

## Taxing social media 'influencers' (Lecture P1272 – 19.51 minutes)

### *What is an 'influencer'?*

There are a variety of definitions of 'influencer', but for the purposes of this article I will assume it's someone with the power to affect the buying habits of others by uploading some form of original, often sponsored, content to social media platforms such as Instagram and YouTube.

Advertisers love influencers, as can be seen from the amounts that some big celebrities can reportedly earn for endorsing a product on Instagram.

- Cristiano Ronaldo (who has 300 million followers) – \$1.60m per post;
- Dwayne Johnson (250 million followers) - \$1.52m per post;
- Ariana Grande (245 million followers) – \$1.51m per post.

Since Coronavirus restrictions began, many more people have started earning a living through their social media activities, whether through YouTube videos or posting articles and pictures on other platforms. As a result, more advisors are having to consider the tax issues that result from this way of generating income.

The influencer will usually be paid a fee for using their social media account to endorse a specific product or service. This is effectively the same as an image rights arrangement of a professional athlete, who would be paid an image rights fee for commercially endorsing a specific product.

### *What sort of income will be taxable?*

Examples of situations that will be taxable are:

- A luxury health spa giving an influencer a week's free stay, in exchange for them posting pictures (tagged with the spa's name) of themselves on Instagram while there;
- A manufacturer of fitness equipment providing rowing and step machines to a fitness trainer, in exchange for the trainer being seen using and discussing them in their YouTube videos.

Influencers should be made aware, though, that the HMRC manuals say that "... voluntary payments designed in some way to augment the consideration payable for goods or services, whether past, present or future, are taxable".

Suppose that an influencer enters a contract with a major cosmetics company. The influencer agrees to post about its products to a mutually agreed schedule, for which the influencer will receive compensation. The influencer is so successful that the company's sales soar and, as a "thank you," the company gives the influencer fifty cases of expensive champagne. This is not done under any written or implied contractual arrangement. Will this 'gift' be tax-free?

Although it is made without any legal obligation whatsoever, to be treated as a tax-free gift, the property must be given out of disinterested generosity. This clearly is not the case here, as the property transfer arises in the context of the influencer's business relationship with the company.



## *CMA Report*

Hidden advertising is illegal in the UK. The Competition and Markets Authority (CMA) published a report in August 2018 into the disclosure of paid endorsements on social media platforms. It singled out sixteen celebrities, including writer and fashion designer Alexa Chung and singer Ellie Goulding, who subsequently agreed to be more transparent when being paid to endorse products.

Changes have also been made by social media platforms to try to ensure compliance. For example, from 2021 onwards, anyone attempting to endorse a business on Instagram is prompted to confirm before posting if it appears they have been offered an incentive. If they have, they will not be able to publish their post until they have included a clear disclosure.

The CMA has also published guidance on how influencers should disclose this information in postings. Interestingly, from a taxation perspective, it defines 'payment' as "... any form of reward, including money, gifts of services or products, or the loan of a product..." and emphasises that this applies even if the influencer got sent it out of the blue (i.e. unsolicited 'freebies').

Any disclosable payments under these CMA rules are clearly likely to be regarded as income by HMRC.

## *Basis of taxation*

If an influencer is paid for a post, they'll be taxed on the income. If the influencer is an employee, this will apply even where the fee is paid to them as a consequence of their employment in another organisation (e.g. a rugby union star endorsing a brand of rugby boot).

Employees and employers may want to set up an image rights company to deal separately with endorsement income, but HMRC will challenge such an arrangement where it appears to have been set up to avoid payroll taxes. In *Hull City AFC (Tigers) Limited v HMRC (TC07074)*, concerning the image rights payments to the footballer Geovanni, The First-tier Tribunal concluded that, viewed realistically, the sums payable by the Club for Geovanni's image rights were actually paid to secure Geovanni's services as a footballer and not to obtain the right to commercially exploit his image. However, where there is not an employment relationship for tax purposes, there should be no doubt that income received for endorsement of products on social media is a form of image right.

To avoid high personal tax rates, setting up an image rights company may be appropriate in many cases, although the attractiveness will reduce in April 2023, when the corporation tax rate increases significantly for profits above £50,000. Note also that a UK-resident company is taxable on its worldwide profits.

Let's consider the tax that applies when the contract is with the influencer personally and assume that there is no employment relationship:

- If they're trading as an influencer (which would be established by considering the well-known 'badges of trade'), then the income will be taxed under Pt 2 ITTOIA 2005;
- If they're considered not to be trading, they'll be taxed under the miscellaneous income provisions in Ch 8, Pt 5, ITTOIA 2005.

Where payment is not in cash, the rules for barter transactions may apply. A barter transaction is essentially something that is capable of being converted into money or something of direct monetary value. The rules on such transactions were made explicitly clear for trading and property

income by s71 FA 2016. The value of the transaction is the money's worth of the transaction, but this may be difficult to assess accurately.

It is therefore helpful if barter arrangements are clearly set out in an agreement between the influencer and the business looking to promote its products or services, with the terms and value explicitly stated. This will also help the business with which the influencer contracts to agree a deduction, as HMRC's view is that where a trader gives free goods and samples of its trade for the purpose of advertising to the public generally, these can be allowable deductions. See BIM45032 for examples.

Influencers, who presumably in the main are not tax experts, should be made aware that they could be left with a tax bill even where they have not received any cash!

### *Freebies*

Even if the influencer isn't considered to be trading, it's likely that the products or services received where an agreement is in place are not gratuitous and therefore are likely to be taxable. This is on the assumption that the agreement amounts to an enforceable contract.

However, if the influencer is not trading, HMRC's view is that voluntary gifts are not taxable under Part 5 of ITTOIA 2005. Thus, when influencers receive complete freebies without their knowledge and there is no contractual arrangement or obligation to deliver content (so the influencer is not 'trading'), these 'voluntary gifts' are potentially tax-free, but HMRC will look at each case individually.

### *Relevant HMRC guidance*

Many professions have specific guidance to help determine what's taxable and what's tax deductible, but there's currently no guidance available for social media influencers. There is, however, guidance for athletes (see BIM50610), writers (BIM 100205) and actors and entertainers (BIM50151). Some of this may prove useful as, for example, there is similarity between a writer and a blogger, or between a vlogger and an entertainer.

### *Points forward*

Regulators are increasingly looking into the industry. The Advertising Standards Agency (ASA) has recently censured 122 celebrities, including Chloe Ferry (who found fame in 'Geordie Shore') and model and writer Jodie Marsh, for repeatedly flouting social media advertising rules. The ASA has the power to issue fines and delete posts, which it is now threatening to do if there is continued non-compliance.

No doubt it is an industry that HMRC will take an increasing interest in too, as Influencers may receive a wide range of (often expensive) gifts, such as holidays or fashion items. Increasing numbers of influencers will need to consider whether gifts received are taxable, so it would be prudent to ask clients about their social media income, including apparently free gifts received.

*Contributed by Kevin Read*