

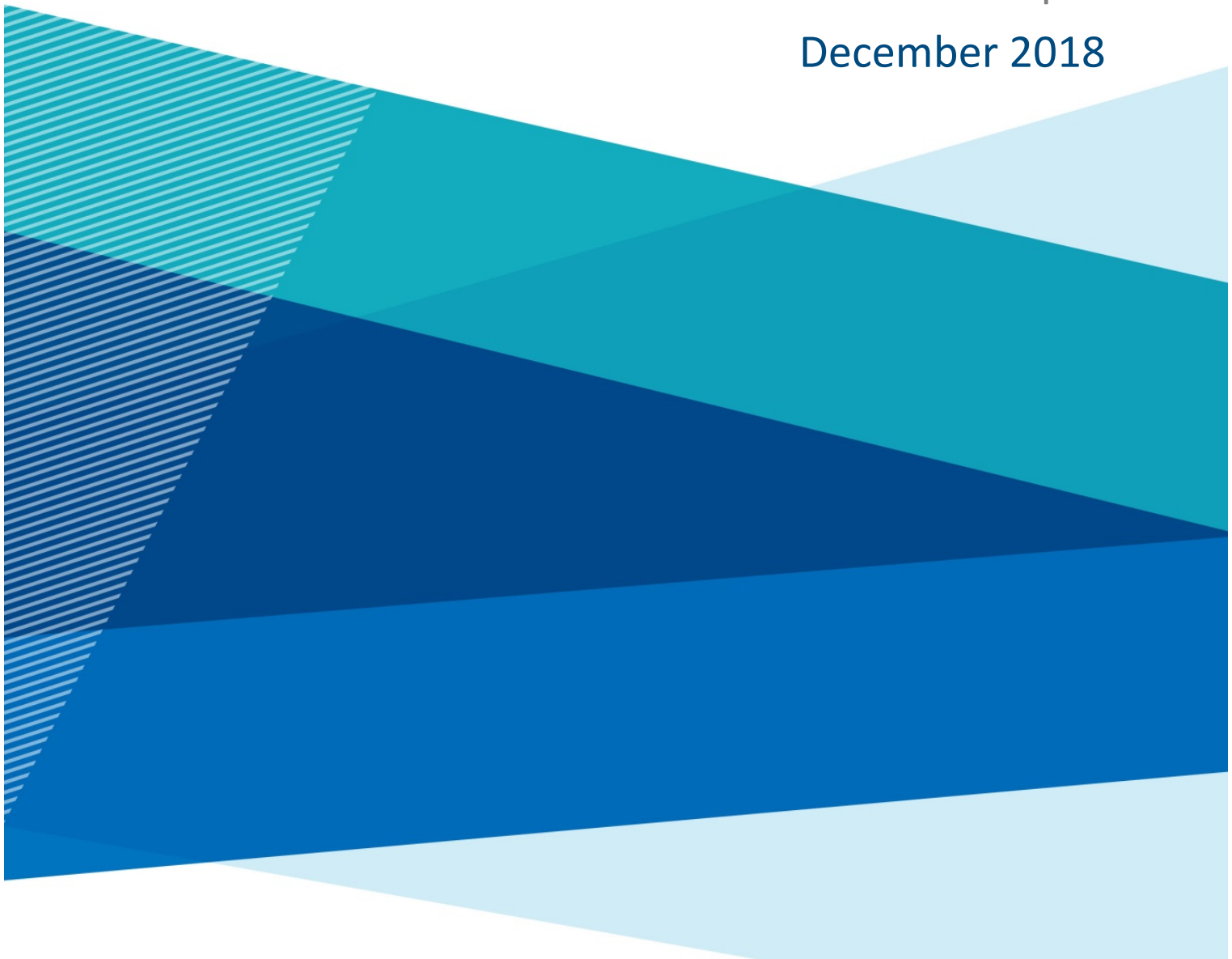


Australian Government
The Treasury

TSY/AU

Taxation of income for an individual's fame or image

Consultation Paper
December 2018



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Consultation process

Request for feedback and comments

The purpose of this consultation paper is to seek comments on the Government's proposed approach to implementing the 2018-19 Budget measure *Tax Integrity — taxation of income for an individual's fame or image*. The measure aims to ensure that all remuneration (including payments and non-cash benefits) provided for the commercial exploitation of a person's fame or image will be included in the assessable income of that individual. The Government is committed to improving the integrity of the tax system by ensuring that high profile individuals are not able to take advantage of lower tax rates by licensing their fame or image to another entity.

