

Sportspeople & superannuation contributions

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In draft *Superannuation Guarantee Ruling* SGR 2008/D1, the ATO explains the application of section 12(8) of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) (**SGAA**) to sportspersons and persons providing services in connection with sporting activities.

The ATO further considers the extended application of sections 12(1) and 12(3) of the SGAA to sportspeople. Also, the ATO discusses whether prize monies and other payments to sportspersons are “salary or wages” within section 11 of the SGAA and whether such payments are considered “ordinary time earnings” within section 6(1) of the SGAA.

Statutory basis

The SGAA operates to encourage employers to provide their employees with a minimum level of superannuation of 9%. If such superannuation contributions are not made, employers will be liable for the superannuation guarantee charge.

Meaning of ‘sport’ and ‘sportsperson’

The SGAA does not define the term ‘sport’ or ‘sportsperson’.

The ruling regards a person who performs or participates in a sport or similar activity which requires the person to display their physical or other personal skills as a ‘sportsperson’ for the purposes of the SGAA.

The term 'sport' has its ordinary meaning and should be given a broad interpretation read in the light of section 12(8) of the SGAA. It should not be narrowly read so as to include only activities that have a physical element (SGR 2008/D1, paragraphs 49 to 51).

Application of section 12(1)

Section 12(1) applies to a sportsperson if the person falls within the category of a common law employee under an employment relationship with an employer.

Common law cases such as *Hollis v Vabu* (2001) 207 CLR 21 discuss the meaning of a common law employment relationship as one which is a 'contract of services' and an independent contractor and a principal as a 'contract for services' (SGR 2008/D1, paragraph 53).

In addition, the ATO sets out the following non-exhaustive list of indicators on the existence of a common law employment relationship:

- the employer exercises control and/or direction in regards to work done;
- the worker serves under the employer's business, rather than their own;
- the contract is not for the production of a given result;
- the worker is obliged to complete the work on their own and is not allowed to delegate their duties to others;
- the worker should bear little or no risk of the costs arising out of injury or defect in carrying out their work;
- the worker should not have to provide assets, tools or equipment, and if made to do so should be reimbursed for any related expenditure;
- the employer should be able to dismiss or suspend the worker;
- the employer should have the right to enjoy the exclusive services of the worker;
- the worker is being provided with employee benefits such as sick and annual leave; and
- the worker is required to market the employer's business by, for example, wearing a uniform (SGR 2008/D1, paragraph 54 to 55).

If section 12(1) of the SGAA does not apply to a sportsperson, then section 12(8) and to a lesser extent section 12(3) of the SGAA will need to be examined in determining whether a superannuation contribution needs to be made by the payer (SGR 2008/D1, paragraph 8).

Application of section 12(8)

For section 12(8) to apply to a given sportsperson, the following conditions need to be met:

- there must be participation or performance in a sporting event;
- payment must be made regardless of the result;
- there must be a causal link to the payment; and
- there must be active participation using physical or personal skills (SGR 2008/D1, paragraph 10).

Section 12(8)(a) needs to be considered on a payment by payment basis. Also, all of the facts and circumstances of each particular payment need to be taken into account in considering the application of the section. If the section applies to a given payment, then the recipient of the payment will be considered an employee for the SGAA purposes. Other relevant indicators are if the sportsperson is obliged to make certain 'appearances' or if they are under the direction of a club or coach (SGR 2008/D1, paragraph 9).

Section 12(8)(b) of the SGAA covers persons whose services are required in order for the sport to be played. For example, referees, umpires and other sporting officials who are not under a common law employment contract with the payee. It is important to note that the service provided has to be 'in connection with' the payment made and the services rendered in order for the sport to be played (SGR 2008/D1, paragraph 12).

The application of section 12(8)(c) of the SGAA may result in a sportsperson paid to appear on a television or radio broadcast being considered an employee under the section. Whilst it is necessary that the services rendered be directly related to the making of a film, tape or disc or television or radio broadcast, there is no requirement that the sportsperson actually use their physical or personal skills (SGR 2008/D1, paragraph 13).

Application of section 12(3)

Section 12(3) of the SGAA requires superannuation contributions to be made if a payment is made under a contract 'wholly or principally' for the 'labour' of a person. This section may apply in the case of sponsorship/endorsement agreements. However, the section will not apply to a sportsperson if the agreement with the sportsperson is for a result (SGR 2008/D1,

paragraph 14).

For example, section 12(3) will not apply where the contract is simply to display a company logo as this is to achieve a result (ie to advertise the company) and is not “wholly or principally” for the “labour” of the sportsperson (SGR 2008/D1, paragraph 14).

Operation of section 11(1)(d)

Payments covered by section 12(8) constitute ‘salary and wages’ due to the operation of section 11(1)(d). However, there is a difference between the operation of the ‘salary and wages’ provision to common law employment relationships and section 12(8). In the case of common law employment relationships, ‘salary and wages’ payments arise from the employment relationship as opposed to payments within section 12(8) which attribute the person the status of ‘employee’. There are general exceptions in section 27 of the SGAA that may apply (SGR 2008/D1, paragraph 15 to 17).

SGAA application to non-residents

The SGAA may apply to a non-resident sportsperson. The instances in which a payer is not required to make superannuation contribution for a non-resident, however, are as follows:

- a certificate of coverage is made under a scheduled international security agreement excusing a payer from making superannuation contributions; and
- team officials and non-resident event organisers considered a ‘prescribed employee’ within section 7(1) of the *Superannuation Guarantee (Administration) Regulations 1993* (Cth) (SGR 2008/D1, paragraph 20).

Assessable income

The SGAA operates independently of the *Income Tax Assessment Act 1997* (Cth) (**ITAA**) in regard to the ‘assessable income’ of sportspersons (SGR 2008/D1, paragraph 21 to 23).

Lump sum payments

Where lump sum payments are made at the end of the year or season, representing the payment of prize money and guaranteed 'appearance money; the sum should be apportioned and the tests in sections 12(1), 12(8) and 12(3) applied to each part of the lump sum payment (SGR 2008/D1, paragraph 73).

Exclusions

The general exclusions in sections 27 and 28 of the SGAA apply when considering if an 'employer' for the purpose of sections 12(8), 12(3) and 12(1) is liable for the superannuation guarantee charge in relation to a sportspersons or persons providing services in connection of sporting activities.

An exclusion that may be relevant is where an employer pays an employee less than \$450 a month. In such a case, no superannuation contribution will need to be made (SGR 2008/D1, paragraph 73).

Conclusion

A significant objective of the new *Superannuation Guarantee Ruling* is to consider in what circumstances a sportsperson will be considered an employee within section 12(8) of the SGAA. The ruling also expressly excludes prize money and grants from being considered as 'salary or wages' and 'ordinary time earnings' within the SGAA. However, it is important to note that superannuation guarantee rulings are not binding on the Commissioner, they are merely indicative of the Commissioner's views on the issues.