



Film Financing and Television programming

A Taxation Guide



Now in its eighth edition, KPMG LLP's ("KPMG") Film Financing and Television Programming: A Taxation Guide (the "Guide") is a fundamental resource for film and television producers, attorneys, tax executives, and finance executives involved with the commercial side of film and television production. The guide is recognized as a valued reference tool for motion picture and television industry professionals.

Doing business across borders can pose major challenges and may lead to potentially significant tax implications, and a detailed understanding of the full range of potential tax implications can be as essential as the actual financing of a project. The Guide helps producers and other industry executives assess the many issues surrounding cross-border business conditions, financing structures, and issues associated with them, including film and television development costs and rules around foreign investment. Recognizing the role that tax credits, subsidies, and other government incentives play in the financing of film and television productions, the Guide includes a robust discussion of relevant tax incentive programs in each country.

The primary focus of the Guide is on the tax and business needs of the film and television industry with information drawn from the knowledge of KPMG International's global network of member firm media and entertainment Tax professionals.

Each chapter focuses on a single country and provides a description of commonly used financing structures in film and television, as well as their potential commercial and tax implications for the parties involved. Key sections in each chapter include:

Introduction

A thumbnail description of the country's film and television industry contacts, regulatory bodies, and financing developments and trends.

Key Tax Facts

At-a-glance tables of corporate, personal, and value-added (VAT) tax rates; normal nontreaty withholding tax rates; and tax year-end information for companies and individuals.

Financing Structures

Descriptions of commonly used financing structures in film and television production and distribution in the country and the potential commercial tax implications for the parties involved. The section covers rules surrounding co-productions, partnerships, equity tracking shares, sales and leaseback, subsidiaries, and other tax-efficient structures.

Tax and Financial Incentives

Details regarding the tax and financial incentives available from central and local governments as they apply to investors, producers, distributors, and actors, as well as other types of incentives offered.

Corporate Tax

Explanations of the corporate tax in the country, including definitions, rates, and how they are applied.

Personal Tax

Personal tax rules from the perspective of investors, producers, distributors, artists, and employees.

Digital Media

For the first time, we have included a discussion of digital media tax considerations recognizing its growing role in the distribution of film and television content.

KPMG and Member Firm Contacts

References to KPMG and other KPMG International member firms' contacts at the end of each chapter are provided as a resource for additional detailed information.

Please note: While every effort has been made to provide up-to-date information, tax laws around the world are constantly changing. Accordingly, the material contained in this publication should be viewed as a general guide only and should not be relied upon without consulting your KPMG or KPMG International member firm Tax advisor.

Production opportunities are not limited to the countries contained in this Guide. KPMG and the other KPMG International member firms are in the business identifying early-stage emerging trends to assist clients in navigating new business opportunities. We encourage you to consult a KPMG or KPMG International member firm Tax professional to continue the conversation about potential approaches to critical tax and business issues facing the media and entertainment industry.

Thank you and we look forward to helping you with any questions you may have.

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The following information is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230 as the content of this document is issued for general informational purposes only.

The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

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Australia

Introduction

Since 1999, the Australian government has undertaken a program of significant business tax reforms. The result is a changed Australian tax landscape that includes the broad-based goods and services tax (GST), tax consolidation regime, specific tax rules to classify financial instruments as debt or equity, thin capitalization rules, simplified dividend imputation rules, comprehensive tax rules for recognizing and calculating foreign exchange gains and losses, and new rules redefining the taxation of financial arrangements.

On the international front, recent developments include the debate around Base Erosion and Profit Shifting (BEPS), which is driving Australian tax reform. A broad suite of measures aimed at combating tax avoidance has been legislated, including a re-write of Australia's transfer pricing rules, which are intended to more closely align Australia's transfer pricing rules to the Organisation for Economic Co-operation and Development (OECD) model guidelines. Other measures taken include the introduction of Country-by-Country reporting (CbC), which applies to multinational enterprises (MNEs) with annual global turnover of more than AUD 1 billion, and was effective from January 1, 2016. CbC requires MNEs to report details of their international related-party dealings, revenues, profits, and taxes paid by jurisdiction to the Australian revenue authorities. Additional anti-avoidance measures include the introduction of the Multinational Anti-Avoidance Law (MAAL) and Diverted Profits Tax (DPT), which will be discussed later on.

Of direct relevance for film projects was the phasing out of the Division 10B and Division 10BA tax incentives and the introduction of the new Australian Screen Production Incentive as a result of a review in 2006 to reform and strengthen the Australian screen media industry. The shift toward producer-based incentives was intended to make Australia a more attractive location for overseas film investment by improving the accessibility of the tax offsets available.

In 2008, a new authority named Screen Australia was established to bring together the functions of the Australian Film Commission (AFC), Film Finance Corporation Australia Limited (FFC), and Film Australia Limited (FAL) and carry out additional functions regarding the support and promotion of Australian film and the provision of tax incentives to film producers. The Screen Australia Web page (<http://www.screenaustralia.gov.au>) and the Attorney-General's Department – Ministry for the Arts Web page (<http://arts.gov.au/film-tv/australian-screen-production-incentive>) provide relevant information for taxpayers wishing to invest in the film industry.

There are three types of producer incentives available: the Producer Offset, the Location Offset, and the Post, Digital, and Visual Effects Production (PDV) Offset. The offsets can only be claimed by a production company that is either an Australian resident or a foreign resident that has a permanent establishment in Australia and has an Australian business number (ABN). Only one of the three offsets may be claimed for a film production.

Australia

Production companies should therefore carefully consider which offset (producer, location, or PDV) is most appropriate to their individual circumstances given the fact that certification for one offset prohibits certification for the other two.

Key Tax Facts

Corporate income tax rate	30%, or 28.5% for companies with aggregate turnover of less than AUD 2 million
Highest personal income tax rate	49% (including 2% Medicare levy) ¹
Goods and services tax rate	10%
Annual GST registration turnover threshold	AUD 75,000
Domestic non-treaty withholding tax rates: Unfranked dividends	30%
Franked dividends	0%
Interest	10%
Royalties	30%
Tax year-end: Companies	June 30
Tax year-end: Individuals	June 30

Film Financing

Financing Structures

Co-production

Australia has entered into a number of co-production agreements with other countries. Currently, Australia has full co-production treaties with Canada, the United Kingdom, Italy, Israel, the Republic of Ireland, Singapore, China, South Africa, the Republic of Korea, and Germany and “less-than-treaty” memoranda of understanding (MOU) with New Zealand and France. Australia is also negotiating co-production treaties with India, Denmark, and Malaysia and is renegotiating existing treaties with the United Kingdom. Submissions may be addressed to the Ministry for the Arts suggesting a new co-production partner.

