SGR 2009/1 - Superannuation guarantee: payments made to sportspersons

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This ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statements: Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (Published 31 March 2022), Jamsek v ZG Operations Australia Pty Ltd (No 3) (Published 15 May 2024) and JMC Pty Ltd v Commissioner of Taxation (Published 15 May 2024).

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Superannuation Guarantee Ruling

Superannuation guarantee: payments made to sportspersons

Contents Para

What this Ruling is about 1

Previous Rulings 6

Ruling 7

Date of effect 24

Appendix 1:

***Examples* 25**

Appendix 2:

***Explanation* 46**

Appendix 3:

***Alternative views* 134**

Appendix 4:

***Detailed contents lists* 137**

Preamble

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.

[**Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]

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 who 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 an employee under subsection 12(1) if their relationship to the payer conforms to the indicators and factors that typify a common law employment relationship. 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

Tests in subsection 12(8) to be applied on a payment by payment basis

9. Subsection 12(8) applies on a payment by payment basis. The character of the payments received by a sportsperson are determinative of whether that person will be treated as an employee of the payer under subsection 12(8) for the purposes of the SGAA. In determining the character of the relevant payment, reference must be made 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.

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

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 performance or participation in the performance of a sport or any 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 or similar activity and that performance or 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 (unless the sportsperson is an employee at common law) 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.

[1] See paragraph 88 of this Ruling for a description of the types of payments that constitute 'appearance fees'.
[2] See discussion at paragraphs 89 to 91 of this Ruling for a description of the types of payments that constitute 'prize money'.

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 of the payer 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 a 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 any film, tape or disc or of any television or radio broadcast.

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'[3]

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). Payments that come within the scope of subsection 12(8) are 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'[4] paid to a sportsperson by their common law employer has the same 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.

[3] See also Superannuation Guarantee Ruling SGR 2009/2.
[4] See paragraphs 89 to 91 of this Ruling for a description of the types of payments that constitute 'prize money'.

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. Therefore, 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).

19. Where relevant, the exclusions from 'salary or wages' contained in sections 27 and 28 should be considered to determine the amount of an employer's individual superannuation guarantee shortfall and superannuation guarantee charge payable by an employer.

20. The SGAA also applies to non-resident sportspersons paid to participate in sport in Australia, regardless of whether the payer is an Australian resident or a foreign resident. 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'[5]

21. A sportsperson's ordinary hours of work for the purposes of calculating ordinary time earnings are generally the hours that they actually worked.[5A] 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 (unless the sportsperson is an employee at common law) because the entitlement to the prize money will only arise on achieving a specific result.

[5] See also Superannuation Guarantee Ruling SGR 2009/2.
[5A] See paragraphs 16 and 17 and 203 to 210 of SGR 2009/2 regarding ordinary hours of work when they are not specified in a relevant award or agreement.

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.*[6] This does 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 section 12 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.

Date of effect

24. This Ruling applies both before and after its date of issue. However, this Ruling will not apply to entities to the extent that it conflicts with the terms of a settlement of a dispute with the Commissioner agreed to before the date of issue of this Ruling.

Commissioner of Taxation
21 January 2009

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

Appendix 1 – Examples

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

Example 1: Employee at common law; sponsorship agreements and award for 'best and fairest'

25. Kyle is an Australian resident who is registered to participate in the national football 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 is $50,000. In addition, for each match for which Kyle is selected he is entitled to be paid $1,000 if the match is 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 because of a minor injury is not selected in either the thirteen man starting line up or as one of the four interchange players.

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. This is because Kyle must perform the activities of training and playing in matches and cannot delegate to another person to fulfil those obligations. Further, Kyle is required to submit to the direction of the team coach. Therefore, Kyle is an employee under subsection 12(1). Superannuation contributions should be made for Kyle by the club to avoid SGC being applicable to the playing fee and the match fees.