Interested parties are invited to comment on the application and broad principles outlined in this consultation paper. Comments received will feed into the development of legislation required to implement this measure, helping to ensure it operates appropriately and achieves its policy objectives.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted. All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Closing date for submissions: 31 January 2019

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Background: Taxation of income for an individual's fame or image

Current practice

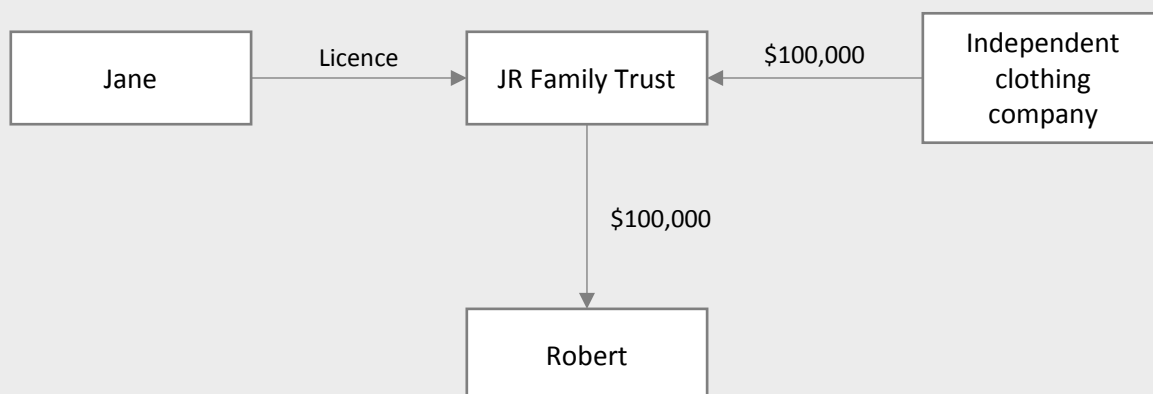
High profile individuals, such as celebrities, sportspeople, internet personalities and entertainers, often earn income from a number of sources, including salary and wages, bonuses, business and investment income. However, when individuals begin to develop fame and a public following, they can also earn income from the use of their fame or image. This exploitation can consist of advertisements, sponsorships, including wearing associated brand products, public appearances and the promotion of products.

Income from the exploitation of an individual's fame or image (fame or image income) is generally taxed consistently with other forms of income, provided it is earned by the individual. However, individuals with fame or image often seek to license their fame or image to a separate entity, such as a company or trust, for use. When individuals make use of these licensing structures, the other entity may be contractually entitled to payments attributable to the individual's fame or image. Where such payments from the licence are received by the other entity, this may create opportunities to take advantage of different, and often concessional, tax treatment.

Example 1 – Licensing structures

Jane is a high profile entertainer who has built a significant fan base. In 2017-18, Jane was approached by an independent clothing company that offered Jane \$100,000 to allow them to print Jane's face onto a series of clothing items, which the company then offered for sale.

Jane set up a related entity in the form of a trust (the JR Family Trust), of which Jane's spouse (Robert) was the sole beneficiary. Jane granted the JR Family Trust the licence to use her fame or image. The JR Family Trust relied on this licence to sublicense the use of Jane's image to third parties. The JR Family Trust entered into a licensing agreement with the independent clothing company, and received the \$100,000 for the use of Jane's image pursuant to that agreement.



In 2017-18, Jane paid tax at the top marginal tax rate and would have paid tax of \$45,000 (before the Medicare levy) on the \$100,000 payment had it been paid to her directly. However, as Robert was the sole beneficiary of the JR Family Trust and had no other income in the financial year, when the Trust distributed the \$100,000 of 'licensing' income to him, he only paid tax of \$24,632 (before the Medicare levy).

Tax paid was reduced by \$20,368.