Screen Australia administers the official co-production program and is the “competent authority” for the purposes of the program. Screen Australia administers the program within the terms of the International Co-Production Program Guidelines (version issued December 13, 2013 and revised November 22, 2015) available on the Screen Australia Web page. If a production qualifies as an official co-production, it may be eligible for certain benefits, such as investment by Screen Australia and tax concessions. To qualify, productions must meet certain tests, which require an overall balance of all creative,

¹ Generally, the levy is payable at a rate of 2 percent of each dollar of a taxpayer’s taxable income over AUD 180,000 and applies to resident and non-resident individuals from July 1, 2014. However, the amount may be reduced depending on the individual’s circumstances.

Australia

technical, and financial elements to be maintained across co-productions over a period of time. Broadly, the following must be satisfied:

- There must be a producer from each co-production country;
- A co-producers' agreement is in place between the co-producers that outlines the responsibilities and rights of each co-producer and fulfils all the requirements of the relevant co-production arrangement;
- The financial contribution of each co-producer is secure and committed, including where relevant, the minimum contribution of a third-party co-producer;
- The Australian co-producer must retain a share of copyright in the co-production, i.e., in the finished film;
- The film must be made in the co-production countries; however, some co-production arrangements provide for the competent authorities to consider requests to undertake location filming outside the co-producing countries in exceptional circumstances;
- Participants in the making of the film must be national or permanent residents of Australia or the co-producing country;
- A film may be based on an underlying work from any country;
- Australian minimum participation levels are set out in each co-production arrangement; the minimum is typically 20% or 30%;
- The proportion of the budget raised by the Australian co-producer must be reasonably similar to the proportion of the budget spent on Australian elements; and
- The proportion of the budget raised by the Australian co-producer must be reasonably similar proportionally to the Australian creative contribution.

Australian participation in a co-production is determined by a points system, known as Australian Points (AP). The AP must reach at least the minimum contribution level prescribed by the relevant co-production arrangement as a percentage of the total creative points and must also be reasonably proportionally similar to the financial contribution that the Australian co-producer makes to the co-production. A 5% leeway is allowed.

Each test has a set number of roles that are always counted (top-line key creative roles). These roles attract "compulsory points." In addition, the Australian co-producer may select roles in the discretionary point section to make up the level of points required for the film. However, Screen Australia reserves the right not to accept the allocated discretionary points.

For example, the points' values system for feature films and television drama is set out in the following table:

Australian Points System – Feature Films and Television Drama		Points
Compulsory points		
Writer		2
Director		2

Australia

Australian Points System – Feature Films and Television Drama	Points
Director of philosophy	1
Editor/Picture editor	1
Cast (four principal roles)	4
Discretionary points (select five from below)	
Composer	1
Costume designer	1
Production designer	1
Script editor	1
Sound designer	1
Underlying work	1
VFX supervisor	1
Other senior key role specific to the film, such as choreographer, special makeup design, etc.	1
Total:	15

Partnership

Limited partnerships are taxable as companies in Australia and, accordingly, are not commonly used in any investment structure.

Where an unlimited (i.e., general) partnership is formed in Australia to make a film in Australia, the Australian tax treatment will be straightforward. General partnerships are not tax-paying entities; however, they are required to lodge tax returns in Australia, disclosing the partnership profit-sharing arrangements. All partners will be subject to full Australian tax on their share of the partnership profits as the carrying on of a business by the partnership will give each partner a permanent establishment in Australia. Relief from double taxation should be available.

In the event that a partner is resident in Australia but the partnership carries on business outside Australia under the control of a non-Australian resident, the non-Australian resident partner would clearly not be liable to Australian tax. The Australian-resident partner would still be liable to Australian tax on its share of the partnership profits.

Equity Tracking Shares

The term “equity tracking shares” is not used in Australia. Internationally, the term refers to shares that provide for dividend returns dependent on the profitability of a film production company’s business. These shares have the same rights as the production company’s

Australia

ordinary shares except that dividends are profit-linked and have preferential rights to assets on a liquidation of the company.

If the production company is resident in Australia, these tracking shares would be regarded as preference share capital. Normally, the dividends paid on the tracking shares would be treated in the same way as dividends paid on ordinary shares. Dividends paid on ordinary and preference shares in Australia are normally treated similarly, provided that the equity tracking shares are considered to be an equity instrument under the debt/equity rules.

If the tracking shares are acquired by an Australian-resident investor, but the production company is resident elsewhere, any dividends received on the tracking shares would be treated in the same way as dividends received on ordinary shares. As of the date of publication, where the Australian-resident company has a greater than 10% participation interest in the foreign production company, any dividends received on the tracking shares may qualify for a Division 768-A exemption from income tax in Australia, provided certain conditions are met. Any tax withheld in the foreign jurisdiction would be dealt with according to the dividend article of the appropriate double tax treaty.

Amendments to Foreign Nonportfolio Dividends

Division 768-A replaces Section 23AJ, which was repealed on and from October 17, 2014.

In summary, Division 768-A will apply where an Australian company holds at least a 10% "participation interest" (instead of a voting interest) in the foreign company. Broadly, a "participation interest" is determined by reference to the percentage holding of capital, voting rights, or rights to distributions of capital or profits of a company, or the percentage of a beneficial entitlement to income or capital of a trust.

The exemption is intended to apply where the dividends flow through an interposed trust or partnership.

The exemption will also be expanded to apply where the foreign equity distribution is received by an Australian corporate tax entity, whereas previously, the exemption only applied where it was received by an Australian company. This may enable an Australian public trading trust, corporate unit trust, and corporate limited partnership to access the exemption, provided it satisfies the other requirements for the exemption.

Yield Adjusted Debt

A film production company may sometimes issue a "debt security" to investors. Its yield may be linked to revenue from specific films. The principal would be repaid on maturity and there may be a low (or even nil) rate of interest stated on the debt instrument. However, at each interest payment date, a supplementary (and perhaps increasing) interest payment may be paid where a predetermined target is reached or exceeded (such as revenue or net cash proceeds).

For Australian tax purposes, this "debt security" would probably be classified as debt under the debt/equity rules. Generally, if the parties are at arm's length, the interest would be regarded as fully tax-deductible to the payer and subject to a 10% withholding tax irrespective of the jurisdiction of the lender (unless the lender is a financial institution resident in the United Kingdom, the United States, New Zealand, Japan, Germany, South Africa, Finland, France, or Norway, where Australia's double tax agreements provide for no interest withholding tax).

Australia

Any repayment of the principal would not be subject to any form of withholding tax.

Sale and Leaseback

A purchase and leaseback of a film is not usually tax-effective in Australia, as the purchaser is regarded as having made a capital payment and would only be able to amortize the purchase price over the life of the film's copyright. Any license payments received by the purchaser/lessor of the film would be fully assessable to tax.

Other Tax-effective Structures

Australian Subsidiary

An Australian subsidiary will provide foreign filmmakers with the greatest flexibility. To the extent that funds are required in Australia, the subsidiary could obtain a limited license from a foreign copyright holder and make the film in Australia under that license. The fee to the production company can be structured on a cost-plus basis.

