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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New Zealand

Introduction

Once called "one of the wonders of the world," the New Zealand film industry has continued to blossom as a popular filmmaking destination for international film production companies. This has been driven by New Zealand's remarkable and remote landscapes and the wealth of experience and comparatively cheap costs it can offer. The success of *The Lord of the Rings* trilogy has been followed by a string of other films, including *The Lovely Bones, District 9, Boy, The Hobbit, Tintin, Rise of the Planet of the Apes, and Dawn of the Planet of the Apes*.

New Zealand is particularly renowned for its leading post production and digital work. The digital effects in all three of the *Lord of the Rings* films, *King Kong,* and *Avatar* received both Academy Awards and BAFTAs for *Best Visual Effects*.

The New Zealand government is committed to the continuing development of a vibrant New Zealand film industry and supports the industry through a variety of financial incentives. This includes funding from the New Zealand Film Commission ("NZFC"); the New Zealand Screen Production Grant ("NZSPG"), which provides a 20 percent government grant to assist large budget productions that meet certain "New Zealand spend" criteria; and the Post, Digital and Visual Effects Grant. In certain cases, the NZSPG can be as much as 25 percent of eligible spend.

New Zealand is now well-positioned to offer a diverse variety of skills and expertise, as well as facilities built to worldwide leading practice specifications.

Key Tax Facts

Highest corporate income tax rate	28%
Highest personal income tax rate	33%
Goods and services tax rate	15%
Annual GST registration threshold	NZD 60,000
Normal nontreaty withholding tax rates:	
Dividends	30%, 15%, or 0%
Interest	15% or 0%
Royalties	15%
Tax year-end: Companies	March 31
Tax year-end: Individuals	March 31

Film Financing

Financing Structures

Co-production

New Zealand has entered into a number of co-production treaties with other countries. Currently, New Zealand has full co-production agreements with the following countries:

- Australia
- Canada
- China
- Chinese Taipei
- Denmark
- France
- Germany
- India
- Ireland
- Israel
- Italy
- Poland
- Republic of Korea
- Singapore
- Spain
- South Africa
- United Kingdom

The NZFC is authorized by the New Zealand government to deal with film and television co-production issues. If a co-production is appropriately structured, it is eligible for certification as a New Zealand film by the NZFC and may also be eligible for funding from the NZFC. The specific assessment criteria for a co-production will depend on the co-production agreement. However, as a general principle, there must be a balance between creative, financing and expenditure contributions from each country. Practically, financing and expenditure contributions in New Zealand are measured through actual or estimated expenditure, and creative contribution is measured on a points system, which allocates creative points depending on the nationality of certain personnel.

Partnership

At present, New Zealand has two forms of partnerships: general and limited liability partnerships.

General partnerships are not tax paying entities in their own right—partnership income is attributed to individual partners based on the partnership profit-sharing arrangements. Partners report the partnership income in their individual income tax returns, and the income is taxable at the individual's marginal tax rate.

All partners will be subject to New Zealand tax on their share of the partnership profits, as the carrying on of a business by the partnership gives each partner a permanent establishment in New Zealand. As partnership income is taxable in the partners' own hands, and general partnerships have unlimited liability, they are not commonly used in any investment structure.

The limited partnership rules have been in force since April 1, 2008 and provide that a limited partnership is a separate legal person from its partners.

Limited partnerships must have at least one general partner who carries on the partnership's business, and one limited partner who may provide capital to the partnership but is not permitted to participate in the management of the limited partnership. General partners are jointly and severally liable for any debts or liabilities of the limited partnership to the extent that the limited partnership itself cannot meet these. Limited partners have limited liability, except in some situations where they have participated in the management of the limited partnership.

General partners are able to claim a full deduction for their share of limited partnership tax losses, but limited partners can only claim tax losses to the extent of their economic loss. The limited partnership rules calculate this by limiting a limited partner's losses to the amount of the tax book value of their investment into the limited partnership. If in any year a limited partner was left with losses that they could not utilize, then these can be carried forward to a future year.