Integrity concerns

Over recent years, the Government has taken action to address integrity concerns across the tax system, including preventing income splitting arrangements and structures where there is evidence of misuse or tax avoidance. These integrity concerns cover all aspects of the tax system, from individuals to multinationals. For example, the Government has introduced the tax integrity measures 'enhancing the integrity of concessions in relation to partnerships' and 'removing the capital gains discount at the trust level for Managed Investment Trusts and Attribution MITs'.

The Government is concerned that fame or image licensing structures may have been established to provide income splitting benefits to high profile individuals that cannot be obtained by other individuals. These benefits have created opportunities for high profile individuals to take advantage of different tax rates and avoid paying tax at their marginal rate. The recent consultations undertaken by the Australian Taxation Office (ATO) on its draft Practical Compliance Guideline 2017/D11, *Tax treatment of payments for use and exploitation of a professional sportsperson's 'public fame' or 'image'* (the draft PCG 2017/D11), confirmed concerns that some individuals are licensing a sizable amount of income through related entities.

Separate to the Government's Budget measure, the ATO has withdrawn its draft PCG 2017/D11 and ATO Interpretive Decision 2004/511, *Licence to use image granted to a family trust* (ATOID 2004/511), which provided guidance to sportspeople on how they should apply the current taxation law, in response to concerns that many of the licensing structures and arrangements being used are not effective under the current Australian law.

Government's response

To address the integrity concerns the Government announced changes to the tax treatment of fame or image income in the 2018-19 Budget measure *Tax Integrity — taxation of income for an individual's fame or image*. The measure aims to ensure that all remuneration (including payments and non-cash benefits) provided for the commercial exploitation of a person's fame or image will be included in the assessable income of that individual.

The measure improves the integrity of the tax system by ensuring that high profile individuals are not able to take advantage of lower tax rates by licensing their fame or image to another entity. All individuals earning income from the exploitation of their fame or image, and their related entities (such as the family trust in Example 1) that hold a licence to use the individual's fame or image, are intended to be subject to the measure.

The new arrangements will apply from 1 July 2019.

The stakeholder submissions received as part of this consultation process will assist to finalise the policy ahead of the development of exposure draft legislation.

History and context

Fame or image tax structures in Australia have evolved and become more common over time.

The licensing of fame or image is legally complex. Fame or image (or image rights) are not recognised under Australian intellectual property law. Instead, a series of protections from acts, such as defamation and consumer protection laws may give an individual certain rights to bring an action against other entities that make use of their fame or image without authorisation. These protections have been interpreted as creating a proprietary interest, the use of which can be licensed to another entity. These licences have been considered by some taxpayers and advisers as providing a basis in tax law to treat income received in respect of an individual's fame or image as being income of the licence holder rather than of the individual.

There is evidence that, currently, individuals are splitting, or apportioning, lump sum payments to shift more income outside of their personal assessable income. Income splitting arrangements can be central to contract negotiations with high profile individuals.

Protections for an individual's fame or image

The ability to make use of licensing structures stems from the common law treatment of rights relating to an individual's image. Australia's law does not recognise a proprietary right in a person's fame or image. However, individuals do have the right to take action against others that have used their image without consent. For example:

- unauthorised use of a person's image to suggest an association between the person and another person, or the goods and services of another person, or an endorsement by them of another person or the other person's goods or services, may give rise to the tort of 'passing off'¹ or a cause of action under section 18 of Schedule 2 of the *Competition and Consumer Act 2010* to protect against misleading and deceptive conduct; and
- unauthorised use of a person's name or image for promotional purposes, which could adversely affect their reputation, may give rise to a cause of action in defamation.

The existence of these causes of action means that individuals can require payment for the use of their image. Further, individuals can create licences in relation to the use and exploitation of their image and grant these licences to third parties, authorising the use of their image. The legal effect of the licence is to make lawful an activity that would otherwise not be permissible and could be actionable, for example by the tort of passing off.

¹ The tort of 'passing off' provides protection where an entity wrongly suggests a connection or representation with another entity's goods or services, and where there is a threat of damage to the reputation or goodwill of the wronged entity.