Tax and Financial Incentives

Investors

There are anti-avoidance provisions in the Australian tax legislation, the broad impact of which is that any transaction that has a dominant or principal purpose of avoiding tax can be challenged by the Australian revenue authorities. The general anti-avoidance provisions have been recently expanded to include the MAAL and DPT.

The MAAL, effective from January 1, 2016, targets MNEs that artificially structure to avoid having an Australian permanent establishment. The DPT is a new, up-front penalty tax of 40% aimed at preventing the diversion of profits through contrived arrangements from Australia to a country where the income/profits are subject to an effective tax rate that is less than 80% of the Australian relevant tax rate (i.e., less than 24%), and there is insufficient economic substance. The DPT applies to income years commencing on or after July 1, 2017. As at the time of writing, the DPT has been introduced into Parliament but has not yet been passed by either the House of Representatives or the Senate.

Australian Screen Production Incentive

The Australian Screen Production Incentive comprises the Producer Offset, Location Offset, and PDV Offset. The Producer Offset scheme is administered by Screen Australia, and both the Location Offset and the PDV Offset are administered by the Attorney-General's Department – Ministry for the Arts.

Producer Offset

The Producer Offset is a refundable tax offset of 40% of a film's Qualifying Australian Production Expenditure (QAPE) for Australian feature films and 20% where the Australian film is not a feature film. The Producer Offset is to be claimed in the income tax return for the income year in which the project is completed.

The Producer Offset is available to productions that incur eligible expenditure on or after July 1, 2007, in relation to certain types of eligible productions. In order to claim the Producer Offset, the production company must first obtain a certificate of eligibility from Screen Australia.

The types of films that are eligible for the Producer Offset include feature films, single-episode programs, series, a season of a series, and other short-form animated dramas. To be eligible, the film must have "significant Australian content" or be a film made

Australia

in accordance with the requirements of a co-production agreement (in which case it is considered to meet the significant Australian content test).

The determination of “significant Australian content” is a matter of judgment based on consideration of all the elements of a particular project. Where there are non-Australian elements in a particular aspect of the film, the applicant should provide justification for these elements, and it is expected that there would be reliance on strong Australian elements in other aspects of the film.

Screen Australia has provided the following guidance for matters it will consider in determining whether “significant Australian content” exists (refer to the Producer Offset: Guidance on Significant Australian Content (SAC) (September 2009) publication available on the Screen Australia Web page):

- *Subject matter of the film:* Whether or not the film looks and feels significantly Australian. This involves considering whether it is based on an Australian story; the extent to which it is about Australian characters and is set in Australia; whether the core origination of the project took place in Australia or under Australian control; the length and extent of association that Australian citizens or residents have had in its development; and other relevant factors that are peculiar to an individual project. This is one of the more important matters in satisfying the significant Australian content test.
- *Place where the film was made:* Whether the film was, to a significant extent, produced in Australia. Screen Australia will take into account each phase of the production cycle separately (pre-production, production, and post production). Where a film is shot mostly overseas, it will need strong claims in other matters to pass the significant Australian content test.
- *Nationalities and places of residence of the persons who took part in the making of the film:* Whether the nationality (citizen or permanent resident of Australia) and residence (if nationality is not Australian) of filmmakers are Australian. That of the producer, writer, and director is especially important, followed by that of the lead cast, heads of department, and other cast and crew. Foreign personnel in key roles would reduce a film’s claim in this matter.
- *Details of the production expenditure incurred in respect of the film:* Extent to which the Australian film industry benefits from a film’s production expenditure with respect to its maintenance and development. This includes the extent to which Australian citizens or residents receive the expenditure and the extent to which the expenditure is spent on Australian goods and services.
- *Other matters that the film authority considers to be relevant:* Screen Australia may take into account anything else that it considers relevant, for example, policy issues, copyright ownership, creative control, etc.

Screen Australia requires that any film with numerous non-Australian elements provide additional information to support it in a significant Australian content claim. This may include development time lines regarding the length of Australian association, photos demonstrating impact of Australian landscape on the film, etc.

Under the Producer Offset, sources of financing of copyright ownership are no longer specific factors to be considered in determining eligibility for the offset. The Producer Offset is only available to a production company if it is either an Australian resident or a foreign resident that has a permanent establishment in Australia and has an ABN.

Australia

A key criterion to access the Producer Offset is that the production must satisfy a minimum QAPE threshold, depending on the type of project undertaken. The table below summarizes the expenditure threshold requirements after July 1, 2011, depending on the type of film: ²

Film type	Total QAPE on the film is at least	Additional requirement of QAPE that must be incurred per hour
Feature film	AUD 500,000	N/A
Single-episode drama	AUD 500,000	N/A
Series/Season of a series drama	AUD 1,000,000	AUD 500,000
Documentary (single-episode or series)	AUD 500,000	AUD 250,000
Short-form animation	AUD 250,000	AUD 1,000,000

A film's production expenditure is the expenditure incurred or reasonably attributable to actually making the film and any other activities undertaken to bring the film up to the state where it could reasonably be regarded as ready to be distributed, broadcast, or exhibited to the general public. This includes pre-production activities, shooting of the film, and post production activities.

QAPE defines those costs that are eligible for the tax offset to be the production expenditure for the film that is incurred or reasonably attributable to:

- The goods and services provided in Australia;
- The use of land located in Australia;
- The use of goods located in Australia at the time they are used in making the film.

There are specific inclusions and exclusions to this definition.

Effective from July 1, 2011, inclusions to QAPE and production expenditure include:

- Certain financing expenditure incurred in Australia, such as insurance related to making the film, fees for audit services and legal services, and fees for incorporation and liquidation of the company that makes or is responsible for making the film
- Expenditure in obtaining an independent opinion of the amount of a film's QAPE required for use in relation to the financing of the film
- Expenditure in:
 - (a) Producing material for publicising or otherwise promoting the film where the copyright in the material is held or partially held by a company that is an Australian resident;

² *Income Tax Assessment Act 1997* s 376-65(6)-(7).

Australia

(b) Unit publicist fees; and

- Certain prescribed expenditure incurred in delivering or distributing the film.

Generally, the following costs are excluded from production expenditure and QAPE in order to focus the tax offset on the expenditure that occurs in the activity of making the film:

- Financing expenditure;
- Foreign development expenditure – expenditure on development work undertaken outside of Australia;
- Foreign-held copyright acquisition – acquiring copyright from a non-Australian resident (this applies to the purchase and licensing in preexisting works);
- Foreign business overheads – expenditure incurred to meet the business overheads of the company;
- Publicity and promotion expenditure – except those incurred in producing Australian copyrighted promotional material and producing additional content;
- Deferments and profit participation – payments that are deferred until the production provides financial returns;
- Residuals paid out after the film is completed – amounts payable in satisfaction of the residual rights of a person who is a member of the cast;
- Advances – amounts paid by way of advance on a payment;
- Costs incurred in the acquisition of depreciating assets.

