



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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Introduction

The National Film Development Corporation Malaysia is the central government agency for the film industry in Malaysia. The tax treatment of the film industry falls under the general provisions of the Malaysian Income Tax Act 1967 (the Act). There are, however, various tax incentives available for Malaysian companies or Malaysian resident individuals who meet the requisite criteria. These are briefly discussed below.

Key Tax Facts

Corporate income tax rate	24%
Highest personal income tax rate	28%
Service tax **	6%
Sales tax**	Generally 10%, 5%, or exempted
Normal nontreaty withholding tax rates:	
Dividends	0%
Interest	15%
Royalties	10%
Fees for technical and other services	10%
Tax year-end: Companies	Financial year end
Tax year-end: Individuals	December 31

** Goods and Services Tax (GST) was abolished and replaced by Sales Tax and Service Tax ("SST"), effective September 1, 2018. Unlike GST, Sales Tax and Service Tax are two separate taxes.

Film Financing

Financing Structures

The financing structures used would depend on the nature of the involvement of parties and legal and commercial considerations. In Malaysia, businesses can be carried out via a company or a partnership.

Company

A company is governed by the Companies Act 2016. A company may be financed by share capital or shareholders' loans or both. A company is taxed as a separate legal entity. After tax profits may be distributed to shareholders in the form of dividends.

Where the share capital is in the form of preference shares, the returns paid to the holder of the preference shares are treated as dividends for tax purposes notwithstanding that

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preference shares may be classified as debt in the financial statements of the issuing company.

It has to be noted that, for exchange control purposes, Central Bank approval is required for the issuance of redeemable preference shares to a nonresident.

Partnership

A partnership is governed by the Partnership Act 1961 or the partnership agreement, if one exists. A partnership is defined as the relationship between parties carrying on business in common with a view to profit and hence, is not a separate legal entity.

A partnership is not taxed, but it is required to compute and submit a tax return to ascertain the profit attributable to the respective partners. The partners are to include the profit so ascertained in their tax return.

Limited Liability Partnership (LLP)

The Limited Liability Partnerships Act 2012 has introduced the concept of an LLP.

For income tax purposes, an LLP is treated as a separate legal entity from its partners. The income of the LLP is taxed at the LLP level. Consequently, the partners are not liable to tax on their share of income from LLP (whether distributed or not).

Joint Ventures

A joint venture may be incorporated or unincorporated. An incorporated joint venture is established as a company under the Companies Act 2016. An unincorporated joint venture is akin to a partnership where the rights of the respective parties are documented in the joint venture agreement. The tax treatment of these is as discussed above.

There may be instances where an unincorporated joint venture is based on revenue share and not profit share. Such a joint venture does not have to file a tax return. Joint venture partners must compute any revenue they derive and any expenditure they incur in respect of the joint venture and include these in their respective tax returns.

Other Financing Considerations

Exchange Controls and Regulatory Rules

Malaysia has a limited exchange control regime. Dividends and profits may be repatriated without restriction. However, where the financing is in the form of a foreign currency loan which is in excess of Ringgit Malaysia (MYR) 100 million equivalent (in aggregate), the loan has to be approved by the Central Bank. This restriction does not apply if the loan is:

- From licensed onshore banks,
- From resident and nonresident entities within the borrower's group,
- From the borrower's resident and nonresident direct shareholders, and
- Through the issuance of foreign currency debt securities to another resident.

Where the financing is in the form of a MYR loan, Central Bank approval is required for loans in excess of MYR1 million. This restriction does not apply if the lender is a nonresident entity within the group or a direct shareholder and the loan is used to finance activities in the real sector in Malaysia. The restriction also does not apply if the loan is from any nonresident through the issuance of tradable private debt securities or Islamic private debt securities.

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Corporate Taxation

Recognition of Income

Malaysia operates a territorial basis of income taxation, where only income accruing in or derived from Malaysia or received in Malaysia from outside Malaysia is subject to income tax. However, income sourced outside Malaysia and received in Malaysia is currently exempt from income tax except for resident companies in the business of banking, insurance, and air and sea transport. The corporate income tax rate in Malaysia is 24% with effect from the 2016 year of assessment.