Nonresident partners are only subject to New Zealand tax on their New Zealand sourced income. This is because limited partnership income still flows through to the partners.

Unincorporated Joint Venture

A New Zealand resident investor may enter into a New Zealand-based unincorporated joint venture ("UJV"), also known as a contractual joint venture, with a foreign investor to finance and produce a film in New Zealand. The rights of exploitation may be divided worldwide amongst the UJV members, although the New Zealand company may retain exclusive media rights in New Zealand.

Difficulties often arise in determining whether the arrangements entered into are UJVs or partnerships. The legal documentation is critical and needs to be carefully drafted to avoid unintended consequences. If the agreement created a partnership, then all activities carried on in New Zealand would be on behalf of the partnership and are likely to create a taxable presence in New Zealand for the foreign investor (subject to any relevant tax treaty).

If a UJV is established, provided that the exploitation of the film can be kept separate from the production, the foreign investor should not be subject to New Zealand tax on the income it receives from exploiting the film in the overseas territories. This is because the investors are not sharing overall revenue but taking various worldwide rights to exploit from within their own home territories. As long as the foreign investor cannot be said to be carrying on a trade in New Zealand of film production or exploitation, New Zealand tax would be solely chargeable in respect of the New Zealand investor's activities and any other trade that the foreign investor may carry on in New Zealand.

The issue is more complicated if the foreign investor produces the film in New Zealand under a production contract. The foreign investor is likely to be taxed on the basis that business profits arise in respect of a permanent establishment that it operates in New Zealand. New Zealand's tax rules require an arm's length level of profit be returned in New Zealand. In these circumstances, it may be more appropriate to create a separate, New Zealand-incorporated, special-purpose company to undertake the production and set an appropriate market rate for the production fee so that this risk is lessened.

The New Zealand company would be taxed on profits arising from its exploitation of the film. The foreign investor would only be taxable when it carried out the production of the film, provided the correct structure was in operation.

New Zealand Branch

If the foreign investor produces the film in New Zealand, it is likely that it would have a production office and hence a permanent establishment in New Zealand. The business profits relating to that permanent establishment would be taxed in New Zealand, and the foreign investor would have to rely on an applicable double tax treaty to obtain relief.

New Zealand's tax treaties generally provide that New Zealand tax on business profits is creditable against the tax in the foreign jurisdiction. New Zealand currently has tax treaties with the following countries:

- Australia
- Austria
- Belgium
- Canada
- Chile
- China
- Czech Republic
- Denmark
- Fiji
- Finland
- France
- Germany
- Hong Kong
- India
- Indonesia
- Ireland
- Italy
- Japan
- Malaysia
- Mexico
- Netherlands
- Norway
- Papua New Guinea
- Philippines
- Poland
- Republic of Korea
- Russian Federation
- Samoa
- Singapore
- South Africa
- Spain
- Sweden
- Switzerland
- Taiwan
- Thailand
- Turkey
- United Arab Emirates
- United Kingdom
- United States of America
- Vietnam

New Zealand Subsidiary

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

Look-through Companies

For income years beginning on or after April 1, 2011, certain New Zealand companies can elect to be "look-through companies" for tax purposes. A look-through company retains limited liability in respect of its shareholders, but allows the income and expenditure of the look-through company to be directly attributed to its shareholders for tax purposes (similar to partnerships).

Recent law changes mean that where nonresidents control a company (i.e., ownership interests exceed 50 percent), the company will only be able to retain its look-through status if no more than NZD 10,000 or 20 percent of gross income (whichever is greater) is foreign sourced. In other words, the entities will only be effective for New Zealand sourced income.

Equity Tracking Shares

The term "equity tracking shares" is not commonly used in New Zealand. 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 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 New Zealand, these tracking shares would be regarded as preference shares. The dividends paid on the tracking shares would be treated in the same way as dividends paid on ordinary shares. If imputation credits were attached, care would need to be taken to ensure the anti-streaming rules do not apply to the imputation credits so attached.

