TD 2023/4EC - Compendium

 This cover sheet is provided for information only. It does not form part of *TD 2023/4EC - Compendium*

Australian Government
Australian Taxation Office

Public advice and guidance compendium – TD 2023/4

Relying on this Compendium

This Compendium of comments provides responses to comments received on Draft Taxation Determination TD 2022/D3 *Income tax: use of an individual's fame by related entities*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	The difference in tax treatment depending on how the services of the individual with fame are engaged, in paragraphs 10 and 11 of the draft Determination, it effectively highlights that the ATO's interpretation, that the individual should include the assessable amount instead of the related entity, can be circumvented simply by having the related entity engage the individual with fame to provide services instead. It is concerning that by simply rearranging the 'direction' of the engagement, one can easily achieve a tax outcome that could overcome the ATO's interpretation that the individual should include the assessable amount instead of the related entity. That is, that the adverse tax outcome detailed in paragraph 10 of the draft Determination could be averted by having the related entity engage the individual with fame to provide the service, instead of having the individual authorising the related entity to use their fame for a fee. This is a change in form without a change in substance; that is, the entity being taxed as opposed to the individual with fame.	It is necessary to consider the particular factual arrangement when considering the tax implications that arise from that arrangement. We may apply compliance resources to consider arrangements that are restructured with the purpose of achieving a tax benefit for a particular taxpayer or where the purported arrangements do not reflect the underlying agreement between the parties. Regardless of how the transaction is structured, a related entity cannot sub-license the fame of an individual. This is because Australian law does not recognise property rights in fame. As such, the individual cannot vest their fame in the related entity for the related entity to then exploit.

Issue number	Issue raised	ATO response
	Omit the approach in paragraph 11, which will promote and educate taxpayers to restructure their transactions to overcome the application of the law as interpreted by the ATO by having the related entity engage the individual with fame to provide the service. Alternatively, provide further comments and examples of instances where the mere reorganisation of the 'direction' of the engagement would not avoid the outcome of having the individual include the assessable amount.	
2	The basis of the Commissioner's view is not correct at law: • An individual athlete can license the related entity the right to use or sub-license that goodwill. • Income derived by the related entity is property income of that entity from commercially exploiting the goodwill associated with the player. • The payment is a contractual payment made in exchange for the related entity sub-licensing a third party to use the goodwill in the individual athlete's name, likeness and reputation. While it is accepted that an individual may have no property in their personal fame alone, it does not mean that an athlete does not have a proprietary interest in the goodwill in the individual's name, likeness or reputation and association with a product or service. Although the Commissioner has taken the position that personal goodwill cannot be transferred in the absence of transferring all of the assets of a business, the Commissioner has never made any comment concerning the licensing of personal goodwill to another entity. Protection against damage to property in an individual's goodwill is the subject matter that that the tort of passing off protects.	Under Australian law, an individual cannot vest their fame in a related entity for the related entity to then exploit for the reasons set in paragraphs 6 to 11 of the final Determination.