28. If there is any doubt that Kyle is in a common law employment 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. The playing fee of $50,000 and the fee paid for the match for which Kyle was selected but did not take the field, if not already subject to paragraph 12(8)(a), would be subject to paragraph 12(8)(b). These payments are made to Kyle for services he has provided in connection with an activity referred to in paragraph 12(8)(a). 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 match or matches. This will be the case despite the fact that the award was given to Kyle because of his participation in each of the matches in which he had played. 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 $1,000 payment made to Kyle from the sports clothing manufacturer is paid under a results based contract[7] and cannot be said to have any 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. Therefore, subsections 12(1) and 12(8) would not apply.

31. Under the terms of the agreement in respect of the retail shopping centre, Kyle's contract obliges him to attend certain events and he was paid a $5,000 fee for those attendances. The substance of the contract is to provide a result to the payer and not wholly or principally for Kyle's 'labour' such that paragraph 12(3) will not apply. Therefore, the payment 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.

Appearance on television show

32. The $2,000 payment Kyle receives for his appearance on the televised variety show would make him an employee of the television station operator under paragraph 12(8)(c) because he is being paid to provide services in direct connection with the television broadcast.

[7] Refer to paragraphs 42 to 47 of SGR 2005/1

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 a grant totalling $5,000 that was an incentive payment from the regional Olympic Committee as she will compete for a medal in the upcoming summer games.

Appearance fee and 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, by virtue of the $10,000 appearance fee payment, Aimee is an employee of Auspromotions under paragraph 12(8)(a). Further, that $10,000 payment is salary or wages under paragraph 11(1)(d) and is also ordinary time earnings under subsection 6(1). 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).

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 subject to 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 grant made to Aimee was to provide financial support to Aimee so that she could further develop her sporting talent. The grant was 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 grant is to enable Aimee to be able to train and hence enhance her performance at those events. Therefore, the payment of the grant by the Olympic Committee to Aimee does not make Aimee an employee of the Olympic Committee.

Example 3: Sponsorship agreement; payment for hire of equipment

39. Vicki's Café is sponsoring motorcycle racing so that Vicki's business would benefit from the exposure in the form of advertising. The sponsorship money is paid to Jerry, a young rider seeking to establish himself and he has obtained the sponsorship 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 and to be available to sign autographs at the event.

Sponsorship agreement

41. Jerry is not in a common law employment relationship with Vicki's Café. Indicators that support this conclusion are that Jerry is required to provide his own motorcycle (on which the advertising will be displayed), and which events he participates in and how he undertakes that participation are at his absolute discretion. Further, subsections 12(3) or 12(8) do not apply to make Jerry an employee of Vicki's Café because under the arrangement the sponsorship payment is made for a result (that is, to advertise Vicki's Café at various motorcycling events). 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 indicators required to establish a common law employment 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 participate in the promotional activity in the sense required by subsection 12(8) – that is his participation does not involve the exercise of his personal skills. 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 foreign resident for tax purposes. 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 an employee at common law of the State cricket side.

44. If there is any 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 foreign resident for tax purposes, his country of origin does not have a scheduled international social security agreement with Australia, so unless minimum superannuation contributions are made on his behalf to a complying fund the State side would be liable for the SGC. 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.[8]

[8] 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 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.[9] 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 eligible[10] employees, the employer will be liable to pay the SGC. The concept of 'salary or wages' is important to employers for superannuation guarantee purposes as salary or wages is used for calculating the individual superannuation guarantee shortfall of each of their eligible employees.

47. The SGAA defines 'employee' and 'employer' in section 12. Under subsection 12(1), if a person is an employee at common law, that person is an employee under the SGAA.[11] Further, for the purposes of the SGAA, subsections 12(2) to 12(11) expand the meaning of 'employee' and 'employer' beyond situations where there is a common law employment relationship and make provision to avoid doubt as to the status of certain persons.[12] The extending provisions that are relevant to this Ruling are subsections 12(3) and 12(8).[13]

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

48. The terms 'sportsperson' and 'sport' are not defined in the SGAA.[14] For the purposes of this Ruling these terms will be given their ordinary meaning, and 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'.

