



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 of 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 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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Colombia

Introduction

In Colombia, the film industry is growing. Between the years 1997 and 2003, Colombia produced an average of 4.2 films per year. By 2004 and in the years following, the average number of films produced was 8, thanks to a new law issued in 2003. The national productions have increased—between 2001 and 2009, 77 national films were released, while between 2010 and 2018, 227 national films were released.¹

Law 397 of 1997 (also known as “The Culture Law”) created the Ministry of Culture. Within this ministry is the Cinematography Bureau, the entity that is in charge of promoting and encouraging the Colombian film industry. Law 397 of 1997 established policies that foster the production and co-production of Colombian films. A film production fund was created and funded with state budget and its purpose is to encourage and grant Colombian film production.

The Colombian Congress enacted Law 814 of 2003 (modified by Law 1607 of 2012), which created a new tax benefit and a new para-tax contribution called “Quota for Cinematographic Development,” and reorganized the cinematographic industry aiming to induce a progressive development of the Colombian industry and to promote film activities in Colombia. These resources go to the Fund for Film Development, the National Arts and Cinematographic Culture Counsel (the entity that will manage said Fund), and the Cinematographic Information and Registration System (SIREC, a database including producers, exhibitors, distributors, and others involved in similar activities related to the cinematographic industry).

Additionally, after Law 1556 of 2012 or “Colombia’s Filming Law” was enacted, which gives benefits to the producer company such as recognition of 40 percent of the expenses made in the whole production process and 20 percent in expenses related to hotels, transport, and food, the film industry grew noticeably. While in 2013 only one international movie was made in Colombia, between the years 2013 and 2018 a total of 27 international films were shot in the country.²

There are some national entities, such as the Colombian Film Heritage Non-Profit Foundation (called, in Spanish, *Fundación Patrimonio Fílmico Colombiano* [FPFC]), which function mainly to gather or recover audio and visual records that should be part of the Colombian film heritage, as well as to promote national film production.

Law 1943 of 2018, which was recently enacted, includes a tax exemption for entities of the “orange economy,” which carry out activities of production, postproduction, distribution,

¹ *El cine colombiano se abre espacio en la industria cinematográfica del mundo*, <http://www.mincultura.gov.co/prensa/noticias/Paginas/El-cine-colombiano-se-abre-espacio-en-la-industria-cinematogr%C3%A1fica-del-mundo.aspx> (last visited May 21, 2019).

² *Colombia: Hollywood’s ideal location*, <http://www.procolombia.co/noticias/en/colombia-hollywoods-ideal-location> (last visited May 21, 2019).

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and exhibition of cinematographic films, videos, programs, commercials, and television commercials (assuming certain conditions are met).

The television industry is still small; however, many domestic TV shows (mostly soap operas) have been exported in the past few years and TV stations are coming to film in Colombia due to the low film costs, availability of technicians, and good levels of technology infrastructure that allow production of high-quality series.³

Currently, there are five television channels (two private and three public) with nationwide coverage and nine regional channels. The National Television Authority (which is the government entity in charge of developing the policies regarding the television service) opened a public bid, in order to allow a third private channel with nationwide coverage. This process has been suspended due to legal matters, since there are no bidders.

Key Tax Facts

Highest corporate income tax rate	FY19: 33% FY20: 32% FY21: 31% FY22 and onwards: 30%
Highest personal income tax rate	39% for the taxable year 2019
DTTs withholding tax rates: Dividends	Depending on whether the dividends are distributed from previously taxed profits or are distributed from nonpreviously taxed profits
Interest (income tax)	20% for the taxable year 2019*
Film royalties (income tax)	20% for the taxable year 2019
Tax year-end: Companies	December 31
Tax year-end: Individuals	December 31
Financial Transactions Tax – GMF	It is a debit tax at 0.4%.

*For long-term loans, that is, those granted for a term of one year or more, interest is taxable at 15%.

Film Financing

Financing Structures

There are several corporate structures for doing business in Colombia that all may apply to the film industry as there are no restrictions regarding the type of entity that is able to develop these activities.

Corporation (Sociedad Anónima S.A.)