Licence to use an individual's image

A view has been advanced by some taxpayers and advisers that where a taxpayer licenses the use of their fame or image to another entity, they can alienate² any resulting income as it is a payment linked to the licence. On this basis, high profile individuals have subsequently created structures to minimise the amount of tax they pay. As a result, in November 1999, the ATO released a Taxation Ruling (Taxation Ruling TR 1999/17, *Income tax: sportspeople - receipts and other benefits obtained from involvement in sport*) providing targeted advice to sportspeople about what to include in their assessable income. The ruling noted that payments received from public appearances, product promotions and endorsements, were assessable income if received in connection with an employment contract. The ruling also noted that a sportsperson's business could involve the commercial exploitation of their fame or image.

The ATOID 2004/511 published in June 2004 (now withdrawn) recognised that professional sportspeople could grant a licence to a trust in relation to the use of their fame or image and the resulting income from the use of the licence would be income of the trust and not personal services income.

Carrying on a business separate to an employment relationship

In 2009 in *Spriggs v Commissioner of Taxation* [2009] HCA 22 the High Court held that sportspeople, because of the nature of their activities, will generally derive both personal exertion income from employment activities and income from carrying on a business of using their fame or image.

- Personal exertion income includes payment for personal services, such as match fees, media appearances and interviews.
- Business income includes payments received from commercially using their fame or image, such as endorsements and promotional material.

Both types of income are subject to tax and are generally taxed consistently, provided they are earned by the same entity.

Spriggs v Commissioner of Taxation; Riddell v Commissioner of Taxation

On 18 June 2009, the High Court allowed appeals by Australian Football League's David Spriggs and National Rugby League's Mark Riddell (Spriggs and Riddell) against the Commissioner of Taxation (Commissioner). The High Court held that management fees incurred by Spriggs and Riddell were deductible as they were incurred in the course of gaining or producing assessable income from carrying on a business of commercially exploiting their sporting prowess and associated celebrity.

The case confirmed that, in most cases, sportspeople will be considered to be carrying on a business when receiving fame or image income and that the business can be carried on separately from an employment relationship.

² 'Alienation of income' refers to a situation where income that would otherwise be assessable to an individual is attributed as income to a different entity (for example, a company or trust).

Issues with apportionment of lump sum payments

Following the Spriggs and Riddell court decision, it became apparent that the tax structures used to apportion fame or image income were becoming increasingly complex.

Most sportspeople operating in a team based code receive a single payment under contract, or as part of a collective bargaining agreement, which consists of a mix of personal exertion income as an employee playing professional sport and business income from carrying on a business of using their fame or image. Some sportspeople were attributing a sizable component of their lump sum as income for the use of their fame or image, and entering into arrangements with the purported effect of this income not being taxed in the hands of the individual in respect of whose fame or image it relates.

The ATO became concerned that the apportionment of the single payment between personal exertion income and income for the use of fame or image for sportspeople was often unrealistic. It is often difficult to estimate the value of an individual's fame or image, particularly where there is not a commercial market to value those rights, or in fact there are no separately tradeable rights. In many cases, the value being placed on those rights did not seem reasonable or justifiable.

In response to this concern, on 19 July 2017, the ATO released the draft PCG 2017/D11, which provided a safe harbour of 10 per cent for apportioning lump sum payments for the provision of a professional sportsperson's services and the use and exploitation of their fame or image under licence, while indicating that approaches to apportionment that resulted in a higher amount were likely to attract detailed scrutiny. The limit of 10 per cent was set as being reasonable across all sporting player groups and codes.

Concerns with licensing structures

The release of the draft PCG 2017/D11 prompted further consideration of the arrangements that license income. In particular, there are uncertainties about the interpretation of the law in relation to arrangements that purport to assign or transfer forms of goodwill (including rights relating to a person's fame or image) independently from the business it is associated with.

While an individual can license their fame or image to others in exchange for income, the licence would not assign any property to the other entity, it would simply authorise the other entity to use the individual's fame or image. Ownership of fame or image remains with the individual and, consequently income associated with that fame or image is also assessable to the individual (see *FCT v Everett* [1980] HCA 6, which was determined on the basis of the existence of a property right). As a practical example of where ownership of an individual's fame or image cannot be passed to another entity, if a related entity (such as a family trust that holds a licence) were to become insolvent, creditors would not be able to seize the licence in lieu of payment. The individual would still retain control over their own fame or image. In light of these concerns, the ATO withdrew its ATOID 2004/511 and the draft PCG 2017/D11 on 24 August 2018.