49. 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 not an exhaustive one.

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[9] See Explanatory Memorandum to the Superannuation Guarantee (Administration) Bill 1992.
[10] Some employees may be excluded. See further explanation at paragraphs 53, 123 and 124 of this Ruling.
[11] Subject to the minor exceptions in subsections 12(9A) and 12(11).
[12] Except for subsections 12(9A) and 12(11) which restrict the meaning of those terms.
[13] Subsections 12(3) and 12(8) are also discussed in SGR 2005/1 at paragraphs 64 to 78 and 83 to 88 respectively.
[14] 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, attract 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.[15]

51. The purpose of subsection 12(8) is 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, … physical or other personal skills…'.[16] 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.[17]

52. Further, it is considered that the word 'similar' is used to show that 'activity' is limited to things of a like kind. It is considered that activities covered by paragraph 12(8)(a) are those which derive their sporting content from the performance or presentation because that is the common thread running through the listed activities. For example, a sportsperson who is paid to participate in training sessions as part of a team is participating in a 'similar activity' for the purposes of paragraph 12(8)(a).[18]

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

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

(i) Determine whether the sportsperson is an employee at common law by considering the key indicators (see paragraph 56 of this Ruling). If, after an examination of the relevant factors, the relationship between the payer and the sportsperson is a common law employment relationship, then subsection 12(1) applies and a liability for SGC may arise if the required contributions are not made.

[15] The world governing bodies of each of these 'games of skill' are represented in the Association of the International Olympic Committee Recognised International Sports Federations.

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

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

[18] Note that participation in training activities may also fall within the scope of paragraph 12(8)(b) as services provided in connection with an activity referred to in paragraph 12(8)(a) – refer to paragraph 28 of this Ruling.

(ii) If a common law employment relationship is not identified then the extended definition of 'employee' contained in subsection 12(8) should be considered (see paragraphs 66 to 99 of this Ruling), and if subsection 12(8) does not apply, then subsection 12(3) should be considered (see paragraphs 100 to 113 of this Ruling).

(iii) If the tests in subsections 12(1), 12(3) or 12(8) 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 123 and 124 of this Ruling).

Who is an employee within the ordinary meaning of that term? – subsection 12(1)

54. The courts have considered the meaning of 'employee' and 'employer' in cases such as *Hollis v. Vabu*[19] and *Stevens v. Brodribb Sawmilling Co Pty Ltd.*[20] 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'.

55. 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 discussed in detail in SGR 2005/1.[21]

56. Briefly, indicators of a common law employment relationship include:

- The employer exercising, or having a right to exercise, control over the manner in which the work is performed by the worker.[22]
- The worker serving the employer in the employer's business rather than carrying on a trade or business of their own.[23]

[19] (2001) 207 CLR 21.
[20] (1986) 160 CLR 16.
[21] At paragraphs 32 to 60.
[22] Paragraphs 33 to 38 of SGR 2005/1. See also *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.
[23] Paragraphs 39 to 41 of SGR 2005/1. See also *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21 at 44 and 45, endorsing Windeyer J in *Marshall v. Whittaker's Building Supply Co* (1963) 109 CLR 210.

- The substance of the contract under which the worker is engaged not providing for the production of a given result.[24]
- The worker being contractually required to personally perform the work, in contrast to having a power to delegate the work.[25]
- The worker bearing little or no risk of the costs arising out of injury or defect in carrying out their work.[26]
- 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.[27]
- The employer having the right to suspend or dismiss the worker.[28]
- The employer having the right to the exclusive services of the worker such that the worker does not perform work for others.[29]
- 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.[30]
- The worker being required to market the employer by bearing that entity's livery, for example, by wearing a uniform.[31]

[24] 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.
[25] Paragraphs 48 to 50 of SGR 2005/1.
[26] Paragraph 51 of SGR 2005/1.
[27] Paragraphs 52 to 57 of SGR 2005/1.
[28] 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.
[29] 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.
[30] Paragraph 58 of SGR 2005/1. See also *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24 per Mason J.
[31] 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.