Issue number	Issue raised	ATO response
	An individual athlete does not need to assign ownership of the goodwill in the individual's name, likeness or reputation to a related entity in order for that related entity to sub-license the right to exploit the goodwill in that athlete's name, likeness or reputation. Instead, the individual can license to the related entity the right to use or sub-license that goodwill.	
3	The draft Determination seeks to rely on outdated and untested law, with the sole authority for the ATO's position being the case of *Australian Consolidated Press Ltd v Ettingshausen* [1993] NSWCA 10 (*Ettingshausen*). More specifically, the ATO relies on page 10 of that decision which solely refers to the case of *Clark v Freeman* (1848) 50 ER 759, being a case from the year of 1848. Fundamentally, the ATO is relying on a principal of law established in 1848 and has rarely been considered since then. The legal proposition relied upon by the ATO in the draft Determination is fundamentally incorrect and is in opposition to the legal principles relied upon by the ATO in ATO Interpretative Decision ATO ID 2004/511 *Income Tax: Licence to use image granted to a family trust* (withdrawn) to support the proposition that an individual can transfer the economic benefit and the right to sue in relation to their name and image to a separate legal entity. This is a well-established principle not only in Australia, but internationally.	The New South Wales Court of Appeal's decision in *Ettingshausen* is the current leading authority in Australia that an individual does not have a right of property in their fame. ATO ID 2004/511 was withdrawn on 18 August 2018. We acknowledge that certain views expressed in ATO ID 2004/511 and Draft Practical Compliance Guideline PCG 2017/D11 *Tax Treatment of payments for use and exploitation of a professional sportsperson's 'public fame' or 'image'* (withdrawn on 24 August 2018) were contrary to certain views expressed in this Determination. This is the reason for the transitional compliance approach provided in the Determination.
4	To minimise any confusion, it is considered that the Determination should provide a more detailed explanation regarding the Commissioner's reasoning for the ATO's view. First, the current analysis in the draft Determination primarily focuses on whether 'fame' is an identifiable asset but does not sufficiently explain the Commissioner's view as to why: • the related entity is not the entity that derives the ordinary income despite potentially engaging in a business activity and entering contractual arrangements, and	Paragraphs 6 to 11 of the final Determination provide sufficient reasoning that related entities cannot sub-license the fame of an individual. While an individual can exploit their fame by licensing others to use their image for a fee, such a licence would not vest any property in the fame in the other entity (unless the individual has some other recognised form of intellectual property (IP) right in the image (that is, copyright and has appropriately licensed that IP right). As such, while the individual can exploit their fame by licensing with a related entity to use their fame, image or likeness for a fee, the related entity cannot exploit that fame by sub-licensing it to others. Any income derived from such a purported sub-licensing arrangement would be attributable to the individual and

Issue number	Issue raised	ATO response
	• the transfer or vesting of property rights in the related entity is crucial for that entity to derive income according to ordinary concepts. It is also considered that the Determination should contain an additional section outlining alternative arguments and an explanation of why the Commissioner does not agree with those alternate views. The inclusion of this information is important to ensure that taxpayers and tax practitioners can make informed decisions about their own factual circumstances.	assessable to them under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997). We do not consider alternative views concerning the ability of an individual to exploit fame under a sub-licensing arrangement are supported by Australian law.
5	The draft Determination appears to imply that the Commissioner's view is applicable only to related entities. However, the fundamental principles should apply to both related and unrelated entities in determining whether an entity has derived income. It is recommended that the final Determination should contain clarification on this point and the rationale if there are different outcomes.	Paragraph 6 of the final Determination makes clear an individual cannot vest or transfer any property in their fame to another entity. The reference to 'another entity' is not limited to a related entity and applies to both a related and unrelated entity.
6	It is considered that the draft Determination should clarify the scope of the Commissioner's view. This could include guidance or signposts to other ATO guidance products on how arrangements involving IP rights that do not fall within the scope of the draft Determination may be entered into and transacted with. Given the factual nature of the issue, practical examples outlining instances when the Commissioner's view in the draft Determination does not apply will assist in demonstrating the application of the underlying principles.	This suggestion has been noted. We have clarified the example at paragraphs 12 and 13 of the final Determination.
7	Legitimate international fame arrangements of a famous person should be excluded from the final Determination. Provided these arrangements satisfy the relevant double-tax agreements, the controlled foreign company rules, and the foreign entities are not managed and controlled in Australia, it is suggested that such international arrangements (whether for registered IP or 'fame' of the famous person), should be excluded from the Determination's approach.	We consider that the views set out in the final Determination apply to arrangements subject to Australian law. This may include arrangements that have international components.

