


TD 96/D18 - Income tax: should directors' fees be included in the assessable income of a director who is a partner in a professional partnership and who must pass on those fees to the partnership as required by the partnership agreement?

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This document has been finalised by TD 97/2.

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: should directors' fees be included in the assessable income of a director who is a partner in a professional partnership and who must pass on those fees to the partnership as required by the partnership agreement?

1. Generally no.
2. It is common practice for a partner in a professional partnership to be appointed as director of a client company or a public company. The appointment is usually considered to be another service provided by a professional partnership or an extension of the normal business activities of the partnership and is made because of the partner's connection with the partnership.
3. It is also a common requirement that the partner obtain the approval of the other partners to accept the appointment as director. The partnership agreement usually provides that directors' fees received by partners are to be paid into the partnership account.
4. In accordance with the partnership laws of the States and Territories, a partner who accepts an appointment as a director in the course of carrying on the usual business of the partnership, does so in the capacity as agent for the firm. We consider that a partner in a professional partnership who is appointed as a director in the circumstances outlined in paragraphs 2 and 3 would be appointed as an agent for the partnership. Alternatively, even where the appointment is not part of the usual business of the partnership, the relevant partner may be obliged to account to the partnership for directors' fees received from an appointment which became available by virtue of that director's membership of the professional partnership.
5. If the appointment as director is either as agent for the partnership or resulted from the opportunity arising from membership of the partnership, any directors' fees received by the partner are received in the capacity as trustee for the partnership. While the individual partner may have legal entitlement to the directors' fees, the beneficial entitlement rests with the partnership. Consequently, the directors' fees are income of the professional partnership and the partner is not an employee of the paying company for the purposes of the PAYE provisions of the *Income Tax Assessment Act 1936* or the *Superannuation Guarantee (Administration) Act 1992*.

6. In the case where an appointment as a director is unrelated to the partner's membership of the professional partnership, the individual partner is beneficially entitled to any directors' fees. The partner is an employee of the paying company for the purposes of the PAYE and Superannuation Guarantee provisions, notwithstanding any agreement to pay the directors' fees over to another.

Commissioner of Taxation20 November 1996

FOI INDEX DETAIL: Reference No.

Related Determinations: SGD 93/10

Related Rulings: IT 2128; IT 2320; IT 2321

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