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Use of an individual's fame by related entities

The ATO recently released Taxation Determination TD 2023/4 – Income tax: use of an individual's fame by related entities, (previously released in draft form as TD 2022/D3) to help individuals understand the income tax implications of the use of their fame.

The determination applies to arrangements where an individual with fame establishes a related entity (e.g., 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 the determination). The related entity then agrees with other entities for their authorised use of the individual's fame in return for a fee.

In Australian law, an individual with fame has no property in that fame, 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 S.6-5 of the ITAA 1997 as ordinary income.

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. Consequently, there is no recognised proprietary right (common law or otherwise) in an individual's fame that is capable of transfer or assignment.

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, and 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. The related entity is receiving an amount that is being applied or dealt with on the individual's behalf.

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 S.6-5 of the ITAA 1997 as ordinary income, although consideration would also need to be given to the potential application of the personal services income rules or the anti-avoidance rules in Part IVA of the ITAA 1936.

The determination applies to years of income commencing both before and after its date of issue, except where the ATO's compliance approach (set out in the Appendix to the Ruling) applies. Under the compliance approach, the ATO will not devote compliance resources to apply the views expressed in the new TD to income derived before 1 July 2023 from arrangements which are consistent with the principles outlined in Draft Practical Compliance Guideline PCG 2017/D11 (which was withdrawn on 24 August 2018).

Note that the ATO's prior guidance only applied to professional sportspeople, but TD 2023/4 applies to entertainers, actors, entrepreneurs, artists, influencers and professional sportspeople, as well as other public figures.