Disqualifying factors

A production company is not entitled to the Producer Offset if it or any other person in relation to the underlying copyright of the film has done any of the following:

- Claimed a tax deduction for the project under Division 10B; or
- Been issued with a final certificate under Division 10BA; or
- Been issued with a final certificate for the Location Offset or PDV Offset; or
- Received investment support under the FLIC scheme; or
- Received production funding from the FFC, AFC, Australian Film Television and Radio School, or Film Australia prior to July 1, 2007; or
- Received financial assistance from the Producer Equity Program issued by the film authority (currently Screen Australia).

The Producer Offset can be applied for in two parts. A producer can make an application for a Provisional Certificate, which will provide guidance on whether a production is likely to qualify for the Producer Offset, or for a Final Certificate, a mandatory application that provides the base for the calculations for the payment of the Producer Offset by the Australian revenue authorities. While a Provisional Certificate application can be made once financing and distribution arrangements have been completed, a Final Certificate application can only be submitted when the film is completed, all expenditure has ceased, and the project has evidence of distribution.

Australia

Screen Australia has announced that there will be changes to the Producer Offset processes in 2017. Changes include the introduction of online application forms for provisional and final certification. For further information, please refer to the Screen Australia Web site.

Location Offset

In 2001, as a financial incentive for the producers of large budget films to locate in Australia, the government introduced a refundable tax offset scheme. The tax offset was intended to complement the diversity of Australia's locations, the skills and flexibility of Australian crews and creative teams, and the internationally recognized standards of Australia's technical facilities and postproduction services. The refundable film tax offset scheme was reviewed in 2006 and the Location Offset introduced as part of the new producer incentives. The Location Offset has since been amended, effective from May 10, 2011.

The new Location Offset is effectively an enhancement of the previous refundable film tax offset scheme aimed at encouraging large-scale film productions to locate in Australia. As part of the 2011 – 2012 amendments, the Location Offset provides a 16.5% refund for principal photography or predominantly an animated production commencing on or after May 10, 2011 (an increase from 15%, which still applies to films commencing on or after May 8, 2007 and prior to May 10, 2011) on the total of the production company's QAPE on the film. The general test for QAPE for the Location Offset is the same as that for the Producer Offset, including specific inclusions and exclusions and rules related to expenditure generally. However, there are a few additional rules that apply to the Location Offset and the PDV Offset.

Consistent with the other Australian Screen Production Incentive offsets, the Location Offset is to be claimed in the income tax return for the income year in which the film is completed, and can only be claimed by an eligible film production company that is either an Australian-resident company or a foreign corporation with an ABN that is operating with a permanent establishment in Australia.

A film will be eligible for the Location Offset if it is a feature film or a film of a like nature, a telemovie, a miniseries, or certain television series.

The Location Offset is administered by the Attorney-General's Department – Ministry for the Arts. Applicants must first apply to the Department for a certificate of eligibility, which is issued by the Minister for the Arts in order to guarantee receipt of the Location Offset (refer to the Guidelines to the Australian Screen Production Incentive – Location and PDV Offsets: Incentives for screen production in Australia (2013) publication available at <http://www.arts.gov.au/>).

The key criterion to access the Location Offset is a minimum QAPE level of AUD 15 million on the production of the film. Once this criterion is satisfied, the film will qualify for the tax offset irrespective of the percentage of the film's total production expenditure that is spent on film production activity in Australia.

To be eligible for the Location Offset, a company must have either carried out, or made the arrangements for the carrying out of, all the activities in Australia that were necessary for the making of the film. It is not necessary for the company to be responsible for the entire production.

Australia

Disqualifying Factors

The disqualifying factors that apply to location offsets are mirrored in the PDV Offset disqualifying factors (listed below).

An eligible production company can apply for the Location Offset in the income year in which the QAPE ceased being incurred.

PDV Offset

The PDV Offset is designed to attract post-production, digital, and visual effects production to Australia as part of large-budget productions, no matter where the film is shot. Consistent with the other Australian Screen Production Incentive offsets, the PDV Offset is to be claimed through the production company's income tax return for the income year in which the qualifying PDV expenditure ceased being incurred.

The PDV Offset offers a 30% refund for productions commencing on or after July 1, 2011 (an increase from 15%) on all "qualifying PDV expenditure" for an eligible film or television program. The offset is available for PDV production work that commences on or after July 1, 2007. The date that production commences on the film for which the PDV work is being undertaken has no effect on whether the PDV Offset can be accessed. The formats eligible for the PDV Offset are feature films and films of a like nature, including direct-to-DVD, mini-series, telemovies, and television series.

The PDV Offset is administered by the Attorney-General's Department – Ministry for the Arts. Applicants must first apply to the Office for a certificate of eligibility, which is issued by the Minister for the Arts in order to obtain the PDV Offset (refer to the Guidelines to the Australian Screen Production Incentive Location and PDV Offsets: Incentives for screen production in Australia (2013) publication available at <http://www.arts.gov.au/>).

The key criterion to access the PDV Offset is a minimum threshold of AUD 500,000³ on QAPE expenditure to the extent that the QAPE related to the PDV production of a film. Qualifying PDV expenditure is broadly expenditure incurred in relation to PDV production work in Australia. "PDV production" is defined as:

- The creation of audio or visual elements (other than principal photography, pickups, or the creation of physical elements such as sets, props, or costumes) for the film
- The manipulation of audio or visual elements (other than pickups or physical elements such as sets, props, or costumes) for the film
- Activities that are necessarily related to the above activities.

PDV production includes post-production, all digital production, and all visual effects production on the film, but does not include principal photography, whether the footage is shot on film or digitally. Expenditure on any PDV work that does not take place in Australia is not PDV expenditure.

Before granting a certificate of eligibility, in addition to being satisfied that the application meets the expenditure threshold, the Minister for the Arts must also be satisfied that the applicant company is the sole company that is responsible for all the activities that were

³ If the PDV work commenced on or after July 1, 2007 but prior to July 1, 2010, the expenditure threshold is AUD 5 million.

Australia

necessary for PDV production in Australia. Depending on the production, this could be, for example:

- An Australian company set up to manage or commission one or more Australian companies to provide PDV work for the production
- The “lead” Australian PDV company that either undertakes all the PDV work in Australia and/or subcontracts Australian PDV work to other companies
- An Australian production company or production services company.

Disqualifying Factors

An applicant company is not entitled to the PDV Offset where any of the following occur:

- A final certificate has been received for another offset
- A deduction has been previously claimed under Division 10B; or
- The company or someone else has deducted money paid for shares in a film licensed investment company (“FLIC”) and the FLIC has invested in the film, or
- The film has been issued with a final certificate under Division 10BA; or
- The film has been granted a final certificate for either the Producer Offset or the Location Offset; or
- It has received investment prior to July 1, 2007 from the Film Finance Corporation Australia, Film Australia Limited, the Australian Film Commission, or the Australian Film Television and Radio School.