If the tracking shares are acquired by a New Zealand 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. Any tax withheld would be dealt with according to the dividend article of the appropriate double tax treaty. Alternatively, where no double tax treaty exists, a unilateral foreign tax credit would likely be available under New Zealand domestic law.

Under no circumstances are dividends deductible for New Zealand tax purposes.

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 New Zealand tax purposes, this "debt security" is likely to be treated as equity ("a section FA 2 debenture"). Further, any "interest" paid on the security would not be tax deductible and would be treated as a taxable dividend.

Sale and Leaseback

New Zealand has tax legislation to ensure that taxpayers entering into transactions involving the sale and leaseback of certain property are not entitled to deductions for the lease payments, which Inland Revenue describes as "in substance repayments of loan principal."

Tax and Financial Incentives

Investors

There are no specific tax incentives in New Zealand for investors in the film industry, although most production expenditure is deductible once over either one or two years. However, the Government has introduced several funding schemes to encourage the production of New Zealand films.

Government Funding Schemes

From April 1, 2014, the New Zealand government introduced the NZSPG to replace the Large Budget Screen Production Grant and Screen Production Incentive Fund. The NZSPG increased the incentives offered to both New Zealand and international film and television productions.

International Productions

For international productions, the NZSPG currently provides eligible applicants the following tax-exempt grants:

a) For Post, Digital and Visual effect ("PDV") productions:

   i. 20 percent of Qualifying New Zealand Production Expenditure ("QNZPE") up to NZD 25 million; and

   ii 18 percent of QNZPE above NZD 25 million

b) For Live Action Productions ("LAP"), 20 percent of QNZPE

For LAPs, this can be further increased by 5 percent providing they are invited to apply for, and qualify for, the uplift (i.e., they can receive a total International Grant of 25 percent of QNZPE.

LAP films must feature real people or animals and have the overall effect of marketing, promoting and showcasing New Zealand. Applicants that are invited to apply for this 5 percent uplift will be assessed by a verification panel to determine whether this additional grant will generate significant economic benefit to New Zealand.

Unlike the grant for New Zealand productions (discussed below), the international productions grant is not capped. QNZPE is generally production expenditure spent by the applicant on:

- Services provided in New Zealand;
- The use of land located in New Zealand;
- Goods purchased, hired or leased in New Zealand, provided they are sourced from within New Zealand; and
- Goods sourced from overseas, provided those goods are not otherwise available in New Zealand, are located in New Zealand during the making of the production; and are purchased, hired or leased from a New Zealand resident who typically supplies that type of good.

QNZPE includes travel expenses of non-New Zealanders who work on the production in New Zealand, provided (in the case of non-cast members) they work on the production for at least 14 days in total.

QNZPE also specifically includes expenditure incurred through the acquisition of:

- New Zealand copyrights (providing the original owner is or was a New Zealand resident);
- Additional audiovisual content that will be released with the production; and
- The one-way cost of a direct incoming journey to New Zealand.

International productions for feature films need to have QNZPE of at least NZD 15 million to qualify. For international television series or non-feature film productions, the production will need to incur NZD 4 million of QNZPE to qualify. Productions may also be bundled if they meet certain criteria, including the following:

- The QNZPE is at least NZD 30 million for the bundle and NZD 3 million for each individual production;
- All the productions in the bundle have completed principal photography within 36 months following the date the first production commenced principal photography or PDV activity; and
- The applicants for each individual production are related to each other by having a common shareholding of at least 50 percent.

Applicants must first apply for a provisional certificate or register their production with the NZFC in order to be eligible to make a final application for the grant, and there may be a fee associated with this application. Applicants must inform NZFC as soon as practicable after registering if the estimated QNZPE for a production changes by NZD 10 million or more.