57. 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*),[32] it was held that a university student who 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:[33]

> 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.

58. 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 56 of this Ruling.

59. 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.[34]

60. 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 given to the extended meaning of 'employee' in subsections 12(3) and 12(8).

[32] *Kelly* v. *FC of T* (1985) 80 FLR 155, 85 ATC 4283, 16 ATR 478.
[33] *Kelly v. FC of T* 85 ATC 4283 at 4287; 16 ATR 478 at 482.
[34] 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 SGR 2009/2)..

Tests in subsection 12(8) to be applied on a payment by payment basis

61. According to the terms of subsection 12(8), the tests contained in paragraphs 12(8)(a) to (c) must be applied on a payment by payment basis. This is because the focus of the test is on the payment made to the person to perform or participate in the performance of a sport or similar activity or to provide services in connection with such activities or to provide services in connection with the making of any film, tape or disc or television or radio broadcast. Hence, for the purposes of subsection 12(8), 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 under the SGAA.

62. In contrast, when determining whether a person is an employee at common law, a single payment made to a sportsperson to participate in a sporting event does not of itself indicate that a common law employment relationship exists. Rather, the totality of the relationship between the parties must be considered.

What is the relevant 'payment'?

63. Identifying the relevant payment to which the tests in subsection 12(8) must be applied will often be straightforward. Each payment should be examined separately to determine the character of that payment.

64. 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.[35]

65. Where, having regard to all the facts and circumstances including 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.[36]

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[35] See also *McLaurin v. Federal Commissioner of Taxation* (1961) 104 CLR 381.
[36] Refer to paragraph 88 of this Ruling for further discussion of appearance fees.

Payment for performance or participation in the performance of sport involving exercise of physical or other personal skills – extended definition of 'employee' – paragraph 12(8)(a)

66. 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;

67. 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. 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).

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

(a) Payments for performance or participation in the performance of 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 different types of payments is discussed further in this Ruling at paragraphs 86 to 99.

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

Requirement for active participation in the sport

69. 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.[37]

[37] See also SGR 2005/1 at paragraphs 83-84, and *General Aviation Maintenance Pty Ltd and Commissioner of Taxation* [2012] AATA 120 (*General Aviation*) at [30].

70. 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. A common example is where grants are 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 sportsperson's 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 or other personal skills

71. 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 … physical or other personal skills.' That is, the cause of the payment must relate to the sportsperson's active participation in a sport or similar activity that specifically involves the exercise of their personal skills.

72. 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 the driver for autographs.

73. Depending on the circumstances of the case, it may be that the driver's participation in the promotional activity does not require the driver to use their specific physical or personal skills. If this is the case, then such a circumstance will not satisfy the requirement in paragraph 12(8)(a).

Requirement for causal link between payment and participation

74. A payment made to an individual must be directly referrable to that individual's performance or participation in the relevant activity. The requirement to establish this causal link is implicit in the use of the word 'to', as in 'paid *to* perform'.[38] '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 for the sportsperson's active involvement in the relevant activity regardless of the result arising from that participation. Such a payment may be made

[38] Paragraph 12(8)(a).

under a contract whereby the sportsperson undertakes to the payer that he or she will participate in the relevant activity.

75. 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 his or her 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.

76. 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*).[39]

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

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

78. 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 irrelevant for SGAA purposes –subsection 12(8) must be applied to each payment made.

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

79. 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;
>
> (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.

80. Neither of these paragraphs requires a person to actively participate or perform in the sport or broadcast or other activity. However, it is a requirement of both provisions that the person

[39] See paragraph 57 of this Ruling.

provides or performs services 'in connection with' the relevant activity, and not for some other purpose.