Issue number	Issue raised	ATO response
8	It is submitted that where an entertainer has fully trademarked their 'fame' and is in the *business* of exploiting that 'fame' within Australia (for example, that they at a minimum, satisfy the personal services income (PSI) rules), the Commissioner would exclude such entertainers and arrangements from the Determination's approach.	The final Determination is only concerned with income from use of the individual's fame. It does not apply to income from the provision of services (such as where the individual is engaged by a related entity to provide services to a third party), nor does it apply to fees earned by a related entity from exploiting copyright, trademark or registered design rights licensed to the related entity.
9	There does not seem to be a distinction between personal exertion income (contract for playing the sport) and income generated from an activity which is in addition to the personal exertion income. A proportion of the additional income gained from other than playing of the sport should be able to be licensed to another entity.	The final Determination does not apply to PSI.
10	What is the difference if the sporting code uses the players image to promote the game and generate income from the images, and that income is not attributable to the player whose image is being broadcast on billboards, buses, et cetera?	This scenario falls outside the scope of this Determination, however, income earned from an individual entering a contract with a third party to exploit their fame will be assessable as ordinary income to the individual.
11	The final Determination should provide examples regarding how combined-source (and arguably transferable) famous person goodwill scenarios might be treated under the revised approach proposed in the draft Determination.	This scenario falls outside the scope of this Determination.
12	Understanding the Commissioner's logic in targeting their personal fame for taxation purposes is a struggle to some extent. Specifically, successful sole traders also have a high degree of 'fame' in their profession. In such a case, it is usually called 'personal goodwill'. The only difference between the concepts of 'fame' and 'personal goodwill' is in name only. It is submitted that they are one and the same thing for a successful individual. It is further submitted that if there is a tax fiction in transferring such personal goodwill to a related entity for other professions, the Commissioner needs to apply such a position to famous people too.	Goodwill is inseparable from the business to which it is attached. In this case, an individual's fame is an aspect of the overall business which also involves the individual's personal performance in the relevant field.

Issue number	Issue raised	ATO response
13	What is the difference between a person trading their fame or image, and a person trading their knowledge or expertise? For example, if a person with extensive and valuable engineering or accounting knowledge established a related entity to work with their clients using that expertise or knowledge, then how is that different to a person who has established fame and recognition using a trading entity to work with their clients? It seems a very dangerous precedent to effectively undermine legitimate trading entity structures based only on the fact that the person is famous or has built-up recognition.	The arrangement considered in the Determination is not the same as an arrangement for the provision of personal services which falls outside the scope of the final Determination.
14	What will be an acceptable approach to valuing and allocating the various types of income relating to a famous person (including their personal fame or image rights which are subject to paragraph 5 of the draft Determination)?	Valuing services and assets is a question of fact and degree and falls outside the scope of this Determination. Income and deduction claims need to be appropriately and reasonably considered with the relevant approach documented. We provide general guidance on valuations and market value as reflected in the High Court decision in *Spencer v Commonwealth of Australia* [1907] HCA 82 where market value is determined by the voluntary bargaining between an informed, willing but not anxious buyer and seller.
15	With reference to paragraph 11 of the draft Determination, will practical guidance be provided by the ATO regarding the proportion of service fees derived by an individual's related entity which should be personally assessable to the individual to minimise the risk of Part IVA of the *Income Tax Assessment Act 1936* applying?	Refer to the discussion at Issue 14 of this Compendium.
16	There is a genuine practical difficulty in the apportionment of income into the various buckets suggested by the Commissioner in the draft Determination. Whether regarding services or the exploitation of trademarks and designs (contracts with famous people and their service entities) typically take a bundle of rights approach. Therefore, it will be necessary to apportion the income for the final Determination purposes into the various categories – what is taxed to the individual and what is taxed to the services entity. It is submitted that the depth of entertainment business valuation does not exist in Australia.	Refer to the discussion at Issue 14 of this Compendium.

Issue number	Issue raised	ATO response
	Therefore, such an apportionment exercise will prove to be extremely difficult. It is therefore suggested an approach more aligned with the PSI rules. If these are not satisfied, the individual is taxed on the exploitation of their 'fame'. If the famous person satisfies these rules, the licensing of their 'fame' to a related entity will be accepted for Australian taxation purposes.	
17	The example outlined in paragraphs 12 to 13 of the draft Determination should be updated to remove any reference to the photograph, ensuring that the arrangement deals only with the 'goodwill' of the individual. It would be beneficial for the draft Determination to also include a separate example which deals with a known property right, such as a photograph (copyright that belongs to the photographer). This will provide taxpayers and tax practitioners with sufficient information to apply the Commissioner's view to ensure their arrangements factor in all appropriate implications.	We have updated the example at paragraphs 12 and 13 of the final Determination to make it clear that neither the individual nor the related entity have any recognised IP rights in the photograph in question.
18	It is agreed, per paragraph 5 of the draft Determination that the scope of any determination should be limited to the use of an individual's fame and not extended to other matters relating to the exploitation of copyrights, trademarks and registered designs, but unregistered trademarks should be added to that list. Consequently, the reference to the use of a media personality's 'photo' on packaging of a product referred to in paragraph 13 of the draft Determination is confusing. Photograph is usually protected by copyright. The question of ownership of that photo would need to be clarified.	Refer to the discussion at Issues 8 and 17 of this Compendium.
19	Deceased individuals can still have value in their image after death. The ATO's position in the draft Determination would suggest the deceased (via their estate) should continue to pay tax on this income regardless of whether the estate transferred or assigned the rights to another entity (related or unrelated).	This observation is correct. There may be circumstances where the personal representative of a deceased famous person may have to continue paying income tax (on behalf of the deceased estate) on income derived from the purported sub-licensing of the deceased person's fame by a related entity to a third party.