An eligible production company can apply for the PDV Offset in relation to a project once QAPE in relation to PDV expenditure has ceased being incurred.

Product Rulings

Under the product rulings system administered by Australian revenue authorities, it is possible to obtain a ruling that is legally binding on the Commissioner of Taxation and that confirms the tax consequences to a class of investors contemplating an investment in a film.

As the Australian Screen Production Incentives are producer-, rather than investor-related incentives, the role of product rulings has lessened.

No film product rulings in relation to the new Australian Screen Production Incentive have been issued since their introduction.

Businesses

Interest payable on loans and other forms of business indebtedness can generally be deducted for tax purposes. However, the loan principal can never be deducted in calculating taxable profits.

Other general tax incentives for investment include certain beneficial rates of tax depreciation (known as “capital allowances”) for plant and buildings and certain qualifying investments. Capital allowances have generally become less generous in recent years following the removal of accelerated depreciation and the Australian revenue authorities’ determination of longer effective lives. However, the Australian government has introduced

Australia

further concessions, including an increase from 150% to 200% in the diminishing value depreciation rate and the broadening of the scope for business-related deductions.

Government Funding Schemes

Screen Australia

Screen Australia is the Australian government’s key direct funding body for the Australian screen production industry, replacing the Australian Film Commission (“AFC, Film Australia Limited (“FAL, and the Film Finance Corporation Australia Limited (“FFC. Screen Australia commenced operation on July 1, 2008, bringing together the functions of the FFC, FAL, and most of the functions of the AFC. Previously, the FFC was the Australian government’s principal agency for funding the production of film and television in Australia and had invested in over 1,000 features, television dramas, and documentaries.

Through Australian government appropriations and revenue earned from investments in previous years and with the collaboration of private investors and marketplace participants in individual projects, the FFC was able to support a diverse volume of Australian product. From 2008/2009, the former FFC’s functions will be funded through Screen Australia.

The underlying principle for Screen Australia’s co-investment with the Producer Offset will be similar to that of its predecessor agency, the FFC. Namely, where a project meets the general eligibility requirements outlined in Screen Australia’s Terms of Trade, Screen Australia may provide production funding for certain productions.

Screen Australia may provide finance for feature films, television drama, low-budget drama, documentaries, children’s television drama, indigenous films and documentaries, projects produced under the All Media program, and some other types of productions.

The amount Screen Australia will invest in a production depends on the available funding for the particular program, the number of applicants satisfying the program requirements, the quality of the projects, and a cap based on the production type (refer to the Screen Australia – Terms of Trade publication available at <http://www.screenaustralia.gov.au>).

In return for its production investment, Screen Australia requires a copyright interest in the production, equity in the production, recoupment of its investment, and credit for its investment, commensurate to its investment in the production.

State Government Schemes

All of Australia’s state governments have established specific offices/bodies designed to promote, support, and facilitate film and television activities in their states. Most of these provide funding for development and production support, as well as a range of other forms of assistance, including small equity investment, free locations, presentations, and surveys for green-lit productions and other incentives to shoot in their states, such as payroll tax exemption.

The relevant state offices/bodies are as follows:

State/Territory	Office/Body	Web site
New South Wales	Screen NSW	www.screen.nsw.gov.au
Victoria	Film Victoria	www.film.vic.gov.au

Australia

State/Territory	Office/Body	Web site
South Australia	South Australian Film Corporation	www.safilm.com.au
Queensland	Screen Queensland	http://www.screenqueensland.com.au/
Western Australia	ScreenWest	http://www.screenwest.wa.gov.au/
Tasmania	Screen Tasmania	www.screen.tas.gov.au
Northern Territory	Screen Territory	http://artsandmuseums.nt.gov.au/ntfo

Other Financing Considerations

Tax Costs of Share or Bond Issues

No tax or capital duty is imposed in Australia on any issue of new ordinary or preference shares.

Stamp Duties

All states and territories of Australia impose stamp duty on certain types of transactions. The provisions imposing stamp duty and the rates of duty differ between jurisdictions.

Dealings in shares in private companies should not be subject to duty unless there is a relevant acquisition of an interest in a company that is a landholder in any state or territory. Broadly, a company is a landholder if it has landholdings in a state or territory (whether held directly or indirectly through downstream entities) with a certain threshold value ranging from any value to AUD 2 million or more.

Generally, a liability for landholder duty will arise where there is a relevant acquisition of an interest of 50% or more in a private company. In determining whether there is an acquisition of an interest of 50% or more, existing interests held by the acquirer and interests acquired by associated persons and persons in associated transactions can be aggregated.

Landholder duty is imposed at rates up to 5.75% of the unencumbered market value of the land holdings (and goods in certain jurisdictions) of the landholder.

New South Wales, Victoria, and Queensland also impose a foreign purchaser surcharge that applies to relevant acquisitions by foreign purchasers of interests in a landholder that holds residential land. The surcharge rate is 4% in New South Wales, 7% in Victoria, and 3% in Queensland and is imposed in addition to any landholder duty.

There are different acquisition thresholds and rates of duty for acquisitions of interests in listed companies that are landholders. Generally, the acquisition threshold is 90% or more, and in some jurisdictions the rate of duty is 10% of the general landholder duty rate.

There is generally no duty on the grant of a loan provided it is a genuine debt interest and there is no duty on mortgages or charges that secure property located in any state or territory.

Australia

Exchange Controls and Regulatory Rules

There are no specific exchange controls or other regulatory rules in Australia. Therefore, there is nothing to prevent foreign investors or artists repatriating income arising in Australia back to their home territory. However, under the financial transactions reporting legislation, it is necessary to file a currency transfer report to transfer more than AUD 10,000 (or foreign currency equivalent) in or out of Australia.

No changes to reintroduce such controls are expected in the foreseeable future.

Corporate Taxation

Recognition of Income

Film Production Company – Production Fee Income

Australian-Resident Company

If a special purpose company is set up in Australia to produce a film without acquiring any rights in that film, i.e., a camera-for-hire company, the revenue authorities often query the level of income attributed to Australia if they believe that there is flexibility in the level of production fee income that may be attributed such that it is below a proper arm's length amount. It is difficult to be specific about the percentage of the total production budget that would be an acceptable level of income attributed to Australia, but in our experience, an acceptable level could lie between 1% and 5% of the production budget. The lower the percentage is, the more likely an enquiry.

It is seldom possible to negotiate with the Australian revenue authorities in advance about an acceptable level as there are formal ruling processes that are designed for taxpayers to seek binding rulings from the revenue authorities. Australia's revenue authority no longer gives advice binding them to a position other than via the formal ruling processes.