81. The words 'in connection with' do not have a specific technical meaning 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 those cases 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*:[40]

> 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)

82. As can be seen from the statement above, the term 'in connection with' can 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 or performs must relate directly to the relevant activity in question.[40A] Services provided or performed before or after the relevant activity occurs may fall within the scope of paragraphs 12(8)(b) or 12(8)(c) as 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 scenes' services which enable the relevant activity to occur. For example, referees, umpires,

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[40] (1987) 16 FCR 465 at 479-480; (1987) 77 ALR 577, at 591 and 592.

[40A] In *General Aviation* at [30], it was found that the Tandem Master's video recording of skydives was a service covered by either paragraph 12(8)(b) or (c).

team officials and event commentators who participate or provide services before, during and after the sporting activity are employees under subsection 12(8).[41]

83. 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. Therefore, the sportsperson is not an employee of the payer in these circumstances.

84. 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. For example, persons paid to appear in a television 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)?

85. 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.[41A] When read contextually, with particular regard to the terms of subsection 12(1), if a person is an employee by virtue of subsection 12(8) applying then the person liable to make' the payment is 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 liable to make' the payment will be their employer and that person or entity is required to make the minimum amount of superannuation contributions to a complying fund in order to avoid a liability to pay the SGC (unless a specific exemption applies).

[41] See also SGR 2005/1 at paragraphs 83 to 88.

[41A] See *Commissioner of Taxation v Racing Queensland Board* [2019] FCAFC 224 at [50–52], and *Commissioner of Taxation v Scone Race Club Limited* [2019] FCAFC 225 at [10–11], per Griffiths J (adopted by Steward J at [82] and [84], whose reasons were agreed with by Derrington J at [80]).

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

86. 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. In determining the character of the relevant payment, reference must be had to the substance of the arrangement, and not merely to what the parties have agreed to label the payment. Some common types of payments that sportspersons may receive are discussed below.

Match payments

87. A payment made to a person by an organisation 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 organisation 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

88. 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) 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

89. At first instance, in *Stone v. Federal Commissioner of Taxation*[42] Hill J drew a distinction between genuine prize money and appearance money. He said:[43]

> However, the reference to income producing activity does not refer to something that is neither a business, nor an employment or where

[42] [2002] FCA 1492; (2002) 196 ALR 221; 2002 ATC 5085; (2002) 51 ATR 297.
[43] (2002) 51 ATR 297 at 316; 2002 ATC 5085 at 5102.

> the reward is not for services rendered in the sense that s 26(e) requires.
>
> 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.

90. From that analysis, it is clear that a distinction is 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.[44]

91. 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 of the payer under paragraph 12(8)(a).

'Player of the match' awards

92. 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. It was not made for that person's mere participation in or performance of 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. Therefore, the sportsperson is not an employer of the payer in these circumstances.[45]

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[44] 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 and 229; 2003 ATC 4584 at 4596 to 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.

[45] This analysis would be different if the award were paid to the sportsperson by their common law employer – see paragraph 94 of this Ruling.

Bonuses

93. 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 payments made for participation in each session of sport 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,[46] 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 employment relationship exists, that additional amount paid to the football player is more characteristic of an incentive payment or bonus that arises in the course of ordinary hours of work.[47]

94. 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.

95. 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.[48]

96. In the absence of a common law employment relationship, the general principle outlined in paragraphs 74 to 76 of this 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.[49] 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. It is often the case that the larger sum is directly referrable to the specific result achieved.

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[46] See discussion at paragraphs 89 to 91 of this Ruling.
[47] See also paragraphs 28 and 29 of SGR 2009/2 for discussion of when bonuses are OTE.
[48] See also paragraphs 66 and 274 to 278 of SGR 2009/2 for discussion of when bonuses are salary or wages.
[49] See discussion at paragraph 63 to 65 of this Ruling.

Grants

97. The receipt of grants was considered in *FC of T v. Stone*[50] 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'.[51] The Full High Court also restated what Hill J noted in his Federal Court judgement:[52]

> 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)

98. 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,[53] 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. The payment of a grant as described above will not make the sportsperson an employee under paragraph 12(8)(a) or 12(8)(b).

