

# ***TD 2023/4 - Income tax: use of an individual's fame by related entities***

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Status: **legally binding**

## Taxation Determination

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

### **📌 Relying on this Determination**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

<b>Table of Contents</b>	<b>Paragraph</b>
What this Determination is about	1
<b>Ruling</b>	<b>6</b>
<u>Example – media personality agrees with a related entity to use their fame</u>	12
<b>Date of effect</b>	<b>14</b>
<b>Appendix – Compliance approach</b>	<b>15</b>

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

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

<sup>1</sup> While not within the scope of this Determination, consideration also needs to be given to the potential application of the personal services income rules in Part 2-42 of the *Income Tax Assessment Act 1997*.

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Status: **legally binding**

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## Ruling

6. In Australian law, an individual with fame has no property in that fame<sup>2</sup> and therefore cannot vest or transfer any property in their fame to another entity. Exploitation of an individual's fame can be done by way of agreement for a fee. Where a related entity is a party to such an agreement, it is incapable of authorising the use of the individual's fame by other entities as the agreement does not vest any property in the related entity. The fees paid for use of the individual's fame will be ordinary income of the individual and assessable to them under section 6-5.

7. The common law of Australia does not recognise as a proprietary right an individual's ability to exploit their fame separately from an accompanying business.<sup>3</sup> Consequently, there is no recognised proprietary right (common law or otherwise) in an individual's fame that is capable of transfer or assignment. This can be contrasted with copyright, trademark, registered designs and other forms of intellectual property which have proprietary rights recognised under Australian common law and legislation. It is acknowledged that this Determination is about the general exploitation of an individual's fame separate from the exploitation of these recognised intellectual property rights.

8. While an individual does not have a recognised proprietary right in their fame, they may be entitled to pursue a limited number of causes of action, such as the tort of 'passing off'<sup>4</sup>, or under section 18 of Schedule 2 to the *Competition and Consumer Act 2010*, if their fame is used in a manner which misleads the public or a significant portion of the public into thinking some form of association or endorsement exists between the individual and the product or services of another.

9. Under the cause of action for 'passing off', the relevant property that is protected is the goodwill<sup>5</sup> of the individual's business that would likely be injured due to improper use.<sup>6</sup> Goodwill cannot be dealt with or assigned independently of that individual's business.<sup>7</sup>

10. An individual with fame can exploit that fame by authorising others to use their fame for a fee. However, such an agreement would not vest any property in the individual's fame in the other entity. As a result, a related entity is not in a position to enter into a licensing agreement with a third party to exploit the fame of an individual. The agreement between the related entity and the individual would merely authorise that which would otherwise be actionable.<sup>8</sup> As a result, the related entity cannot derive income attributed to the use of the individual's fame. Accordingly, the income derived under any purported sub-licensing of those rights to a third party by the related entity is the ordinary income of the individual.<sup>9</sup> The related entity is receiving an amount that is being applied or dealt with on the individual's behalf.

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<sup>2</sup> See *Australian Consolidated Press Ltd v Ettingshausen* [1993] NSWCA 10 at page 10.

<sup>3</sup> See *Honey, G. v Australian Airlines Ltd & Anor* [1989] FCA 234. An example of such a business is where professional sportspersons engage in commercially exploiting their sporting prowess and associated celebrity through promotional activities – see *Spriggs v Commissioner of Taxation* [2009] HCA 22.

<sup>4</sup> 'Passing off' is conducting business in a way that misleads the public into thinking your goods or services are those of another business.

<sup>5</sup> For the Commissioner's view on the taxation treatment of 'personal goodwill', see paragraph 59 of Taxation Ruling TR 1999/16 *Income tax: capital gains: goodwill of a business*.

<sup>6</sup> *ConAgra Inc v McCain Foods (Aust) Pty Ltd* [1992] FCA 176; *Irvine v Talksport Ltd* [2002] 1 WLR 2355; *JT International SA v Commonwealth of Australia* [2012] HCA 43.

