot be dealt with or assigned independently of that individual's business.<sup>10</sup>

10. An individual with fame can exploit that fame by authorising others to use their fame for a fee. However, such an agreement would not vest any property in the individual's fame in the other entity. As a result, the related entity is not in a position to exploit the image of the individual with fame. The agreement between the related entity and the individual would merely authorise that which would otherwise be actionable.<sup>11</sup> As a result, the other entity cannot derive income attributed to the use of the individual's fame. Accordingly, the income derived under the purported sub-licencing of those rights to a third party is the ordinary income of the individual.<sup>12</sup> The related entity is receiving an amount that is being applied or dealt with on the individual's behalf.

11. This can be distinguished from a circumstance where a related entity engages the individual with fame to provide services. For example, the individual with fame may be

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<sup>3</sup> See *Australian Consolidated Press Ltd v Ettingshausen* [1993] NSWCA 10 at [7].

<sup>4</sup> See *Honey, G. v. Australian Airlines Ltd & Anor* [1989] FCA 234. An example of such a business is where professional sportspersons engage in commercially exploiting their sporting prowess and associated celebrity through promotional activities – see *Spriggs v Commissioner of Taxation* [2009] HCA 22.

<sup>5</sup> It is acknowledged that in some cases copyright, trademark or registered design-rights legislation may provide certain statutory rights that are proprietary but this Determination is about the general exploitation of the image separate from any such rights.

<sup>6</sup> In the tort of 'passing off' or under section 18 of Schedule 2 of the *Competition and Consumer Act 2010*.

<sup>7</sup> 'Passing off' is conducting business in a way that misleads the public into thinking your goods or services are those of another business.

<sup>8</sup> For the Commissioner's view on the taxation treatment of 'personal goodwill', see paragraph 59 of Taxation Ruling TR 1999/16 *Income tax: capital gains: goodwill of a business*.

<sup>9</sup> *ConAgra Inc v McCain Foods (Aust) Pty Ltd* [1992] FCA 176; *Irvine v Talksport Ltd* [2002] 1 WLR 2355; *JT International SA v Commonwealth of Australia* [2012] HCA 43.

<sup>10</sup> *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; *Commissioner of Taxation v. Just Jeans Pty Ltd* [1987] FCA 218.

<sup>11</sup> See *JH Coles Pty Ltd v Need* (1933) 49 CLR 499 at [503].

<sup>12</sup> Although the fee is paid to the related entity on the individual's behalf and in accordance with their direction in respect of their image, that fee is taken to be derived by the individual under subsection 6-5(4).

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engaged by the related entity to attend product launches and promotional events for a third party. In these circumstances, contractual payments by the third party to the related entity can be assessable to the related entity under section 6-5. However, consideration would also need to be given in these circumstances to the potential application of the personal services income rules in Part 2-42 or the application of Part IVA of the *Income Tax Assessment Act 1936*.

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**Example – media personality agrees with a related entity to use their fame**

12. *A family trust is established by a media personality. The trustee of the family trust enters into a deed with the individual which grants a right to use and exploit the fame of the individual throughout Australia.*

13. *The trustee contracts with a business for the use of the media personality's photo and name on the packaging of their product for a fee. Payment by the business is made to the trustee. However, the income from this use of the individual's fame is ordinary income of the individual. This is because while the trustee has a right to use that fame, the deed does not provide any property to the trustee which could allow a third party to use it for a fee. Therefore, the individual should include that fee amount in their assessable income in the relevant income year.*

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**Date of effect**

14. When the final Determination is issued, it is proposed to apply to years of income commencing both before and after its date of issue, subject to the compliance approach in Appendix 1 to this Determination. Where an arrangement is subject to the compliance approach in Appendix 1 to this Determination, it is proposed that the final Determination will only apply to income derived from that arrangement in the 2023–24 income year and later income years. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**

5 October 2022

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## **Appendix 1 – Compliance approach**

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**① This Appendix sets out a proposed practical administration approach to assist taxpayers in complying with relevant tax laws. When this Determination is finalised, provided you follow the advice in this appendix in good faith and consistently with the Ruling section, the Commissioner will administer the law in accordance with this approach.**

15. The Commissioner acknowledges that the views on alienation set out in this Determination differ to the practical compliance approach in allowing limited alienation of income taken in Draft Practical Compliance Guideline PCG 2017/D11 *Tax treatment of payments for use and exploitation of a professional sportsperson’s ‘public fame’ or ‘image’* (which was withdrawn on 24 August 2018). The Commissioner also acknowledges that individuals may have entered into arrangements on the basis of PCG 2017/D11. As such, it is appropriate to apply a transitional compliance approach to the views expressed in this Determination.

16. The Commissioner will not devote compliance resources to apply the views expressed in this Determination to income derived before 1 July 2023 from arrangements entered into in good faith that are consistent with the principles outlined in PCG 2017/D11 where they are entered into before the publication of this draft Determination.

17. This compliance approach applies both before and after the issue of this Determination in respect of the 2018–19, 2019–20, 2020–21, 2021–22 and 2022–23 income years.

18. Where the Commissioner is asked to issue or amend assessments, or is asked or required to state a view (for example, in a private ruling or in submissions in a litigation matter), they will do so consistently with the views set out in this Determination. This includes circumstances where the Commissioner identifies a tax risk during the course of an unrelated review or audit activity.

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## **Appendix 2 – Your comments**

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19. You are invited to comment on this draft Determination, including the proposed date of effect and compliance approach. Please forward your comments to the contact officer by the due date.

20. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au.

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

**Due date: 4 November 2022**

Contact officer details have been removed following publication of the final determination.

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## References

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### *Related Rulings/Determinations:*

TR 1999/16; TR 2006/10

### *Legislative references:*

- ITAA 1997 6-5
- ITAA 1997 6-5(4)
- ITAA 1997 Pt 2-42
- ITAA 1936 Pt IVA
- Competition and Consumer Act 2010 Sch 2 18

### *Cases relied on:*

- Australian Consolidated Press Ltd v Ettingshausen [1993] NSWCA 10
- Commissioner of Taxation v. Just Jeans Pty Ltd [1987] FCA 218; 16 FCR 110; 87 ATC 4373; 18 ATR 775; 72 ALR 213 86
- ConAgra Inc v McCain Foods (Aust) Pty Ltd [1992] FCA 176; 33 FCR 302; 23 IPR 193; 106 ALR 465; [1992] AIPC 38,408

- Honey, G. v. Australian Airlines Ltd & Anor [1989] FCA 234; (1989) ATPR 40-961; 14 IPR 264
- Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; 156 CLR 41; 58 ALJR 587; 55 ALR 417; 4 IPR 291
- Irvine v Talksport Ltd [2002] 1 WLR 2355; [2002] EWHC 367
- JH Coles Pty Ltd v Need 49 CLR 499; 7 ALJ 360; [1934] ALR 13; 1A IPR 388; [1934] AC 82
- JT International SA v Commonwealth of Australia [2012] HCA 43; 250 CLR 1; 86 ALJR 1297; 291 ALR 669; [2013] ALMD 712
- Spriggs v Commissioner of Taxation [2009] HCA 22; 239 CLR 1; 83 ALJR 749; 256 ALR 596

### *Other references:*

PCG 2017/D11

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### ATO references

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