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[50] [2005] HCA 21; (2002) 222 CLR 289; (2002) 215 ALR 61; 2005 ATC 4234; (2005) 59 ATR 50.
[51] 2005 ATC 4234 at 27; (2005) 59 ATR 50 at 56
[52] 2005 ATC 4234 at 4244; (2005) 59 ATR 50 at 62.
[53] *FC of T v. Stone* 2005 ATC 4234 at 4245; (2005) 59 ATR 50 at 63.

99. 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.[54]

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

100. 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.

101. 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 of the payer under subsection 12(3).[55]

102. 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 because the payment is not wholly or principally for that person's labour – instead it is dependent on a result.

103. 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 determining the meaning of these words regard may be had to the context in which the phrase appears, including the legislative history of the provision.[56]

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[54] 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.

[55] The scope and operation of subsection 12(3) is discussed in more detail at paragraphs 64 to 78 of SGR 2005/1.

[56] 'Context' is used in its widest sense: *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; 141 ALR 618 at 634 and 635

104. In *DCT v. Bolwell*[57] 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'.[58]

105. 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.[59]

106. Such a conclusion could also be applied in the context of a sportsperson that is contracted to participate in a sporting competition.[60] That is, the result achieved by the sportsperson arises from the sportsperson's own physical and mental ability and because such skill cannot be the subject of someone else's direction, then the contract under which the skill is exercised cannot fall within the expression 'wholly or principally for labour'.

107. To provide further context in which to consider the scope of subsection 12(3), 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'.[61]

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[57] (1967) 1 ATR 862.
[58] Former paragraph 221A(2)(a) of the *Income Tax Assessment Act 1936.*
[59] *DCT v. Bolwell* (1967) 1 ATR 862 at 873.
[60] See also SGR 2005/1 – see paragraphs 64 to 78.
[61] See Second Report of the Senate Select Committee on Superannuation, *Superannuation Guarantee Bills*, at page 146.

108. Therefore, taking into account the legislative history and context outlined above, subsection 12(3) would not apply to treat sportspersons who are paid for their participation in sporting or other similar activities as employees.

Corporate sponsorship

109. 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.

110. 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:[62]

> 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.

111. 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.[63]

112. 'Labour' in the context of subsection 12(3) includes mental and artistic effort as well as physical toil.[64] 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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[62] *FC of T v. Stone* 2005 ATC 4234 at 4242-4243; (2005) 59 ATR 50 at 60.
[63] See *FC of T v. Stone* 2005 ATC 4234 at 4241; (2005) 59 ATR 50 at 58.
[64] *Deputy Commissioner of Taxation v. Bolwell* (1967) 1 ATR 862 at 873.

113. 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

114. 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.[65] However, the sportsperson may be the employee of the intermediary company or trust, depending on the terms of the arrangement.[66]

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

115. 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'.[67] '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.

116. 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.

117. 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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[65] See also paragraph 13 of SGR 2005/1.

[66] See also SGR 2005/2: Superannuation guarantee: work arranged by intermediaries.

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

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

118. 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'.

119. 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', 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.

120. 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.'

121. Further, the calculation of an 'individual superannuation guarantee shortfall'[68] 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).

[68] Section 19.

122. 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 74 to 76 of this Ruling, the payment of prize money will not make the recipient an employee under subsection 12(8). That payment of prize money is not 'salary or wages' under paragraph 11(1)(d).[69]

Exclusions from 'salary or wages'

123. 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 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.