The ATO's withdrawn guidance

The ATO's specific guidance has been restricted to the use of 'image rights' licences by some sportspeople playing team sports pursuant to collective bargaining agreements.

The ATO withdrew the draft PCG 2017/D11 and ATOID 2004/511; with effect from 24 August 2018. The ATO has advised that sportspeople should no longer rely on the now withdrawn PCG 2017/D11.

The ATO has advised that it is not seeking to apply compliance resources before 1 July 2019 to arrangements that were entered into prior to the withdrawal date, where those arrangements are consistent with the now withdrawn draft PCG 2017/D11.

Application of the current law

Concerns with licensing structures has led to the ATO revisiting its position on the use of 'image rights' and it no longer considers that licensing arrangements, like those considered in the draft PCG 2017/D11 between high profile individuals and their associated entities, are effective. The associated entities gain no proprietary or other rights in the individual's fame or image under such licensing agreements and therefore cannot exploit the image rights. In many cases, such income may be characterised as income for service such as an appearance, doing something or wearing something and be ordinary income of the individual or alternatively comprise their personal services income.

This position does not extend to payments for the use of recognised forms of intellectual property (for example copyright or a registered trade mark).

Income from the exploitation of recognised forms of intellectual property is derived by the holder of such property. Where there are no recognised intellectual property rights involved, or payments under the relevant contracts are not allocated between the performance of services and the exploitation of the property rights, the total amount would be ordinary income of the individual.

Specific and general anti-avoidance provisions may also apply to these agreements.

Under this view, there is generally little or no scope for sportspeople and other individuals to redirect parts of their remuneration in the way that raises integrity concerns. The general principle, based on arrangements commonly engaged in by sportspersons, would extend to other arrangements.

However, not all potential structures in use and all circumstances have been reviewed. Legislative amendments would place this outcome beyond doubt. The amendments would also provide clarity for payments that are not part of lump sum remuneration arrangements, including where payments are made directly to the related party.

International comparisons

The lack of recognition of a proprietary right in an individual's fame or image, and subsequent taxation considerations, is not unique to Australia. For example, the United Kingdom and South Africa do not recognise an individual's fame or image as a proprietary right and their tax treatments have come under increased scrutiny in recent years. In contrast, most states in the United States recognise image rights as a proprietary right known as rights of publicity. The approach taken by these countries is discussed below. Other countries have dealt with the uncertain treatment and taxation of income in different ways.

South Africa

South Africa has also addressed concerns that high profile individuals may be able to license their fame or image to a separate entity to reduce their tax obligations. In South Africa, where image rights are not recognised as legal rights, licensing structures cannot hold an asset of an individual's image rights under South African tax law, and the income earned from the exploitation of fame or image is taxed in the hands of the individual.

On 27 May 2016, the South African Revenue Service published a 'Draft Guide on the Taxation of Professional Sports Clubs and Players'³. The Revenue Service determined that image rights are personal rights that are vested in the person as an individual person, cannot be separated from the individual and consequently cannot be disposed of or sold to another entity. As an example, a golfer who allows their name to be used to promote a tournament does not dispose of their name or lose access to it, but continues to possess it both during and after the tournament. The income the golfer earns from the promotion of the tournament is taxed at their marginal rate.

United Kingdom

The United Kingdom (UK) is similar to Australia in that image rights are not recognised. Individuals can rely on various defences against the misuse of their image and may in some circumstances license the use of their image to an image rights company, paying tax through the company. While Australia's and the UK's tax treatment of licensing structures are currently similar, the UK has also identified concerns with these structures. In a report by the UK Committee of Public Accounts in 2017⁴, the Committee noted that image right structures represent the most significant tax risk among footballers and other similar professions. The report found that a large number of resident non-domiciled sportspeople have been making use of image right structures to incorporate their image rights outside of the UK. The report recommended that the UK Government take urgent action to address image rights taxation.

United States

In contrast, image rights, known as rights of publicity, are generally recognised as legal rights in most US States, and can be attributed to a separate entity in its whole (similar to a trademark). When these legal rights are transferred as an asset to another entity, royalties generated from the asset are taxed in the hands of the entity that holds the asset.