An S.A. can be incorporated with five or more shareholders, none of which could have more than 94.9 percent of the total shares of the company. The shareholders are liable up to the

³ *Id.*

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amount of their capital contribution. The company is incorporated through a corporation contract that includes the articles of incorporation and the bylaws of the company. These documents must be formalized through a public deed before a local public notary and then registered in the local Chamber of Commerce of its main domicile. The company issues nominative share certificates that are negotiable.

The social capital is divided in authorized share capital, subscribed share capital, and paid share capital. At the moment of the incorporation, at least 50 percent of the authorized capital must be subscribed, and at least 33 percent of its subscribed share capital must be paid up. If a shareholder owns 95 percent or more of the total subscribed shares, the corporation falls into a dissolution cause.

Simplified Shares Corporation (SAS)

Act 1258 of 2008 introduced a new kind of company, the simplified shares corporation "*sociedad por acciones simplificada*" (SAS, as its acronym is in Spanish). The SAS is a type of corporate structure that gives more flexibility to the founders in setting the basic rules of the company.

The SAS can be incorporated in Colombia with one or more shareholders and their liability is limited to the amount of their capital contribution; likewise, the shareholders of a SAS are not joint or severally liable for tax or labour liabilities.

The SAS can be incorporated with a private document; it is not necessary to grant a public deed before a notary public, except if the shareholders will contribute real property to the SAS.

At the moment of the incorporation, the subscription and payment of the capital can be made under the conditions and proportion established by the shareholders. In any case, shareholders have a term of two years to pay for the subscribed shares.

Limited Liability Company (Sociedad Limitada)

A limited liability company can be organized by 2 to 25 partners. The partners are liable up to the amount of their capital contributions, except for tax and labour liabilities, in which case partners are severally and jointly liable along with the company according to particular provisions.

Capital must be fully paid up at the time of LLC organization and is divided into equal capital quotas of equal amount, which may be assigned in accordance with the provisions in the company's bylaws and Colombian law. The limited liability company is organized through a social contract that contains the articles of organization and the bylaws of the company; such contract must be formalized through a public deed before a local notary and then registered at the Chamber of Commerce of its main domicile.

Branch of a Foreign Company

A foreign company wishing to incorporate a branch to undertake "permanent business" in Colombia must be registered before a notary public and have notarized copies of the bylaws of the head office, a minute issued by the head office governing body deciding the incorporation of a branch in Colombia, and documents evidencing the existence and legal representation of the head office. The public deed incorporating the branch must specify the business to be undertaken, the amount of assigned capital, the duration of business to be undertaken, and the reasons for their termination. The company must appoint a general representative and a Statutory Auditor who must be a Colombian resident.

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The income tax rate applicable to branches is FY19: 33 percent, FY20: 32 percent, FY21: 31 percent, and FY22 and onwards: 30 percent over the income taxable base (gross income minus costs and expenses), regarding the income and equity attributable to them.

Act of Employment Formalization Incentive

Act 1429 of 2010, Law of Employment Formalization (LEF), allows all companies that hire people under 28 years old or women above 40 years old who during the previous year have not been employed, people with disabilities, displaced people, soldiers having served in armed conflict, persons who have left the illegal armed groups, and a person who earns less than 1.5 MW to obtain a tax credit for a discount in payroll taxes and other contributions of the payroll.

Distribution or Agency Contracts

Foreign companies are able to distribute films in Colombia by signing commercial agency contracts with Colombian companies.

Depending on the nature of the contract, the law may require payment to the distributor to take place at the end of the contract.

In these cases, the foreign company does not need to establish a branch in Colombia, and thus payments received from exploiting films in Colombia are subject to income tax (as discussed below).

Tax Benefit for Cinematograph Development

Act 814 of 2003 created a tax benefit for investment or donations, which was then modified by Act 1607 of 2012.

The tax benefit consists of a tax deduction of 165 percent of the amount invested or donated to a Colombian film project, approved by the Department of Culture, once the conditions established in the regulation are met,⁴ regardless of the activity producing income of the investor or donor. The Department of Culture will issue a Certificate of Cinematographic Investment or Cinematographic Donation.