124. There are other provisions which exclude from the definition of salary or wages certain payments made to certain persons. These include the exclusion for salary or wages paid to part-time employees who are under 18 years of age.[71]

Visiting non-resident sportspersons

125. For the purposes of subsection 12(8), if a foreign employer pays a foreign employee for work done in Australia they may also be required to pay SGC unless minimum superannuation contributions are made on the employee's behalf to a complying superannuation fund. Under the SGAA, employers are required to make contributions for eligible 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.[72] Whether a sportsperson is covered by a certificate of coverage must be determined on the facts of each case. If contributions are made in respect of the non-resident sportsperson, they may be able to claim a DASP after leaving Australia if they satisfy certain conditions.[73]

126. It should be noted that under paragraph 27(1)(d) of the SGAA and subregulation 7(1) of the SGAR 1993, certain salary or wages

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[69] By contrast, 'prize money' paid to a sportsperson by their common law employer will form part of salary or wages – see discussion at paragraphs 93 and 94 of this Ruling.
[70] [Omitted.]
[71] Section 28.
[72] Section 15C.
[73] More information about bilateral agreements and the DASP can be found at the Tax Office website www.ato.gov.au.

payments to 'prescribed employees' are not to be taken into account for the purpose of making a calculation under section 19 of the SGAA. A 'prescribed employee' is required to be a holder of one of the listed visas in subregulation 7(1) of the SGAR 1993. The exemption mainly covers certain visiting senior executives and may have some application for visiting team officials and event organisers.

Ordinary time earnings

127. 'Ordinary time earnings' (OTE) is the amount an employee earns for their ordinary hours of work.[74] From 1 July 2008 all employers must use OTE to calculate the level of superannuation contributions necessary in order to meet their SG obligations in respect of an eligible employee.[75] 'Ordinary time earnings' is defined in subsection 6(1) 'in relation to an employee'. Therefore, for payments to constitute OTE they must be made to a person who is an employee in accordance with section 12. 'Earnings' for the purposes of the definition of OTE is the remuneration paid to the employee as a reward for the employee's services.

128. 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?

129. A sportsperson's ordinary hours of work would not usually be specified in an applicable award or agreement. This is because sporting activities are not typically performed in regular defined shifts such as an office clerk's regular 'business hours'. Therefore, the 'ordinary hours of work' for sportspersons would be the normal, regular, usual or customary hours worked by the sportsperson taking into account all relevant circumstances.[76] However, if it is not possible or practical to determine the normal, regular, usual or customary hours, the actual hours worked should be taken as the ordinary hours of work.[77] Where a sportsperson is employed under a contract, their ordinary hours of work will generally be the agreed hours of work if specified under that contract. In other cases, the actual hours worked by the sportsperson will usually be their ordinary hours of work.

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[74] Subsection 6(1). For a full explanation of 'ordinary time earnings' see SGR 2009/2.
[75] See amendments made to the SGAA by *Superannuation Laws Amendment (2004 Measures No. 2) Act 2004.*
[76] See also paragraphs 16 and 17 and 203 to 210 of SGR 2009/2 for further explanation.
[77] See also paragraphs 16 and 17 and 203 to 210 of SGR 2009/2 for further explanation.

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

130. An employee's 'earnings', for the purpose of the definition of OTE, is the remuneration paid to the employee as a reward for the employee's services. The practical effect for superannuation guarantee purposes is that the expression 'earnings' is synonymous with the term 'salary or wages'.[77A] Payments to an employee which are not given as remuneration for their services are not included in OTE as such payments would not be 'salary or wages'. For example, a payment made to reimburse an employee's out of pocket expenses is not salary or wages and therefore not OTE.[78] Also, 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. All amounts of earnings in respect of employment are in respect of the employee's ordinary hours of work unless they are remuneration for working overtime hours, or are otherwise referable only to overtime or to other hours that are not ordinary hours of work.

131. In the context of sportspersons who 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 subsections 12(3) or 12(8).[79]

132. 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.

133. [Omitted.]

[77A] See paragraphs 12 and 185 to 187 in SGR 2009/2 for further explanation.
[78] See paragraphs 46, 48, 57 to 59C, 72 to 76, and 255 to 270 of SGR 2009/2 for further explanation of payments which are not regarded as 'salary or wages'.
[79] 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.

Alternative view: SGD 93/11 view

134. An alternative interpretation of the application of paragraph 12(8)(a) is that any sportsperson who is paid any money to perform, present, play, compete or participate in a sport is 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'?