Applicants can submit:

- A final application once all QNZPE on the production is completed or all that is intended to be claimed is completed; or
- An interim application each time the QNZPE for the production has exceeded NZD 50 million, provided that there is evidence that the production will be completed. Where this occurs, a final application setting out the remaining WNZPE must also be provided once all QNZPE for the production is completed.

Final applications must be made no later than six months after completion of the production (or completion of the last production within a bundle).

A production that has already been the subject of a successful final application is not eligible to form part of another final application as part of a bundle.

New Zealand Productions

For New Zealand productions, a tax-exempt grant of 40 percent up to NZD 15 million of QNZPE is available for certain productions. The New Zealand production grant is capped at NZD 6 million.

An additional grant is available for certain eligible productions, which have a QNZPE between NZD 15 million and NZD 50 million. Eligibility requires the applicant to demonstrate the production will result in significant cultural benefits to New Zealand. The additional grant is capped at 14 million, meaning the maximum total NZSPG for New Zealand productions is NZD 20 million.

In return for an additional grant, applicants must provide the NZFC with a share of net receipts (including profit) from the production equivalent to 50 percent of the equity share in the production attributable to the value of the additional grant.

The minimum QNZPE for an eligible New Zealand feature film is NZD 2.5 million, whereas for a series of programs or a single-episode program, the minimum QNZPE is NZD 1 million and NZD 250,000 for a documentary or short form animation. It should be noted that there are some differences between the inclusions and exclusions to QNZPE for New Zealand productions and international productions.

Grant productions must have significant New Zealand content to be considered a New Zealand production, and qualify for the increased funding rate and lower QNZPE thresholds. When determining if a production has significant New Zealand content, numerous factors will be considered such as the subject and location of the films; nationalities and places of residence of key crew, cast, investors, and copyright owners; sources of funding; ownership and location of equipment and technical facilities; and any other matters the NZFC deems relevant. If a film is made pursuant to any agreement between the New Zealand government and the government of any other country, then it is deemed to have significant New Zealand content.

To be eligible for the grant, feature films must have confirmed commercial cinematic distribution in New Zealand (e.g., a legally binding deal memorandum or distribution agreement) to release the film as the main attraction in cinemas. Similarly, the production of television and non-feature films must also have confirmed commercial agreements for distribution to be eligible for the grant.

The final application for funding under the New Zealand grant can be submitted once the production has been completed. An application for the New Zealand grant cannot be made later than six months after the completion date of the production.

A provisional application can be made before the start of the production to indicate whether the production will meet the eligibility criteria. However, a provisional application does not guarantee the final application will be approved.

Applicants must apply for a provisional certificate or register their production on the NZFC website in order to be eligible to make a final application for the grant, and there may be a fee associated with this application. Applicants must inform NZFC as soon practicable after registering if the estimated QNZPE for a production changes by NZD 1 million or more.

Other criteria

Applicants for the NZSPG must be either a New Zealand resident company or partnership, or a foreign company with a fixed establishment in New Zealand for the purposes of lodging an income tax return.

Successful applicants are not eligible for any other New Zealand government film finance contribution or tax incentive in relation to the production (see discussion under corporate taxation below) or funding through other government agencies.

The screen production must be a feature film, a television movie, television drama series, or mini-series.

Post, Digital and Visual Effects Grant ("PDVG")

To qualify for the PDVG, the QNZPE for a production must exceed NZD 500,000 and be spent on or necessarily related to specified post, digital and visual effects work which are listed in the PDVG criteria. As for the NZSPG, the QNZPE is expenditure on goods or services provided in New Zealand, including expenditure for the use of land in New Zealand.

Criteria relating to residency and exclusion from other grants are the same as for the NZSPG. Applications for the grant can be made once all QNZPE on the production is paid, and must be made within six months from completion of the production.

New Zealand Film Commission ("NZFC")

The NZFC has the responsibility to "encourage participate, and assist in the making, promotion, distribution, and exhibition of films made in New Zealand by New Zealanders on New Zealand subjects," both domestically and internationally.