<sup>7</sup> *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; *Commissioner of Taxation v Just Jeans Pty Ltd* [1987] FCA 218.

<sup>8</sup> See *JH Coles Pty Ltd v Need* 49 CLR 499 at [503].

<sup>9</sup> Although the fee is paid to the related entity on the individual's behalf and in accordance with their direction in respect of their image, that fee is taken to be derived by the individual under subsection 6-5(4).

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Status: **legally binding**

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11. This can be distinguished from a circumstance where a related entity engages the individual with fame to provide services. For example, the individual with fame may be engaged by the related entity to attend product launches and promotional events for a third party. In these circumstances, contractual payments by the third party to the related entity can be assessable to the related entity under section 6-5. However, consideration would also need to be given in these circumstances to the potential application of the personal services income rules in Part 2-42 or the application of Part IVA of the *Income Tax Assessment Act 1936*.<sup>10</sup>

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

12. *A family trust is established by a media personality, Harry Smith. The trustee of the family trust enters into a deed with Harry which grants a right to use and exploit Harry's fame (name, likeness, image and reputation) throughout Australia.*

13. *The trustee contracts with an unrelated business, Products Pty Ltd, for the use of a photo of Harry and Harry's name on the packaging of their product for a fee. Neither Harry nor the family trust has any copyright, trademark or registered design rights in the photo to be used or in Harry's name. Payment by Products Pty Ltd is made to the trustee. However, the income from this use of Harry's fame is ordinary income of Harry. This is because while the trustee has a right to use that fame, the deed does not provide any property to the trustee which could allow a third party to use it for a fee. Therefore, Harry is required to include the fee amount paid by Products Pty Ltd to the trustee in his assessable income in the relevant income year.*

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**Date of effect**

14. This Determination applies to years of income commencing both before and after its date of issue, subject to the compliance approach in the Appendix to this Determination. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**

28 June 2023

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<sup>10</sup> Refer to Taxation Ruling TR 2022/3 *Income tax: personal services income and personal services businesses*.

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Status: **not legally binding**

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## **Appendix – Compliance approach**

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

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

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

17. This compliance approach applies both before and after the issue of this Determination in respect of the 2018–19 to 2022–23 income years.

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

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Status: **not legally binding**

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## References

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*Previous draft:*

TD 2022/D3

*Related Rulings/Determinations:*

TR 1999/16; TR 2006/10

*Legislative references:*

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

*Cases relied on:*

- Australian Consolidated Press Ltd v Ettingshausen [1993] NSWCA 10
- Commissioner of Taxation v Just Jeans Pty Ltd [1987] FCA 218; 16 FCR 110; 87 ATC 4373; 18 ATR 775; 72 ALR 213
- ConAgra Inc v McCain Foods (Aust) Pty Ltd [1992] FCA 176; 33 FCR 302; 23 IPR 193; 106 ALR 465; [1992] AIPC 90-892

- Honey, G v Australian Airlines Ltd & Anor [1989] FCA 234; (1989) ATPR 40-961; 14 IPR 264
- Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; 156 CLR 41; 58 ALJR 587; 55 ALR 417; 4 IPR 291
- Irvine v Talksport Ltd [2002] 1 WLR 2355; [2002] EWHC 367
- JH Coles Pty Ltd v Need 49 CLR 499; 7 ALJR 360; [1934] ALR 13; 1A IPR 388; [1934] AC 82
- JT International SA v Commonwealth of Australia [2012] HCA 43; 250 CLR 1; 86 ALJR 1297; 291 ALR 669; [2013] ALMD 712
- Spriggs v Commissioner of Taxation [2009] HCA 22; 239 CLR 1; 83 ALJR 749; 256 ALR 596; 72 ATR 148; 2009 ATC 20-109

*Other references:*

PCG 2017/D11 (withdrawn)

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ATO references

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