³ South African Revenue Service, [Draft guide on the taxation of professional sports clubs and players](#)

⁴ House of Commons, Committee of Public Accounts, Thirty-sixth Report of Session 2016–17, [Collecting tax from high net worth individuals](#)

Proposed approach

Policy details

In the 2018-19 Budget the Government announced that, from 1 July 2019, all remuneration (including payments and non-cash benefits) provided for the commercial exploitation of a person's fame or image will be included in the assessable income of that individual and taxed at their individual marginal tax rates.

Scope

The measure is intended to apply to all individuals, including sportspeople, entertainers, actors, entrepreneurs and other public figures, and apply to all fame or image income that is taxable in Australia (including benefits).

This is a taxation measure and would not modify the individual's common law or statutory rights in relation to the protection of their image, or otherwise stop individuals from earning income from their fame or image (such as, through advertisements or endorsements). It would not extend to income from the use or exploitation of property rights currently recognised by intellectual property laws (such as patents or copyrights).

Example 2 – Treatment under the measure

In Example 1, Jane has granted a licence to her family trust to use her fame or image. Independent Clothing Company pays the trust \$100,000 to allow them to use Jane's image on clothing the company sells.

If this occurred in 2019-20, the measure will ensure that Jane is taxed on the amount received by the trust as it is income for her fame or image.

As Jane currently pays tax at the top marginal tax rate, she will pay tax of \$45,000 (before the Medicare levy) on the \$100,000 payment.

Genuine arm's length transactions

The measure would apply where amounts were paid to a related party, rather than to the individual, if the amounts relate to the use of the individual's fame or image.

The measure would not apply to income received by an unrelated third party under a genuine arm's length arrangement between an individual with fame or image that results in the third party earning income from the use of the individual's fame or image. This ensures individuals with fame or image are not taxed on income that they did not earn and have no right to.

In Examples 1 and 2, Jane has no right to income from the sale of clothing items by the Independent Clothing Company and this measure will not change that result. Rather the measure will ensure that the payment from Independent Clothing Company will be treated as income derived by Jane and not her family trust.

What constitutes fame or image?

The Government proposes that, for tax purposes, fame or image would cover anything that can be attributable to a person's reputation or appearance and can include an individual's name, image, likeness, identity, reputation and signature, irrespective of their occupation or how they obtained their fame or image. This broad approach would ensure that individuals will not be able to take advantage of potential gaps by rearranging or re-characterising their activities.

Alternatively, a prescriptive definition could be adopted. For example, English courts have previously defined fame or image (referred to as image rights in the United Kingdom) to be:

The right for any commercial or promotional purpose to use the Player's name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number (as may be allocated to the Player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and/or any other representation and/or right of association and/or any other right or quasi-right anywhere in the World of the Player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights.

While a prescriptive approach may provide more certainty to individuals when applying the rules, it is anticipated that a strict legislative definition would not be able to anticipate all future activities, allowing opportunities to exploit possible loopholes. In a digital society, the concepts of marketable fame or a public image has the potential to evolve rapidly and could quickly extend beyond a prescriptive legislative definition.

The Government is also not proposing an approach that targets specific occupations. Fame is not specific to an occupation or to a type of individual. While individuals can generate fame from their employment activities, a business they carry on or an office they hold, they may continue to have fame after ceasing those activities or roles, or generate fame through their personal and social life or personal characteristics or activities. An approach that targets specific occupations would result in unequal tax outcomes between different occupations depending on how the fame or image originates, which would not be appropriate. However, if there are particular practical considerations faced by certain occupations or other classes of people with income from fame or image then these may need to be taken into account in the implementation or administration of the measure.

Discussion questions

1. The Government intends to implement a broad definition of fame or image. Do you consider that a broad definition of fame or image should be adopted? If so, why and what should this definition be? If not, what is the most appropriate alternative and what should it cover?
2. The Government intends that the measure apply to anyone when they generate income from their fame or image. Should the measure target specific occupations or should it be limited or modified in some other way for particular groups? If so, what criteria should apply in defining the group or groups and how should it be limited or modified?
3. Are there any matters relevant to particular groups that may need to be taken into account in the implementation or administration of this measure?

Cross border considerations

The Government is not proposing any changes to the source income rules governing the allocation of primary taxing rights. This section merely describes how the arrangements would apply.

