

PepsiCo – royalty withholding tax & DPT – ATO Decision Impact Statement

On 19 March 2026, the ATO released a [decision impact statement](#) (DIS) on the High Court’s decision in [FC of T v PepsiCo Inc & Anor \[2025\] HCA 30](#), which found that payments made by Schweppes Australia Pty Ltd (Schweppes), the Australian bottler of Pepsi and other beverages, to PepsiCo Beverage Singapore Pty Ltd (PBS) (an Australian resident) for concentrate were not attributable to a royalty for the use of intellectual property (IP) owned by PepsiCo Inc and Stokely-Van Camp Inc, a subsidiary of PepsiCo. Accordingly, such payments were not subject to royalty withholding tax or Diverted Profits Tax (“DPT”). The majority judgement noted the following key points:

- Under the arrangements, Schweppes had obtained a licence to use the PepsiCo IP. It had an obligation to build PepsiCo’s brands and strengthen the PepsiCo IP, which was regarded as sufficient consideration for the use of the IP.
- No part of the price paid for the concentrate was a licence payment but was for goods sold and delivered.
- The concentrate was ordered from and acquired from PBS (and not PepsiCo) and the payments were included in PBS’ assessable income for Australian income tax purposes. The amounts were not “derived by” or “paid or credited to” PepsiCo for the purposes of the royalty withholding tax provisions.
- There was a significant misalignment in economic substance between the actual scheme and postulates advanced by the Commissioner (which recognised the payment of an embedded royalty).
- In respect of the DPT provisions, the taxpayers did not obtain a tax benefit in connection with the scheme as there was no postulate that was a reasonable alternative to entering into or carrying out the scheme.

Key points from the DIS are outlined below:

Identification of royalties

- Consideration continues to be given to a broader meaning rather than a narrow technical meaning under contract law.
- Important to identify the totality of the relevant bargain / agreement which can be framed more broadly than a single contract and may be a composite of multiple contracts. ATO will continue to seek to obtain documents and information necessary to understand the nature of the arrangements between the parties and their associates where there is a dealing in IP.

Embedded royalties

- The decision does not displace the ATO’s long standing view that royalties may be embedded in payments labelled as consideration for goods and services. In future cases involving royalty characterisation, the ATO will seek to understand and test the economic fundamentals that involve provision of IP where no royalty is recognised.

Payment of royalties

- ATO will examine closely any existing arrangements for which a non-resident IP holder receives compensation for making IP available but the arrangements are changed resulting in there no longer being a payment (actual or constructive) of a royalty to a non-resident.

DPT generally

- The finding that DPT did not apply because there was no tax benefit present was placed on “critical facts, unique to these appeals” which the ATO do not expect to be common to other cases.

Identification of tax benefits and the taxpayer’s onus

- Re-emphasised ATO’s longstanding view that taxpayer has the onus to positively discharge the application of Part IVA by establishing that there is no reasonable alternative to the scheme.
- Commissioner noted the possibility that there can be more than one alternative postulate and onus is not discharged merely by demonstrating that there is one reasonable alternative that does not result in the obtaining of a tax benefit.
- In respect of “substance”, Commissioner emphasised that the High Court’s findings were found on the “unique facts of the case that no part of the payment was a royalty”. The Commissioner also noted that the effect of the majority judgment is not to require postulates to reproduce entirely or replicate the “substance” or “consequences” of the scheme in order to be reasonable alternatives.

Tax avoidance purpose

- As the High Court found there was no tax benefit, the Commissioner said that the majority’s (limited) observations on scheme purpose have reduced relevance where parties are not arm’s length parties acting at arm’s length or where the scheme gives rise to a tax benefit.

The Commissioner is also reviewing the impact of the decision on Law Administration Practice Statement PS LA 2005/24 *Application of General Anti-Avoidance Rules*, and draft Taxation Ruling TR 2024/D1 *Income Tax: royalties – character of payments in respect of software and intellectual property rights*. Comments on the DIS are due on 1 May 2026.

The DIS indicates that the decision does not displace the ATO’s long standing view that royalties may be embedded in payments labelled as consideration for goods or services. Although the ATO has accepted the High Court’s decision, this turned on the specific contractual structure, payment flows and other facts and findings in the case which, in the ATO’s view, also limits the general implications of the case.

Division 296 Super Tax – Draft regulations

On 17 March 2026, Treasury released [exposure draft regulations](#) which support the recently enacted Division 296 tax and related superannuation valuation rules. Some highlights from the regulations are as follows:

- **General attribution methods for large and small superannuation funds** – Schedule 1 contains attribution rules for working out a member's share of a fund's Division 296 earnings on a fair and reasonable basis, having regard to various prescribed matters, which is relevant to working out a member's Division 296 tax liability. For small superannuation funds (including SMSFs), the attribution is determined wholly by reference to an actuary's certificate unless limited exceptions apply.
- **Prescribed superannuation interests that use the total superannuation balance (TSB) value formula** – in working out relevant superannuation earnings, certain superannuation interests (e.g. specified non-account based pensions and annuities, interests in specified State schemes) will use a formula based on the change in TSB value rather than the general rule.
- **Treatment for deceased individuals** – in the year in which an individual dies (and any later income year until the benefits are paid or a reversionary recipient starts), earnings attributable to the interest are included in the Division 296 tax assessment. If a pension begins to be paid due to the person's death during the year, the TSB value of the deceased person's interest is taken to be nil at the end of the relevant year.
- **Transitional CGT adjustment for large APRA funds (complying superannuation funds and pooled superannuation trusts)** – net capital gain amount used in calculating Division 296 earnings is multiplied by a prescribed factor for the year, being 0.2 for 2026-27, 0.4 for 2027-28, 0.6 for 2028-29 and 0.8 for 2029-30.

Submissions on the draft regulations can be made until 7 April 2026.

Trusts – proposed 2026 and 2027 changes from ATO's MTAS program

Under the ATO's Modernisation of Tax Administration (MTAS) program:

- From 1 July 2026:
 - The ATO will use trust statement of distribution data to pre-fill income tax returns for individual beneficiaries.
 - Three (3) new labels will be added to the statement of distribution section of the trust tax return, being B1 – Non-primary production managed investment scheme amount, U2 – Franked distribution related to investments amount and H1 – Other assessable foreign source income from a financial investment amount. This information is already provided to individual beneficiaries to support the calculation of their net financial investment loss at Label IT5 of their tax return and these labels will seek to streamline this.
- From 1 July 2027:
 - The pre-filling will be expanded to non-individual entities.
 - Limitations on the number of beneficiaries that can be included in electronic lodgement software to be removed. This means that agents representing larger trusts (more than 200 beneficiaries) will no longer be required to lodge trust tax returns and statements of distribution separately.
 - Statement of distribution changes for 2027 will include:
 - Reporting of unpaid present entitlements of beneficiaries
 - Reporting the rateable reductions applied when calculating franked distributions and capital gains amounts
 - Simpler reporting of non-resident beneficiary distributions of interest, unfranked dividends, royalties and associated tax withheld (removing the need to provide an additional information schedule with the trust return form).
 - Details of the specified individual named in family trust elections and interposed entity elections to be reported in trust tax returns to increase visibility for trustee and tax agent.

Morton's case – taxpayer win on farm subdivision case

The Full Federal Court has unanimously dismissed an [appeal](#) by the Commissioner against the decision in *Morton v FC of T* [2025] FCA 336 that certain property sales were capital receipts rather than assessable income from trading stock. The court upheld the primary judge's finding that the taxpayer was realising a capital asset, rather than carrying on a business of property development.

Contact

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