The NZFC provides financial assistance for New Zealand feature film projects and New Zealand filmmakers by way of loan or equity financing. Loans are available for development costs and are repayable only if the film is actually produced. Equity financing is available for films which have past the development stage and are being produced. The NZFC has a total annual investment budget of approximately NZD 13 million, which it allocates across a minimum of four feature films and nine short films in any one year. These films usually fall within a budget range of NZD 1 million to NZD 5 million.

Approximately 56 percent of the NZFC's annual expenditure is committed to feature film production and development financing, although the NZFC's investment in a single project generally does not exceed NZD 150,000.

NZ On Air

NZ on Air provides funding to producers of television programs for broadcast on New Zealand free-to-air television channels. Approximately NZD 80 million of contestable funding is allocated annually.

The aim of NZ on Air is to help ensure that New Zealand-made programs and broadcasts that would otherwise not be provided in a commercial market are made.

NZ on Air considers certain factors when considering a program for funding, including the production budget, the level of funding from other sources, and whether the program reflects the diverse nature of New Zealand's population and culture. NZ on Air also requires producers to have a commitment from a major New Zealand free-to-air broadcaster before it considers a program for funding.

Other Financing Considerations

Tax Costs of Share or Bond Issues

No tax or capital duty is imposed in New Zealand on any issue of new ordinary or preference shares, nor does New Zealand impose stamp duty.

Exchange Controls and Regulatory Rules

There are no specific exchange controls or other regulatory rules in New Zealand. Therefore, there is nothing to prevent a foreign investor or artist from repatriating income arising in New Zealand back to his or her own home territory.

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

The New Zealand government, through the Overseas Investment Commission, maintains a low level of control over "significant" foreign investment to help ensure investment that is inconsistent with government criteria is discouraged, particularly in relation to certain land. Under the Overseas Investment Act, an "overseas person" must obtain consent to acquire or take "control" of 25 percent or more of a New Zealand business worth more than NZD 100 million.

Corporate Taxation

Recognition of Income

Film Production Company – Production Fee Income

New Zealand Resident Company

If a special purpose company is set up in New Zealand to produce a film without acquiring any rights in that film, i.e., a "camera-for-hire" company, the tax authorities may query the level of attributed income if they believe that there is some flexibility in the level of production fee income that may be attributed to it, such that it is below a proper arm's length rate.

It is possible to seek a binding ruling in the form of an Advance Pricing Agreement from the New Zealand tax authorities to confirm an acceptable level of attributed income.

Non-New Zealand Resident Company

If a company is a nonresident in New Zealand but has a production office to administer location shooting in New Zealand, the tax authorities may argue that it is subject to tax in New Zealand by reason of having a permanent establishment in New Zealand, subject to a specific exemption under an applicable double tax treaty.

If the New Zealand tax authorities attempt to tax the company on a proportion of its profits on the basis that it has a permanent establishment in New Zealand, they would first seek to attribute the appropriate level of profits that the enterprise would be expected to make if it were a separate enterprise operating on an arm's length basis. It is likely that the New Zealand tax authorities would measure the profit enjoyed by the company in its own resident territory and seek to attribute a specific proportion of this, possibly by comparing the different levels of expenditure incurred in each location or the periods of operation in each territory.

If a company is a nonresident in New Zealand and does not have a production office in New Zealand, but undertakes location shooting in New Zealand, it is unlikely that it would have a New Zealand tax liability since it would not be regarded as having a permanent establishment. The New Zealand tax authorities would determine whether or not a "permanent establishment" exists by applying the appropriate article in the relevant double tax treaty, i.e., locations such as a branch, office, factory, workshop, or similar site. This would be undertaken in accordance with OECD principles. If no treaty exists, New Zealand sourced income would be subject to New Zealand tax.