Non-Australian Resident Company

If a company is not resident in Australia but has a production office to administer location shooting in Australia, it is possible that the revenue authorities may try to argue that it is chargeable to tax here by being regarded as having a permanent establishment, subject to specific exemptions under an applicable double tax treaty. The Australian authorities would determine whether or not a "permanent establishment" exists by applying the appropriate article in an applicable double tax treaty (i.e., presences, such as a branch, office, factory, workshop, or similar site). If no treaty existed, they could still be expected to apply a similar set of criteria.

If a company is not resident in Australia and does not have a production office here but undertakes location shooting here, it is unlikely that it would have an Australian tax liability since it would not be regarded as having a permanent establishment.

If the Australian revenue authorities attempt to tax the company on a proportion of its profits on the basis that it has a permanent establishment, they would first seek to attribute the appropriate level of profits that the enterprise would be expected to make if it were a distinct and separate enterprise engaged in that activity. Clearly, however, a proper measurement of such profits would be difficult. It is likely that the Australian revenue authorities would measure the profit enjoyed by the company in its own resident territory and seek to attribute a specific proportion of this, perhaps by comparing the different levels of expenditure incurred in each location or the periods of operation in each territory. The level of tax liability would ultimately be a matter for negotiation.

Australia

The foreign investor would have to rely on an applicable treaty and/or its home country rules to obtain relief from double taxation.

Examples of the relief provided for under Australia's treaties are as follows:

United States	Australian tax on business profits creditable against U.S. tax (Article 22)
United Kingdom	Australian tax on business profits creditable against U.K. tax (Article 22)
The Netherlands	Business profits can be taxed in the Netherlands and a deduction against that tax may be allowed where the income has already been taxed in Australia (Article 23).
Japan	Australian tax on business profits creditable against Japanese tax (Article 25)
Singapore	Australian tax on business profits creditable against Singapore tax (Article 18)
Malaysia	Australian tax on business profits creditable against Malaysian tax (Article 23)
Thailand	Australian tax on business profits creditable against Thai tax (Article 24)

Film Production Company – Sale of Distribution Rights

If an Australian-resident production company sells distribution rights (i.e., licenses rather than assigns the copyright) in a film to an unconnected distribution company in consideration for a lump-sum payment in advance and subsequent periodic payments based on gross revenue, the sale proceeds would normally be treated as income arising in the trade of film rights exploitation. The same rules would apply to whatever type of entity is making the sale.

If intangible assets, such as distribution rights, are transferred from Australia to a connected party in a foreign territory, it is preferable to help ensure that such a transfer is carried out as part of a commercially defensible transaction, as the revenue authorities may well seek to attribute an arm's length price.

Film Distribution Company

If an Australian-resident distribution company acquires rights by way of a lump-sum payment for distribution rights from an unconnected production company, the payment for the acquisition of the rights is normally treated as an expense in earning profits. The expense is not regarded as the purchase of an intangible asset but as a royalty payment. Revenue rulings establish that these payments are fully deductible in the year that the obligation to pay arises. This would be the case whether the company exploits the rights in Australia or worldwide, and whether or not the production company is resident in a country that has a double tax treaty with Australia.

Where the recipient of the payments is nonresident and not subject to tax in Australia, payments for distribution rights may be subject to Australian withholding tax.

Australia

The Australian tax regime does not discriminate between royalty payments for films or other intellectual property. In the absence of a treaty, all royalties are subject to a withholding of 30%.

Examples of the relevant treaty royalty withholding rates are as follows:

United States	5%
United Kingdom	5%
The Netherlands	10%
Japan	5%
Singapore	10%
Malaysia	15%
Thailand	15%

The income arising from exploiting such rights is normally recognized as trading income. The distribution company would be taxed on the income derived from the exploitation of any of its acquired films, wherever and however these are sublicensed, provided that the parties are not connected. If they were connected, the revenue authorities might question the level of income returned. For Australian taxation purposes, income in this case is normally recognized when the right to be paid has been irrevocably determined.

Transfer of Film Rights between Related Parties

Where a worldwide group of companies holds rights to films and videos and grants sublicenses for exploitation of those rights to an Australian-resident company, care needs to be taken to help ensure that the level of profit earned by the Australian company can be justified. Any transactions within a worldwide group of companies are liable to be challenged by the Australian revenue authorities since they would seek to apply an open-market third-party value to such transactions. Indeed, if an Australian-resident company remits income to a low-tax territory via a sublicensing distribution agreement, the Australian revenue authorities can be expected to query the level of such income.

There is no specific level that the Australian revenue authorities seek to apply. They always have regard to comparative deals that other unconnected parties may make. It is always wise to obtain evidence at the time a deal is struck to verify that the price agreed can be substantiated at a later date.

It is possible to obtain formal clearance in advance from the Australian revenue authorities by way of an advance pricing arrangement.

Furthermore, regard should be given to the recently introduced anti-avoidance measures, the MAAL and the DPT, as discussed in the Film Financing section above, in considering the transfer of film rights between related parties.

Australia

Amortization of Expenditure

Production Expenditure

Where a production company owns a copyright in a film, the expenditure will be included in the effective life depreciation regime, and taxpayers can either self-assess the effective life of the film copyright or use the “safe harbour” effective life specified by the Commissioner of Taxation. In the case of film copyright, the Commissioner has specified a “safe harbour” effective life of five years per Taxation Ruling 2016/1.

At times, a distributor may acquire the copyright in a film. Generally, this is done by way of an assignment of the copyright by the producer. The distributor will obtain a deduction for the purchase price of the copyright over the period of the purchase. For example, where a distributor purchased the Australian rights for a film for five years, the distributor would be entitled to amortize the purchase price over five years. Any payments that are exclusively referable to an assignment of copyright would not be subject to any withholding.

The tax treatment of the assignment of copyright as a true purchase of property consisting of the copyright, rather than a payment for the use of, or the right to use, the property (and therefore, a royalty), will depend on all relevant facts and circumstances. The Commissioner of Taxation has indicated in a published ruling (TR 2008/7) that an assignment of copyright amounts to an outright sale if:

- It is for the full remaining life of the copyright; and
- It extends geographically over an entire country or several countries; and
- It is not limited as to the class of acts that the copyright assignee has the exclusive right to do; and
- The amount and timing of the payment or payments for the assignment are not dependent on the extent of exploitation of the copyright by the assignee.

Other Expenditure

Neither a film distribution company nor a film production company has any special status under Australian tax law. Consequently, they are subject to the usual rules to which other companies are subject. For example, in calculating taxable trading profits, they may deduct most normal day-to-day business expenditures, such as the cost of film rights (as detailed above), salaries, rents, advertising, travel expenses, and legal and professional costs normally relating to the business.