Companies with an ordinary paid-up share capital of MYR2.5 million or below at the beginning of the basis period for a year of assessment are subject to income tax at a rate of 17% (18% for 2017 and 2018 year of assessment) on the first MYR500,000 of their chargeable income, and the balance is taxed at 24%. However, such preferential treatment shall not apply where a company is related to a company which has a paid-up capital in respect of ordinary shares of more than RM2.5 million or equivalent, at the beginning of the basis period for a year of assessment.

Companies undertaking a promoted activity or a promoted product are eligible to apply for tax holidays (known as Pioneer Status) or additional allowances on qualifying capital expenditure (known as Investment Tax Allowance). Approval is, however, at the discretion of the relevant authority. At present, production of films or videos and post-production for films or videos are promoted activities.

There is also a statutory order exempting nonresident film companies, actors, and film crews who are in Malaysia, from the payment of income tax in respect of income derived from filming activities commencing on or after March 31, 1999, which have been approved by the Jawatankuasa Filem Asing, Ministry of Home Affairs, Malaysia.

In addition, the Film in Malaysia Incentive (FIMI) is available for film, television, and other relevant production activities conducted in Malaysia that meet the prescribed criteria. The FIMI is a 30% cash rebate of qualifying Malaysian production expenditure for production and post-production activities in Malaysia.

Amortization of Expenditure

Deductions

Generally, expenses that are wholly and exclusively incurred in the production of gross income are tax deductible. Such deductible expenses include the following:

- Interest on loans employed in producing gross income. However, where a loan is employed in business and investments, the interest on the loan would have to be segregated and deducted in accordance with the attributed category, subject to satisfying the wholly and exclusively test. In addition, a taxpayer is only eligible to claim a deduction in respect of interest borrowed against its business income when such interest is due to be paid.

It has been proposed that Earning Stripping Rules (ESR) be effective from January 1, 2019. At present, the rules and guidelines for implementing ESR have not been issued. It is expected that the ESR will only apply to financial assistance provided by foreign related companies at this stage.

- Rent payable in respect of any land or building or part thereof occupied for the purpose of producing gross income.

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- Expenses for the repair of premises, plant, machinery, or fixtures.
- Bad and doubtful trade debts that arise during a period. Conversely, debts that had been previously allowed as a deduction but are subsequently recovered are taxable in the year the recovery takes place.
- Compulsory contributions made by employers to an approved pension or provident fund for employees (subject to a prescribed limit).

These expenses need to be incurred, laid out, or expended during the basis period to be allowed a deduction. Expenses that are domestic, private, and capital in nature are not deductible.

Tax Depreciation/Capital Allowances

Accounting depreciation, being a capital expense, is not deductible. However, tax depreciation (referred to as capital allowances) is granted on qualifying assets used in a business. The prescribed capital allowance rates can be classified as follows:

Type of Asset	Initial Allowance Rate* (%)	Annual Allowance Rate (%)
Heavy machinery and motor vehicles	20	20
Plant and machinery (general)	20	14
Office equipment, furniture and fittings, and others	20	10
Industrial buildings	10	3

* Only available in the first year of assessment

Some assets, such as small value assets that meet certain criteria, may be written off in one year or may qualify for accelerated rates of capital allowance.

Withholding Tax

Malaysian withholding tax is applicable on prescribed payments derived from Malaysia and made to nonresidents of Malaysia.

Dividends

Dividends paid are not subject to withholding tax regardless of the place of incorporation and the tax residency of the shareholder.

Interest

Interest derived from Malaysia and paid to a nonresident, except where such interest is attributed to the business of such nonresident in Malaysia, is subject to 15% withholding tax unless otherwise reduced by an applicable tax treaty.

Interest is deemed to be derived from Malaysia if, among others:

- The responsibility for the payment lies with a Malaysian resident and the loan is laid out on assets used in or held for the production of any gross income derived in Malaysia or the loan is secured by an asset situated in Malaysia
- The interest is charged as an outgoing or expense against any income accruing in or derived from Malaysia.