Some high profile individuals may earn income from the use of their fame or image in a number of countries (for example, advertising in Country A and salary from Country B). Like any other income with an international element, such income may not always be taxable in Australia. Australia's tax treaties contain rules for allocating primary taxing rights over income, or in the absence of a treaty, Australia's domestic law will apply to determine whether, and the extent to which, income is taxable in Australia. Some treaties specifically address income from entertainers and sportspersons.

Broadly, where an Australian resident individual derives income from their fame or image, this income is taxable in Australia. This will be the case where the income is paid to the sportsperson or entertainer directly or if the income is paid to an entity. Australian individuals will be required to report any fame or image income in their income tax returns and pay tax at their marginal rates.

Where a foreign resident derives income in Australia from their fame or image, this income is taxed in Australia if it is Australian sourced and any relevant tax treaty allows Australia to tax the income. In this case, the foreign resident must lodge an income tax return in Australia and declare any income from fame or image. Again this will be the case where the income is paid to the sportsperson or entertainer directly or if it is paid to an entity.

Instances may arise where Australia and another jurisdiction both tax the fame or image income. In such cases Australian residents may be able to apply the foreign income tax offset to alleviate double taxation.

Depending on the structures, arrangements and jurisdictions involved with an individual's fame or image, it is possible that income may be taxed in different entities across different jurisdictions. For example, an individual may be taxed in Australia on their fame or image income and simultaneously be taxed on the same income through a related entity outside of Australia. These types of arrangements may impact relief if double taxation occurs.

Discussion questions

4. Given current tax treaties and source income rules, does the measure provides an appropriate framework for taxing amounts paid in respect of an individual's fame or image in Australia?

Transitional arrangements

The Government is proposing that this measure apply to all arrangements (both new and existing) from 1 July 2019, without special transitional or grandfathering arrangements. This will impact taxpayers in the 2019-20 and later income tax years, with individuals required to report income earned from their fame or image in their individual income tax returns at the end of each financial year.

Affected individuals may need to reorganise their affairs. High profile individuals who have entered into licensing arrangements that extend beyond 30 June 2019 may need to unwind or renegotiate contracts and agreements underlying these arrangements. They may also wish to renegotiate payment arrangements with their employers or business partners.

Discussion questions

5. The Government intends the measure to apply from 1 July 2019. Does the commencement date provide a suitable period for individuals to comply with the new law? If not, why?
6. The Government is not intending to provide any special transitional or grandfathering arrangements. If grandfathering or a transitional period was put in place, what would be a suitable time period?

Interactions

This measure concerns the tax treatment of fame or image income and is not intended to extend to income attributable to intellectual property rights recognised under Australian law. The taxation of fringe benefits will not change as a result of this measure.

Similarly, nothing in this measure would affect an entity's legal rights in relation their intellectual property or for passing off or misleading and deceptive conduct.

Capital gains tax consequences

The use of licensing structures will give rise to potential capital gains tax consequences for the individual and entities concerned. While the tax consequences will depend on specific facts and circumstances, most capital gains tax consequences would be expected to be minimal.

Discussion questions

7. Are there any significant capital gains tax consequences that may need to be taken into account in the implementation and administration of the measure?

Discussion questions

1. The Government intends to implement a broad definition of fame or image. Do you consider that a broad definition of fame or image should be adopted? If so, why and what should this definition be? If not, what is the most appropriate alternative and what should it cover?
2. The Government intends that the measure apply to anyone when they generate income from their fame or image. Should the measure target specific occupations or should it be limited or modified in some other way for particular groups? If so, what criteria should apply in defining the group or groups and how should it be limited or modified?
3. Are there any matters relevant to particular groups that may need to be taken into account in the implementation or administration of this measure?
4. Given current tax treaties and source income rules, does the measure provides an appropriate framework for taxing amounts paid in respect of an individual's fame or image in Australia?
5. The Government intends the measure to apply from 1 July 2019. Does the commencement date provide a suitable period for individuals to comply with the new law? If not, why?
6. The Government is not intending to provide any special transitional or grandfathering arrangements. If grandfathering or a transitional period was put in place, what would be a suitable time period?
7. Are there any significant capital gains tax consequences that may need to be taken into account in the implementation and administration of the measure?