Certain other expenditures cannot be deducted, for example, any expenditure on capital account, such as the purchase of land and buildings, goodwill, and investments, nor can the acquisition of plant and machinery be deducted. Although capital allowances can be deducted at specific rates and in some circumstances, these rates can be generous. Additionally, certain day-to-day expenditures (e.g., business entertainment) and any expenditure that is too remote from any business purpose are not allowable.

Losses

To the extent to which a production company has any carried-forward losses, the continuity of ownership test (COT) or (if the COT is not satisfied) the same business test (SBT) must be satisfied in order to utilize those losses in the current year.

The COT considers whether the same persons beneficially owned the same shares in the company from the beginning of the loss year to the end of the income year in which the

Australia

loss is utilized. The COT is satisfied where the same persons beneficially own between them shares that carry the rights to greater than 50% of voting power, dividend, and capital distributions in the company.

The SBT considers whether the company is carrying on the same business as it carried on immediately before the test time. The test time is the latest time that the company can show it satisfied the COT.

Foreign Tax Relief

Producers and Distributors

There are no special rules for producers and distributors when it comes to foreign tax relief. They are treated as ordinary taxpayers.

If an Australian-resident film distributor/producer receives income from unconnected, nonresident companies, but suffers overseas withholding tax, they are normally able to rely on Australia's wide range of double tax treaties to obtain relief for the tax suffered. If no such treaty exists between the territories concerned, they would expect to receive credit for the tax suffered on a "unilateral" basis.

Further, if income is considered as receipt from the exploitation of a film overseas, it will be considered as foreign income.

Indirect Taxation

Goods and Services Tax

Goods and Services Tax ("GST") is payable by an entity on the taxable supplies that it makes. An entity makes a taxable supply if the supply is made for consideration, in the course or furtherance of an enterprise that an entity carries on; the supply is connected with Australia; and the entity is registered for GST or required to be registered for GST. A supply will not be a taxable supply if it is either GST-free or input taxed. GST is payable at the rate of 10% of the value of the taxable supply. An entity is required to be registered for GST if its GST turnover exceeds AUD 75,000 (AUD 150,000 for nonprofit bodies) in any 12-month period. An entity can voluntarily register for GST if it carries on an enterprise.

An entity is entitled to claim input tax credits for the GST component of its creditable acquisitions, that is, for the acquisitions incurred in carrying on its enterprise except to the extent that the acquisition relates to making supplies that are input-taxed or the acquisition is of a private or domestic nature.

If a supply is "input taxed" (i.e., exempt supplies), no GST is payable on the supply. Input taxed supplies include supplies of residential accommodation and certain supplies of financial services (e.g., loans, mortgages, guarantees). However, the supplier generally cannot claim input tax credits for the GST payable on its acquisitions that relate to that supply (subject to certain limited exceptions, which are outlined below).

An entity that makes input taxed financial supplies may be entitled to claim full input tax credits for its acquisitions relating to financial supplies (even though financial supplies are input taxed) if the supplier does not exceed the "financial acquisitions threshold," which is a *de minimis* test for taxpayers who make very few input taxed financial supplies. In addition, a supplier should be entitled to claim full input tax credits for borrowing expenses if the borrowing relates to the supplier making supplies that are not input taxed.

Australia

Where a supplier makes input taxed financial supplies and exceeds the financial acquisitions threshold, a supplier may be able to claim reduced input tax credits (75% or 55%) on a limited class of specified acquisitions.

If a supply is GST-free, no GST is payable on the supply, but the supplier is entitled to claim input tax credits for the GST included in the cost of its acquisitions that relate to that supply (i.e., zero-rated). GST-free supplies include relevant exports and other nontangible supplies that are for consumption outside Australia.

There is no GST on exported release positive prints or negatives provided that the goods are exported by the exporter within the earlier of 60 days of the date of invoice or the date on which the supplier receives any consideration. The supplier should maintain sufficient documentary evidence to show the goods were exported from Australia and within the specified time frame.

Release positive prints or negatives imported into Australia are generally subject to GST. There are a number of exceptions to this general rule, including prints or negatives that have an import value of AUD 1,000 or less (the current low-value import threshold), which will not be subject to GST on importation. GST is calculated on the sum of the customs value of the goods, cost of overseas freight, and insurance and any customs duty payable on the goods.

Customs Duties

Blank videotapes, recorded tapes, video masters, and cinematographic film, exposed and developed, are free of customs duty.

Customs duty on publicity, advertising, and promotional materials will depend upon the particular type of good, i.e., some advertising material is free of customs duty while other material is subject to a customs duty rate of 5% of the customs value. GST of 10% will apply to imported publicity, advertising, and promotional materials. The value the GST is calculated on at the time of importation is the customs value, plus overseas freight and insurance, plus the customs duty (if any) times 10%.

Costumes and theatrical properties meeting prescribed requirements may also receive a concessional customs duty rate of zero.

In certain circumstances, eligible goods (such as camera equipment) may be temporarily imported into Australia for a period of 12 months free from customs duty and import GST where a valid Admission Temporaire/Temporary Admission (ATA) Carnet is obtained prior to importation. An ATA is an international customs document that provides the Australian Border Force ("Customs") with a guarantee for the payment of customs duty and import GST, where the goods are not exported within the 12-month period.

In any case, consignments with a customs value of less than AUD 1,000 may be currently afforded duty and GST-free entry, subject to certain conditions being satisfied. However, the GST low value threshold is due to change imminently, and prior to relying on this concession, importers are encouraged to check the threshold prior to importing goods.

Customs duty for most goods is levied on an ad valorem basis. The valuation system is based on the WTO valuation agreement with some variations. Generally, the customs value is determined by reference to the price of the goods at the place of export (the location

Australia

where the goods were placed into a container, posted, or placed on board a ship or aircraft). The following additions are made to the price to determine the customs value:

- Commissions other than buying commissions
- Foreign inland freight and insurance (to the extent these are not already included)
- Packing costs
- Cost of materials and services required for production of imported goods, supplied by the purchaser free of charge or at reduced costs
- All or part of proceeds for resale, use, etc., that accrue to the vendor
- Certain royalties and license fees.

The legislation in this area is quite complex and each import must be examined individually to determine the correct customs value.

Customs administers a system of strict liability/administrative penalties for noncompliance with the *Customs Act 1901* and its subordinate legislation. Where customs duty is underpaid, the maximum judicial penalty that can be imposed is AUD 10,800 per incorrect statement and the amount of short-paid duty, whichever is greater. Penalties can also apply where incorrect information is supplied to Customs even if there is no duty-short payment. The maximum judicial penalty for nonrevenue errors is AUD 10,800 per statement.

Personal Taxation

Nonresident Artists (Self-Employed)

Income Tax Implications

Subject to its double tax treaties, Australia taxes the income arising to a nonresident performing artist from a performance in Australia and any other activities carried on in Australia relating to entertainment. The authorities would also seek to tax income received outside Australia in connection with an Australian performance but not if it relates to services carried on outside Australia.