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However, certain interest paid to nonresidents is exempt from withholding tax—for example, interest paid by a bank licensed under the Financial Services Act 2013 or the Islamic Financial Services Act 2013 (not related to funds required for the purposes of maintaining networking funds) or interest paid pursuant to Sukuk originating from Malaysia, other than convertible loan stocks, issued in currencies other than MYR and approved or authorised by, or lodged with, the Malaysian Securities Commission or the Labuan Financial Services Authority. With effect from 2017 year of assessment, this exemption shall not apply to:

- (a) Interest paid or credited to a company in the same group
- (b) Interest paid or credited to:
 - (i) A bank licensed under the Financial Services Act 2013
 - (ii) An Islamic bank licensed under the Islamic Financial Services Act 2013
 - (iii) A development financial institution prescribed under the Development Financial Institutions Act 2002.

Royalties

Royalty is defined in the Act to include:

- (a) The use of, or the right to use in respect of, any copyrights, software, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks, or other like property or rights;
- (b) The use of, or the right to use, tapes for radio or television broadcasting, motion picture films, films or videotapes, or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;
- (c) The use of, or the right to use, know-how or information concerning technical, industrial, commercial, or scientific knowledge, experience, or skill;
- (d) The reception of, or the right to receive, visual images or sounds, or both, transmitted to the public by:
 - (i) Satellite
 - (ii) Cable, fibre optic, or similar technology;
- (e) The use of, or the right to use, visual images or sounds, or both, in connection with television broadcasting or radio broadcasting, transmitted by:
 - (i) Satellite
 - (ii) Cable, fibre optic, or similar technology
- (f) The use of, or the right to use, some or all of the part of the radiofrequency spectrum specified in a relevant licence
- (g) A total or partial forbearance in respect of:

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- (i) The use of, or the granting of the right to use, any such property or right as is mentioned in paragraph (a) or (b) or any such knowledge, experience, or skill as is mentioned in paragraph (c)
- (ii) The reception of, or the granting of the right to receive, any such visual images or sounds as are mentioned in paragraph (d)
- (iii) The use of, or the granting of the right to use, any such visual images or sounds as are mentioned in paragraph (e), or
- (iv) The use of, or the granting of the right to use, some or all such part of the spectrum specified in a spectrum licence as is mentioned in paragraph (f)
- (h) The alienation of any property, know-how, or information mentioned in paragraphs (a), (b), or (c) of this definition.

Where there is an applicable tax treaty, the definition of royalty as defined in the tax treaty shall prevail.

Royalties derived from Malaysia and paid to a nonresident, except where attributed to the business of such nonresident in Malaysia, are subject to withholding tax at a rate of 10% unless otherwise reduced by an applicable tax treaty.

Royalties are deemed derived from Malaysia if, among others:

- The responsibility for payment lies with a resident of Malaysia; or
- The royalty is charged as an outgoing or expense against any income accruing in or derived from Malaysia.

Other Payments

In addition to the above, the following payments, where deemed derived from Malaysia, are also subject to withholding tax:

- Fees for services rendered in Malaysia by a nonresident person or their employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery, or other apparatus purchased from, such nonresident
- Fees for advice, assistance, or services rendered in Malaysia in connection with management or administration of any scientific, industrial, or commercial undertaking, venture, project, or scheme
- Fees for rent or other payments made under any agreement or arrangement for the use of any movable property
- Miscellaneous gains or profits which do not constitute the business income of the nonresident.

The payments are deemed to be derived from Malaysia if, among others:

- The responsibility for the payment lies with a Malaysian resident; or
- The payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia.

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Tax Relief for Foreign Tax Suffered

Where there is an applicable tax treaty, bilateral relief is available to a Malaysian resident in respect of foreign taxes paid. The amount of relief given will be the lower of the tax suffered in the foreign country and the Malaysian tax attributable to the income.

Where there is no applicable tax treaty, unilateral relief is given, and this is restricted to the lower of half of the tax suffered in the foreign country and the Malaysian tax attributable to the foreign income.