Issue number	Issue raised	ATO response
20	A carve out for deceased estates exploiting a deceased's name likeness and image should be excluded from the application of the Determination.	We do not agree as there is no legal basis to exclude deceased estates from the application of the Determination. Also, refer to the discussion at Issue 19 of this Compendium.
21	The proposed treatment of income related to an individual's brand and image under the draft Determination is to tax the individual personally whether the income is distributed via a trust or received by a company. This is the same treatment as under the PSI rules. There is no basis or support for treating such income in the same manner as PSI. The income relevant to the draft Determination is clearly not income generated from personal services and is unrelated to the efforts of the individual and importantly, is income that continues to be generated even after the death of the individual.	Income from the exploitation of an individual's fame by a related entity entering into third-party agreements is not PSI. The income is derived as ordinary income of the individual for the reasons outlined in the final Determination.
22	The Commissioner should exclude the incidental usage of a person's 'fame' from what are primarily services arrangements. Service contracts for a famous person almost always take a bundle of rights approach. Therefore, it is suggested that there be an exclusion where the contract is primarily for the services of the famous individual.	Income from the provision of services is outside the scope of this Determination. However, any income derived under any purported sub-licensing of an individual's fame to a third party by a related entity is the ordinary income of the individual. Further, refer to the discussion at Issue 14 of this Compendium.
23	How will the change in position impact the operations of double-tax agreements for non-residents that utilise an image rights structure in Australia or Australian residents that utilise a similar structure in a foreign tax jurisdiction?	This falls outside the scope of this Determination. Refer to the discussion at Issue 7 of this Compendium.
24	Whether the payments by the third-party sponsors to the related party entity of the individual would constitute a payment under an employment agreement versus a contracting agreement; for example, are there pay as you go (PAYG) withholding, superannuation guarantee charge, workers' compensation issues to consider?	This falls outside the scope of this Determination. The answer to this issue is dependent on the terms and conditions included in the relevant agreement.

Issue number	Issue raised	ATO response
25	How does the individual access the money in their related party that has been generated by the related party under an image rights structure and is attributable to the individual for income tax purposes without paying double tax? Will the mechanism under the PSI rules that disregards later payments of PSI apply to image rights arrangements?	The PSI rules do not apply to this income. The related entity is merely receiving an amount that is being applied or dealt with on the individual's behalf.
26	What will be the ATO's approach to famous persons seeking to restructure their affairs prior to 1 July 2023 in order to respond to the ATO's proposed revised approach in the draft Determination?	The Commissioner will not devote compliance resources to taxpayers who have restructured their affairs prior to 1 July 2023.
27	Additional transitional relief should be provided to taxpayers who have sub-licensed a person's name, likeness and image to a non-related third party for the life of the contract.	As detailed in the compliance approach, income earned after 1 July 2023 will be taxed in accordance with the final Determination.
28	Any potential capital gains tax (CGT) implications should be considered by the ATO and must be considered by the ATO when designing and implementing any grandfathering or transitional provisions. These provisions must address the uncertainty entities will face when unwinding their image rights structure, which will include how entities determine the value generated by the use of an individual's image compared to the goodwill of the business entity. Small businesses that commenced using an image that is recognisable and has value in itself that have substantially grown and now hold significant value in the business itself. Taxpayers (the individuals, their related entities and third parties) potentially will dispose of CGT assets and transfer value by unwinding current arrangements and restructuring to comply with the ATO's position in the draft Determination. It is recommended that a specific CGT roll-over mechanism should be available to affected taxpayers to provide CGT relief to taxpayers that derive a capital gain from unwinding their current arrangements and structures. Preferably this would be	Refer to the discussion at Issue 26 of this Compendium.

