

Is the tip you leave on a café table assessable, or consideration for supply?

Have you ever gone to pay for your coffee or lunch and saw the tip jar at the local café counter, and wondered how (or if) the business and/or its staff accounts for tax on that money? Depending on a number of factors, this can add up to quite a sum over a year, assuming the café owner empties the jar each day.

If a diner at a restaurant leaves a tip for their helpful waiter, employment laws and bodies such as Fair Work Australia would not consider this money to count towards that employee's salary or wage. The ATO however takes a different view. It deems any tips that employees receive, either directly from customers or distributed by the employer, as needing to be reported by the individual as income if the employee is to lodge an income tax return.

Taxation ruling TR 95/11 states, at paragraph 19: "The receipt of 'tips' by a hospitality employee is assessable income under paragraph 26(e) of the Act (see paragraphs 41 to 44)".



However there is another tax consideration.

The customer who gives a tip in addition to paying for the meal may do so on a purely voluntary basis, as the money is intended as a reward to the employees who provided good service. It may be paid by way of cash or credit card, and as restaurant operator passes on the tip to the employee it becomes, as noted above, considered by the ATO to be assessable income in their hands (assuming it is declared). But from the business's point of view, does this tip form part of the "consideration for the supply" of restaurant meals by a restaurateur to the customer?

The ATO says "No", but holds that the voluntariness or otherwise nature of the payment is key to the tax outcome. It says that a tip or gratuity is not consideration for the supply by the restaurateur provided that the tip is passed on to the employees as intended. Section 9-15 of the GST act provides that "consideration includes any payment, act or forbearance, in connection with, in response to, or for the inducement of, a supply of anything". So for a tip to be consideration for the supply of meals and beverages, the ATO expects this money to meet the above particulars. A genuine tip, paid on a purely voluntary basis, is intended to go to the employees who provided the service. The tip does not form part of the consideration for the supply of the restaurant meal, but the ATO expects that the receiver of that gratuity (the hospitality employee) will be required to account for these sums as assessable income.

In its guidance, the ATO adds two notes.

Note 1: An entity must keep records showing that tips have been passed on to employees and not retained as part of the entity's business takings. If a tip is not passed on to the employees, then the tip is consideration for the supply by the restaurateur.

Note 2: If a tip is not paid voluntarily, for example, it is a pre-determined rate or an amount that is otherwise defined as a service charge, public holiday surcharge or similar, then the tip is consideration for the supply by the restaurateur.

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"Is the tip you leave on a café table assessable, or consideration for supply?", *Breaking tax and super news - Tax & Super Australia*, 2017. [Online]. Available: <http://tax-and-supernewsroom.com.au/tip-leave-cafe-table-assessable-consideration-supply/>. [Accessed: 11- Oct- 2017].



Profit-making “intention” of asset ownership can influence tax outcome



A profit that arises from the carrying out of a profit-making undertaking or plan (that is, one with a profit-making intention) will be assessable as statutory income under s15-15 of the ITAA97 where the proceeds of the profit-making undertaking or plan are not otherwise assessable as ordinary income under s6-5 ITAA97. Profit-making “intention” of asset ownership can influence tax outcome

Any capital profit on the disposal of assets acquired before 20 September 1985 is generally received tax-free, unless the taxpayer acquired the asset with the intention of reselling it at a profit or using that asset as part of a profit-making venture. Section 15-15 operates to assess any profit on disposal of an asset if the asset was acquired for a profit making intention before 20 September 1985, but only if the proceeds from the venture are not otherwise assessable as ordinary income.

Any profit made on the disposal is assessed on the same basis as ordinary income pursuant to s25A ITAA36 (that is, the assessable profit is calculated after deducting all expenses incurred in deriving that profit).

A change of intention may subject a profit to s15-15; for example, where the owner of a block of pre-CGT land subsequently decides to significantly improve the land, sub-divide it, build residential units on the lots with the purpose of selling the blocks for profit.

However, profits arising from a “mere realisation” of a capital asset to its best advantage are not subject to s15-15. Whether a capital asset is sold as part of a profit-making plan or as a mere realisation of the asset is a matter of fact and degree.

In the case of *Whitfords Beach Pty Ltd (1982) 12 ATR 692* (here’s a summary of the case), the taxpayer company owned land that had been acquired as a capital asset. When another company subsequently purchased all the shares in the company, the taxpayer developed and sold the land at the direction of the new shareholders. The Federal Court looked through the corporate veil to the intentions of the shareholders and determined that the profit-making intention of the new shareholders should be attributable to the taxpayer company, thereby signalling a change in intention.

Inherited intention

Note that the intention of the original owner of the asset can be attributed to subsequent owners. For transfers of assets under a will or to a recipient in a non-arm’s length transaction, the recipient is deemed to have acquired the asset for:

- The same purpose as the original owner (ie profit motive), and
- The same cost at which the original owner acquired the asset.
- The recipient is taxed on the profit on the disposal of the asset as if they had acquired the asset.