Indirect Taxation

Effective September 1, 2018, Service Tax and Sales Tax replaced GST in Malaysia.

Service Tax

Service Tax is chargeable on (a) any taxable services provided in Malaysia by a registered person in carrying on his business; or (b) any imported taxable service. The rate of Service Tax is generally 6%.

The production of a film or video is not a taxable service. Any taxable service acquired from a taxable person in Malaysia is subject to 6% Service Tax and there is no input tax equivalent. In addition, where a business acquires any taxable service from a person outside Malaysia, Service Tax at 6% needs to be accounted for on such service, whether or not the business in Malaysia is registered for Service Tax.

For importation of digital services by consumers, a new provision is proposed to be introduced in the Service Tax Act 2018 with effect from January 1, 2020 requiring foreign suppliers who provide such services to consumers in Malaysia, to register and charge service tax. Examples of affected services include, but are not limited to, downloaded software, music, videos, and digital advertising.

Sales Tax

Sales tax is chargeable on taxable goods (a) manufactured in Malaysia by a registered manufacturer and sold, used, or disposed of by him; or; (b) imported into Malaysia by any person.

Sales Tax rate is generally 10%, unless the goods are specifically prescribed to be subject to a reduced Sales Tax rate of 5% or exempted from Sales Tax. Specific rates apply to petroleum products.

Certain equipment relating to the production of films is exempted from Sales Tax.

Personal Taxation

General Taxation Rules

An individual is taxed on income accruing in or derived from Malaysia. Such income will be subject to tax at a rate of 28% if the individual is a nonresident or at a graduated scale of 0%–28% if the individual is a tax resident of Malaysia.

An individual would be deemed to be a tax resident of Malaysia for a particular year of assessment if:

- They are in Malaysia for 182 days or more in a basis year

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- They are in Malaysia for less than 182 days; however, the period is linked by or linked to another period of 182 or more consecutive days
- They are in Malaysia for 90 days or more, and for three out of four immediate preceding years of assessment, they are either resident of or in Malaysia for periods amounting to 90 days or more
- They are resident in the year following the particular year of assessment and in each of the three years immediately preceding the particular year of assessment.

The above is subject to relief which may be available under applicable tax treaties.

Public Entertainers

A public entertainer is defined to include:

- (a) A compere, model, circus performer, lecturer, speaker, sportsperson, artiste, or individual exercising any profession, vocation, or employment of a similar nature; or
- (b) An individual who uses his intellectual, artistic, musical, personal, or physical skill or character in,

carrying out any activity in connection with any purpose through live, print, electronic, satellite, cable, fibre optic, or other medium, for film or tape, or for television or radio broadcast, as the case may be.

An individual who works behind the scenes in an arts-related activity or in a sports-related activity does not fall within the definition of public entertainer.

Resident public entertainers are assessed to tax at graduated rates of between 0% and 28%. An exemption of MYR10,000 is, however, available for a royalty or payment in respect of the publication of, use of, or right to use any artistic work (other than an original painting) and for a royalty in respect of recording discs or tapes. Limited exemptions are also available for resident individuals receiving income from musical compositions.

Income of a nonresident public entertainer consisting of remuneration or other income (including both monetary and nonmonetary payments such as fees, prize money, allowances [per diem], and reimbursements or disbursements for benefits enjoyed by the nonresident public entertainer such as accommodation, meals, air fare, and tax borne by a sponsor) in respect of services performed or rendered in Malaysia is subject to withholding tax of 15% on his/her gross income.

Remuneration or other income derived by a nonresident public entertainer is exempt from withholding tax in the following situations:

- (a) Where a public entertainer's income is paid out of the public funds of the government of a foreign country for an employment contract and the public entertainer performs in Malaysia for less than 60 days; and
- (b) Income derived by nonresident film companies, actors, and film crews who are in Malaysia from filming activities commencing on or after March 31, 1999, which have been approved by the Jawatankuasa Filem Asing, Ministry of Home Affairs, Malaysia.

Limited scope exemptions may be given under a tax treaty. As such, the terms of any relevant tax treaty should be reviewed to determine the extent of and qualifications for any exemption.

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