The tax benefit will not be applicable if the investor is a producer or co-producer of the cinematographic project, nor for investments made on advertising films or soap operas.

Quota for Cinematographic Development Rate (Special Contribution)

Act 814 of 2003, Section 5, created a special contribution called "Quota for Cinematographic Development," then modified by Act 1607 of 2012:

- For exhibitors: 8.5 percent on total income from the sale of tickets to the cinema exhibition in movie theatres or exhibition halls
- For distributors: 8.5 percent on total income from the distribution of foreign films
- For producers of Colombian films: 5 percent on total income.

Exhibitors, distributors, and producers are responsible for the payment of the Quota for Cinematographic Development (special contribution). The withholding tax agent of the quota is the exhibitor, and a tax return must be filed monthly.

⁴ Decree 255 of 2013.

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Other Financing Considerations

Colombian and foreign financing can be obtained. Foreign indebtedness is subject to a prior deposit with the Colombian Central Bank. However, since 2008, said deposit is equivalent to 0 percent of the total foreign loan; therefore, this requirement is now irrelevant.

Foreign investment in Colombian television is allowed. However, according to Law 680 of 2001, a limit of 40 percent is placed on foreign investment in the capital of companies that have concessions to run channels on Colombian television.

Corporate Taxation

Corporate Tax

Colombian companies are taxed at a rate of FY19: 33 percent, FY20: 32 percent, FY21: 31 percent, and FY22 and onwards: 30 percent as stated in Act 1943 of 2018. Such tax is calculated on the taxable income (gross income minus costs and expenses).⁵ Dividends declared as enforceable to the shareholders until December 31, 2018: 5 percent taxation when dividends are distributed from profits that were taxed at the level of the distributing entity.⁶

Bear in mind that if those dividends were not declared as enforceable until the referred date, as from January 1, 2019, a 7.5 percent withholding tax (WHT) would apply.

With regard to dividends distributed from profits that were not taxed at the level of the distributing entity,⁷ if dividends were declared as enforceable until the referred date, the applicable rate should be 35 percent plus an additional 5 percent WHT after applying and deducting the initial 35 percent corporate tax.

If those dividends were not declared as enforceable until the referred date, as from January 1, 2019, a WHT would apply as follows depending on the taxable year in which the dividends are paid: FY19: 33 percent, FY20: 32 percent, FY21: 31 percent, and FY22 and onwards: 30 percent, plus the 7.5% WHT (of the PPT dividends), once discounted the mentioned income tax rate.

It should be analysed if by applying the Double Taxation Treaties⁸ (DTTs), WHT is reduced.

a. Income Tax on Royalties Paid Abroad

The taxable base for the exploitation of films under any legal title, by a foreign individual or company without a domicile in Colombia, is the total royalties paid abroad. This taxable income will be subject to a 20 percent WHT.

If the licensee is a resident of DTTs countries, the WHT rate will be 10 percent.

⁵ According to Section 107 of the Colombian Tax Code, costs and expenses are deductible provided they are necessary, proportional, and have a causality relationship with the income generated by the taxpayer.

⁶ Section 48 of the Colombian Tax Code.

⁷ Section 49 of the Colombian Tax Code.

⁸ Colombia has Treaties to Avoid Double Taxation (DTT) with Spain, Switzerland, Chile, Canada, Mexico, Portugal, India, Czech Republic, South Korea and also with the Andean Community countries (Bolivia, Ecuador, and Peru). DTTs pending of a specific approval: France, UK, Japan, Italy, United Arab Emirates.

