

10 November 2022

Adam Johnson
Director
Public Advice and Guidance
Small Business
Australian Taxation Office

By email: adam.johnson@ato.gov.au

Dear Mr Johnson

Draft Taxation Determination TD 2022/D3: Use of an individual's fame

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to Draft Taxation Determination *TD 2022/D3: Income tax: use of an individual's fame by related entities (draft TD)*.

In the development of this submission, we have closely consulted with our National Small and Medium Enterprise Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

The Tax Institute broadly supports the release of guidance on this issue. The taxation of arrangements that involve an individual's 'fame' is complex and likely to result in significant confusion for taxpayers and tax practitioners. The confusion has likely been exacerbated since the withdrawal of Draft Practical Compliance Guideline PCG 2017/D11 *Tax treatment of payments for use and exploitation of a professional sportsperson's 'public fame' or 'image'* and the announced but unenacted measure (**ABUM**) concerning an individual's fame in the [Federal Budget 2018–19](#). Until the ABUM is legislated or the Government expressly announces that it will not proceed with the measure, the difficulties for taxpayers in applying the legislation are likely to continue.

The draft TD would benefit from further guidance on the specifics of the Commissioner's view. This includes a more detailed explanation regarding the Commissioner's reasoning for the ATO's view and whether a different tax outcome arises for unrelated parties (and if so, why). We note that there is a lack of legislative and judicial guidance on the taxation implications for the use of an individual's fame. The inclusion in the draft TD of any alternative views, and why the Commissioner does not agree with them, will better assist taxpayers and tax practitioners understand the potential consequences of their arrangements.



We also consider that further clarification is required on the scope of the Commissioner's view, with examples of arrangements involving intellectual property rights that are intended to fall outside the draft TD. The example in the draft TD is an area where additional clarity on this point would be useful. The example likely contains an arrangement involving a known intellectual property right, being the copyright for the photo provided, despite the Commissioner's view not intending to cover these types of arrangements.

Our detailed response is contained in **Appendix A**. We would be pleased to work with the ATO to further discuss the development of the draft TD to ensure that it provides taxpayers and tax practitioners with the most useful and accurate guidance.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix B** for more about The Tax Institute.

If you would like to discuss any of the above, please contact our Senior Advocate, Robyn Jacobson, on (03) 9603 2008.

Yours faithfully,



Jerome Tse

President

APPENDIX A

We have set out below our detailed comments and observations for your consideration to ensure that the draft TD provides the most effective and practical advice for taxpayers and their advisers.

Clarification of scope of ATO view

Broadly, we understand that the Commissioner's view in the draft TD does not apply to all situations and arrangements that utilise an individual's 'fame'. These include instances where the individual is engaged for services, or if the individual is entering into dealings that involve recognised intellectual property such as copyright. This view is supported by paragraph 5 of the draft TD which states:

This Determination is only concerned with income from use of the individual's fame. It does not apply to income from the provision of services (such as where the individual is engaged by a related entity to provide services to a third party), nor does it apply to fees earned by a related entity from exploiting copyright, trademark or registered design rights licensed to the related entity.

The topic of intellectual property rights can be a factually difficult question to address, and it is important to ensure that advice on the issue is clearly articulated. Without the necessary clarification, it is likely that taxpayers and tax practitioners will misunderstand and incorrectly apply the Commissioner's view.

We consider that the draft TD should clarify the scope of the Commissioner's view. This could include guidance or signposts to other ATO guidance products on how arrangements involving intellectual property rights that do not fall within the scope of the draft TD 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 TD does not apply will assist in demonstrating the application of the underlying principles.

Clarification of the example

The current wording of the draft TD may result in the Commissioner's view being interpreted as extending to instances where an individual is actually dealing with intellectual property or potentially providing services. This is despite current paragraph 5 of the draft TD and is demonstrated in the example in the draft TD which refers to an individual's trust that:

... contracts with a business for the use of the media personality's **photo** and name on the packaging of their product for a fee ... (emphasis added).

We understand that a photograph is a form of copyright that belongs to the photographer, unless the contract for the engagement assigns it to another entity. Commercially, it is likely that the provision of the individual's photograph may be subject to a series of arrangements that allows the ultimate entity to utilise the copyrighted photograph in exchange for a fee or royalty arrangement. Depending on the terms of the arrangement, the relevant individual may not even have any rights to the underlying photograph. This would occur in situations where the photograph was commissioned by the business or the individual's trust in the first instance.

Based on our understanding of paragraph 5 above, the rights to the use the photograph, if appropriately assigned from the individual to the business, would not fall within the scope of the draft TD. This is because the parties would be dealing with a known and actionable property right.

We recommend that the example 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 TD to also include a separate example which deals with a known property right, such as a photograph. 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.

Detailed explanation of Commissioner’s view

The application of the legislation in this area is uncertain, and reasonable minds may differ on the appropriate outcome. In the absence of the ABUM from the [Federal Budget 2018–19](#) being enacted, no existing specific legislative provisions deal with the taxation outcomes of arrangements involving an individual’s ‘fame’. Case law provides limited guidance that can assist in this regard. This is likely to result in confusion for taxpayers and tax practitioners when managing these types of arrangements.

To minimise any confusion, we consider that the draft TD should provide greater detail supporting the Commissioner’s view. First, the current analysis in the draft TD 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 into contractual arrangements; and
- the transfer or vesting of property rights in the related entity is crucial in order for that entity to derive income according to ordinary concepts.

Secondly, the draft TD 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. We recommend that the draft TD should contain clarification on this point and the rationale if there are different outcomes.

We also consider that the draft TD should contain an additional section outlining alternative arguments and which provides 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.

Given the uncertainty surrounding the application of the law, The Tax Institute also supports the referral of appropriate cases for consideration for test case funding. In the absence of a legislative measure, judicial guidance on the issue would provide greater certainty to both taxpayers and the Commissioner when considering the taxation implications of these arrangements.

APPENDIX B

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.