Issue number	Issue raised	ATO response
	effected by way of legislation, otherwise the ATO (working with the tax community) must provide the transitional relief for affected taxpayers. Taxpayers should not be penalised with a CGT liability that results from the taxpayer unwinding structures and arrangements that were established in accordance with the previous ATO position. The CGT relief should apply to all capital gains derived by affected taxpayers who must restructure their arrangements to comply with the Determination. In other words, there should be no thresholds or caps prescribed to access such CGT roll-over relief.	
29	If the draft Determination is finalised in its current form, then appropriate grandfathering and transitional provisions must be provided to ensure the position in the draft Determination applies prospectively only and not to arrangements entered into before the draft Determination is finalised. The final Determination should also provide CGT concessions for affected taxpayers unwinding their current image rights structures that were correctly established under the current rules.	Refer to the discussion at Issue 26 of this Compendium.
30	The change in position by the ATO in the draft Determination creates various substantive issues for taxpayers that are not dealt with by the ATO, including, but not limited to: • how the change in position will impact foreign residents and the application of double-tax agreements • whether payments by unrelated sponsors to the unrelated entity will attract PAYG withholding obligations • the CGT and stamp duty implications for taxpayers unwinding their currently compliant arrangements.	Refer to the discussion at Issue 26 of this Compendium.
31	The draft Determination does not take account of the unique circumstances of sportspeople compared with other individuals.	The final Determination contains the Commissioner's view of the law that applies equally to all individual taxpayers with fame.

Issue number	Issue raised	ATO response
32	The reversal of the ATO's position set out in the draft Determination will have a detrimental impact on taxable economic activity in Australia and Australia's reputation internationally as a 'high-taxing' jurisdiction. It is already difficult to entice international sport stars and celebrities to ply their trade in Australia due to the 'tyranny of distance' Australia suffers. Tax concessions have previously been provided to entice events into Australia; the same must be done at the individual level to attract overseas talent and retain local talent. The ATO's change of position under the draft Determination contradicts the current practice adopted by most prominent international jurisdictions, including the United States of America, United Kingdom and Spain, that enables individuals to protect the use and exploitation of their image and to be taxed in the entity that legally owns these IP rights.	We are aware that other countries have different laws to Australia. The Commissioner must administer the law as it applies in Australia and cannot comment on matters of international policy.
33	Rather than charge the income directly to the person whose fame is being exploited, the ATO should look to make rules about the value for which the right to exploit fame is being sold by the individual which may include valuation rules based on future profits, et cetera. This is more streamlined to the general rule of how taxation systems work rather than create an extraordinary rule for determination of income in the hand of a specific individual by bypassing another entity.	The Commissioner must administer the law as it applies in Australia and cannot comment on matters of policy.
34	Is subsection 405-20(4) of the ITAA 1997 wide enough to capture these payments as 'assessable professional income' for averaging purposes? This should be referenced in the final Determination.	This falls outside the scope of this Determination.
35	Should the definition of PSI in section 84-5 of the ITAA 1997 be widened in order to capture payments for fame?	The Commissioner must administer the law as it applies and cannot comment on matters of policy.
36	The start date should be the date the final Determination is issued and in the public domain.	We acknowledge the feedback and note that the compliance approach applies from the 2018–19 to 2022–23 income years.

Issue number	Issue raised	ATO response
37	What is the compliance obligation for a third party engaging for fame regarding contracting? Does the third party need to ensure they contract only to an individual?	There are no compliance obligations on third parties.
38	Is it correct that under the draft Determination, for non-residents, the payer would withhold tax at non-resident rates for image rights regardless of the contracting party?	This falls outside the scope of this Determination.
39	For an Australian tax resident, if they contract via a connected entity, what is the extent of the payer's obligation to ensure they are attributing the income as ordinary income to the individual?	Refer to the discussion at Issue 37 of this Compendium.
40	What is the treatment of agreements that were signed prior to the date of effect of the draft Determination, but that have obligation in future income years?	The compliance approach applies from the 2018–19 to 2022–23 income years. After this time, taxpayers should ensure they comply with the principles outlined in the final Determination.