If a nonresident performing artist receives any payment arising from or in consequence of an entertainment activity in Australia, the payer is obliged to withhold pay as you go (PAYG) tax and remit this tax to the Australian tax authority. An entity carrying on an enterprise in Australia, whether an Australian entity or a foreign entity, must withhold an amount from payments made to another entity or individual, subject to certain exemptions discussed below.

To strengthen the collection of Australian taxes, a specific withholding regime applies for payments made to nonresident entertainers (including a performing artist) who are not engaged as employees. The rates of withholding for payments to entertainers that are individuals are the marginal rates applicable to nonresidents, unless an ABN is required and no ABN is provided. If an ABN is required and no ABN is provided to the payer, withholding is required at 49%. The rate of withholding for payments made to nonresident companies is the company tax rate of 30% (49% if no ABN is provided).

The specific withholding regime also addresses payments made to related support staff (e.g., choreographer, costume designer, director, director of photography, film editor, musical director, producer, production designer, set designer) who are not engaged as employees. Nonresident support staff are not required to provide a Tax File Number (TFN) or

Australia

ABN if they are tax resident of a country with which Australia has a double tax agreement, and they are present in Australia for not more than 183 days during the financial year. If they do not meet the above criteria, withholding is required at nonresident rates or at 49% if an ABN is required and no ABN is provided.

In addition, various government departments in Australia are increasingly sharing information with each other, in particular the department of immigration and the Australian revenue authorities. Where an organization has obtained a visa for the relevant artist, it is likely that the Australian revenue authorities will have oversight of this individual and would be expecting to receive the withholding taxes outlined above.

Australia's double tax agreements provide the following rules:

United States	U.S. artists (or an entity that provides the services of an artist) are taxable in Australia to the extent to which they carry out activities in Australia, except where the payment does not exceed USD 10,000 (Article 17).
United Kingdom	U.K. resident artists (or an entity that provides the services of an artist) are taxable in Australia to the extent to which they perform services in Australia (Article 16).
Netherlands	Dutch resident artists are taxable in Australia to the extent to which they perform services in Australia (Article 17).
Japan	Japanese resident artists are taxable in Australia to the extent to which they perform services in Australia (Article 16).
Singapore	Singapore resident artists are taxable in Australia to the extent to which they perform services in Australia (Article 12).
Malaysia	Malaysian resident artists are taxable in Australia to the extent to which they perform services in Australia, except where the visit is supported by government funds (Article 16).
Thailand	Thai resident artists are taxable in Australia to the extent to which they perform services in Australia, except where the visit is supported by government funds (Article 17).

It will be noted that nonresident performing artists are taxable only on the remuneration received in respect of the services they perform in Australia. Provided that genuine services are performed outside Australia and an arm's length fee is payable for those services by the production company, no tax would be levied in Australia on those payments.

It is common practice for an artist's representative to negotiate with the Australian revenue authorities on the deductions that can be claimed against the Australian source income.

Employers are liable for superannuation contributions equivalent to 9.5% of the Australian fee paid to the artist. For the 2016/2017 year, the earnings cap that applies for superannuation contribution purposes is AUD 206,480 (i.e., total remuneration of approximately AUD 226,096, including the superannuation component). No further

Australia

superannuation contribution is required on fees that exceed that amount. Superannuation contributions may be refunded to the artist after negotiation.

Payroll tax (which is a state/territory tax) is levied at differing rates throughout Australia and may be as high as 6.1% of the salary cost.

Fringe benefits tax (FBT) is levied at 49% (rate applicable from April 1, 2015) on the employer in respect of benefits, such as employer-provided cars, free or low-interest loans, free or subsidized residential accommodation or board, goods and services sold at a discount or provided free by an employer, and expenses paid on behalf of an employee. However, contributions to superannuation funds, employee share acquisition schemes, the use of certain commercial vehicles where private use is restricted to travel between home and work, residential accommodation provided to an employee living away from home, and a number of other minor items are exempt from FBT.

The taxable value of a fringe benefit is calculated as follows:

Type 1 – Where GST applied to cost of benefit	Cost to employer x 2.1463
Type 2 – Where GST did not apply to cost of benefit	Cost to employer x 1.9608

The employer is entitled to an income tax deduction for FBT paid by the employer.

Resident Performing Artists (Self-Employed)

Resident performing artists are taxed similarly to employees, although they may not require PAYG withholding by the payer if they perform services through a company and they provide an ABN. However, please note the revenue authorities may challenge the arrangement and, accordingly, most resident artists are taxable as individuals.

Employees

Income Tax Implications

Employers of employees working in Australia are obliged to make regular, periodic payments to the Australian revenue authorities in respect of employees' personal tax liabilities arising from salaries or wages paid to them. Deductions are made under the PAYG withholding system. Employers deduct PAYG based on tax tables supplied by the revenue authorities. The tables are designed to approximate the tax liability on annual salaries.

Employers are also generally obliged to deduct the employees' Medicare levy liability at the rate of 2% of PAYG salary or wages.

Social Security Implications

Employers are liable for superannuation contributions in respect of payments of salaries or wages. Currently, the minimum superannuation contribution is 9.5% with a single annual concessional contribution limit of AUD 30,000 or AUD 35,000 for those aged 49 years or over on June 30, 2014, and post-tax contributions will be limited to AUD 180,000 per annum (subject to averaging over three years).

Australia

Digital Media

Tax Issues on Distribution and Payment for Digital Media

Cross-Border Transactions and Indirect Tax

As noted above, there is no GST on exported release positive prints or negatives (physical) provided that the goods are exported by the exporter within the earlier of 60 days of the date of invoice or the date on which the supplier receives any consideration.

If the prints/negatives are exported over the Internet (i.e., the recipient downloads it online or receives the file via e-mail), then it should also be broadly GST-free where the recipient is located outside Australia.

However, release positive prints or negatives imported into Australia are generally subject to GST on importation unless they have a customs value of less than AUD 1,000. GST is calculated on the sum of the customs value of the goods, cost of overseas freight, and insurance and any customs duty payable on the goods.

The sale of positive prints or negatives will be subject to Australian GST on the sale where any of the following occur:

- The positive prints or negatives are located in Australia and delivered or made available in Australia;
- The positive prints or negatives are located outside of Australia and are imported into Australia by the seller; or
- From July 1, 2017,⁴ the positive prints or negatives are located outside of Australia and are imported into Australia by the buyer, who is an end consumer, and the customs value is less than AUD 1,000.

From July 1, 2017, the supply of digital products (including digital prints) that are purchased and downloaded by an Australian consumer from nonresident supplier will be “connected with Australia” and may be subject to GST. The liability for GST will rest either with the supplier or with the operator of an “electronic distribution platform” through which the sales are made.

⁴ We note that the enabling bill has been introduced into Parliament but has not yet been passed at the time of writing.

Australia

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Australia