135. SGD 93/11 was issued on 22 July 1993 and withdrawn on 5 December 2007. SGD 93/11 stated that prize money and appearance fees (but not 'player of the match' and similar 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)

136. 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 for the sportsperson's participation or performance 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 – Detailed contents list

137. Below is a detailed contents list for this Superannuation Guarantee Ruling:

	Paragraph
What this Ruling is about	**1**
Previous Rulings	**6**
Ruling	**7**
Definition of 'employee'	7
Specific provision that apply in respect of sportspersons	9
Tests in subsection 12(8) to be applied on a payment by payment basis	9
Payments for participation or performance – paragraph 12(8)(a)	10
Payments for services provided in connection with a sporting activity – paragraph 12(8)(b)	12
Payments for provision of services in, or in connection with, any television or radio broadcast – paragraph 12(8)(c)	13
Contracts 'wholly or principally for the labour of a person' – subsection 12(3)	14
Definition of 'salary or wages'	15
'Ordinary time earnings'	21
Relevance of income tax treatment of payments	23
Date of effect	**24**
Appendix 1 – Examples	**25**
Example 1: Employee at common law; sponsorship agreements and award for 'best and fairest'	25
Contract with national football club	27
Best and fairest award	29
Sponsorship agreements	30
Appearance on television show	32
Example 2: Appearance fee; prize money and grants	33
Appearance fee and prize money paid by Auspromotions	35
Grants from the regional Olympic Committee	37
Example 3: Sponsorship agreement; payment for hire of equipment	39
Sponsorship agreement	41

Payment for hire of motorcycle 42
Example 4: Non-resident sportsperson 43
Appendix 2 – Explanation 46
Legislative context 46
Meaning of 'sportsperson' and 'sport' for the purposes of subsection 12(8) 48
Determining whether a sportsperson is an 'employee' for the purposes of the Superannuation Guarantee provisions 53
Who is an employee within the ordinary meaning of that term? – subsection 12(1) 54
Tests in subsection 12(8) to be applied on a payment by payment basis 61
What is the relevant 'payment'? 63
Payment for performance or participation in the performance of sport involving exercise of physical or other personal skills – extended definition of 'employee' – paragraph 12(8)(a) 66
Meaning of the term 'paid to perform …, or participate in the performance … of' 69
Requirement for active participation in the sport 69
Requirement that participation must relate to physical or other personal skills 71
Requirement for causal link between payment and participation 74
Will paragraph 12(8)(a) apply differently to amateur and professional sportspersons? 77
Payments for persons providing services in connection with sport – paragraphs 12(8)(b) and 12(8)(c) 79
Who is the 'employer' for the purposes of subsection 12(8)? 85
Characteristics of different types of payments to sportspersons in relation to their involvement in sport 86
Match payments 87
Appearance fees 88
Prize money 89
'Player of the match' awards 92
Bonuses 93
Grants 97
Contract that is wholly or principally for the person's labour – extended definition of 'employee' – Subsection 12(3) 100
Corporate sponsorship 109

Sportsperson paid through third parties 114
Salary or wages – extended definition in paragraph 11(1)(d) 115
Exclusions from 'salary or wages' 123
Visiting non-resident sportspersons 125
Ordinary time earnings 127
What are a sportsperson's ordinary hours of work? 129
What payments constitute 'earnings' for the purposes of the ordinary time earnings definition? 130
Appendix 3 – Alternative views **134**
Alternative view: SGD 93/11 view 134
Why this is not the preferred view of subsection 12(8) 136
Appendix 4 – Detailed contents list **137**

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Previous draft:

SGR 2008/D1

Related Rulings/Determinations:

SGR 2005/1; SGR 2005/2; SGR 2009/2; SGD 2006/2; TR 97/22; TR 1999/17; CR 2007/36; CR 2007/57

Previous Rulings/Determinations:

SGD 93/11

Subject references:

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- contract for labour
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- employees
- employers
- PAYG withholding
- performers
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