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b. Property Transfer of Films

In the case of property transfer of films, the following rules must be considered regarding payments abroad for this concept:

- If the property transfer of films is executed while the films are inside Colombian territory, the income arising from that payment will be national source income and taxable in the country; the WHT should be of 15 percent or 10 percent on the payment or accrual if the profit is considered as an ordinary income or a capital gain (depending on the holding period). In this case, the receiver of such payments (foreigner without residence or domicile in Colombia) will have to file an income tax return, according to the general rules of the Colombian Tax Code⁹
- If the property transfer of films is executed while the films are not within Colombian territory, the income coming from such payment will not be national source income; therefore, withholding tax will not apply over such payment or accrual.

c. Property Transfer over the Copyrights of the Film

In the case of property transfer of copyrights of the films, the following rules must be considered regarding payments abroad for this concept:

- If the property transfer of the copyrights is executed while the copyrights are registered in Colombia, the income from that payment will be national source income, taxable in the country; the WHT should be of 15 percent or 10 percent on the payment or accrual if the profit is considered as an ordinary income or a capital gain (depending on the holding period). In this case, the receiver of such payments (foreigner without residence or domicile in Colombia) must file an income tax return according to the general rules¹⁰
- If the property transfer of the copyrights is executed while such copyrights are not registered in Colombia, the income from such payment will not be national source income; therefore, WHT will not apply over such payment or accrual.

Municipal Industry and Commercial Tax

Colombian companies and branches of foreign companies are subject to a municipal tax called "*Impuesto de Industria y Comercio*" (Industry and Commerce Tax), at rates from 0.1 percent to 1 percent on the total revenues. This tax is payable on gross revenues from film exhibition activities.

Indirect Taxation

Value Added Tax (VAT)

The general rate of VAT in Colombia is 19 percent on the sale of movable goods and real estate with some exclusions, sale or transfer of rights on intangible assets related to intellectual property, importations, and the rendering of services within Colombian territory and from abroad with some exclusions.

When a foreign company without domicile in Colombia renders services levied with the VAT, this tax will apply upon the fees or services value; however, the foreign company will not be economically affected by the application of this tax, because the Colombian resident, if belonging to the VAT common regime, will implement a "reverse charge mechanism" or "hypothetical withholding" in order to fulfil its tax liabilities before the tax administration

⁹ Sections 415 and 592 of the Colombian Tax Code.

¹⁰ Sections 415 and 592 of the Colombian Tax Code.

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(DIAN, by its acronym in Spanish).¹¹ Otherwise, the foreign provider of the services would have to register as a foreign provider of services responsible of the VAT before the DIAN.

Now, recently enacted legislation (Act 1943 of December 2018) establishes that in the case of e-services, the foreign provider can apply to an alternative WHT mechanism where the issuer of the credit/debit card, through which the payment is made, applies the VAT WHT by eliminating the obligation for the foreign vendor to file VAT returns.

However, the dispositions that regulate this alternative mechanism have not been issued yet. The government should enact them in the near future.

As mentioned, only the provision of e-services would be eligible to the alternative mechanism. Pursuant to Article 473-2, e-services are:

- Provision of audiovisual services (amongst others, music, videos, movies, games, and broadcasting of events)
- Services provided through digital platforms
- Online advertising
- Remote training or education
- Provision of rights to use or exploit intangibles
- Other digital services provided to Colombian tax residents.

VAT at the 19 percent rate will also apply to the provision of licenses and the authorization to exploit films, in favour of licensees located in Colombia. The VAT will be accrued by the Colombian licensee via reverse charge mechanism.

Likewise, commissions or fees charged by agents with residence in Colombia to foreign companies accrue VAT at a 19 percent rate except in those cases of exportation or service contracts.

There is no VAT chargeable on showing films, i.e., ticket for the cinema (Section 476, subsection 18, Colombian Tax Code); however, the rental of video movies in Colombia accrues VAT at the 19 percent rate.

Tax on the Exhibition of Films

In the city of Bogota only, there is a Beneficence Tax at 10 percent of the price of a ticket to a public spectacle (among them film exhibitions).

Stamp Tax

As of 2010, the stamp tax rate is 0 percent when an agreement is signed.

¹¹ When a foreign company performs services subject to VAT in Colombian territory, the Colombian company that purchases those services shall self-assess the 100 percent of the VAT accrued at a rate of 19 percent, and pay it to the Colombian Tax Authority by means of a withholding tax return. In other words, the VAT will be accrued ahead of the recipient of the taxable service who will be liable to declare and pay the TAX via a withholding tax return. Given that the tax will be ahead of the recipient of the service, the withholding does not affect the amount of the payments abroad.

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