Payments to a non-New Zealand resident company performing services in New Zealand are subject to a non-final 15 percent nonresident contractors' tax ("NRCT"). This assumes the nonresident has a New Zealand tax number ("IRD number") that was provided to the payer. If no IRD number is provided, the NRCT rate is 20 percent of every payment. However, an exemption is available if the company can show that it does not have a tax liability in New Zealand (for example, a nonresident company is not subject to New Zealand tax under a double tax agreement due to not having a permanent establishment). Application for the exemption must be made to the New Zealand Inland Revenue Department.

Film Production Company – Sale of Distribution Rights

If a New Zealand-resident production company sells licenses rather than assigns distribution rights 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 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 license.

The acquisition of such rights is treated as film expenditure and is tax deductible in the same manner as non-New Zealand film production expenditure (discussed under "Amortization of Expenditures").

The receipts by the New Zealand production company would be regarded as royalties, and the profits would be subject to corporate tax as profits arising from a trade. These rules apply whether or not the acquiring party is a resident in a country with which New Zealand has a double tax treaty.

If intangible assets such as distribution rights are transferred from New Zealand to a connected party in a foreign territory, the tax authorities would seek to ensure arm's length consideration is provided.

Film Distribution Company

If a New Zealand 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 tax deductible in the same manner as non-New Zealand film production expenditure (discussed under "Amortization of Expenditures"). The expenditure is regarded as a royalty payment rather than as the purchase of an intangible asset, unless the New Zealand company acquires all rights to the film. This would be the case whether the company exploits the rights in New Zealand or worldwide, and whether or not the production company is a resident in a country that has a double tax treaty with New Zealand.

Where the recipient of the payments is a nonresident and not subject to tax in New Zealand, the royalties are subject to New Zealand withholding tax.

The New Zealand withholding tax regime does not discriminate between royalty payments for films or other intellectual property. In the absence of a double tax treaty, all royalties are subject to a withholding tax of 15 percent.

Examples of the relevant royalty rates under New Zealand's double tax treaties are as follows:

— United States	— 5%
— Australia	— 5%
— Netherlands	— 10%
— United Kingdom	— 10%
— Singapore	— 5%
— Malaysia	— 15%
— Thailand – dependent on type of royalty	— 10% or 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 the parties were connected, the tax authorities might question the level of income returned. For New Zealand taxation purposes, income in this case is normally recognized when the right to be paid is irrevocably determined.

Nonresident Film Renters

Income derived by nonresident film renters (i.e., income from renting, exhibiting, or issuing a film, or from the selling or hiring of film equipment) was historically taxed in New Zealand on the basis that 10 percent of the gross receipts from New Zealand were taxable in New Zealand. This effectively meant New Zealand taxed this income at 2.8 percent (i.e., 10 percent at the corporate tax rate of 28 percent).

From November 2, 2012, income derived by a nonresident film renter in New Zealand is taxable as a royalty and subject to the New Zealand withholding tax regime. The withholding tax rate is 15 percent, which can be reduced to 10 percent or 5 percent if a double tax treaty applies.

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 a New Zealand-resident company, care needs to be taken to help ensure that the level of profit returned in New Zealand is based on arm's length principles. The New Zealand tax authorities apply standard OECD principles in determining whether income is being returned on an arm's length basis.

It is possible to obtain formal clearance of the attributed income in advance from the New Zealand tax authorities by way of an Advance Pricing Agreement.

Amortization of Expenditures
New Zealand tax legislation contains detailed rules regarding the timing of deductions that may be claimed when producing a film or acquiring rights to a film. In addition, there is a general rule that where expenditure (including film expenditure) has been financed by way of a limited recourse loan (i.e., a loan where repayment is conditional on the venture producing interest or an event occurring), no deduction may be claimed for deductible expenditures arising under the loan until such time as the borrower is personally at risk. Outside of this situation, the principles governing deductibility of expenditures are outlined below.

Production Expenditures
The costs of producing a New Zealand film (that has been certified as such by the NZFC) can be deducted in the year of completion. In addition, any costs incurred in later years are deductible in the year in which they are incurred. As noted above, the NZFC certifies a film as a New Zealand film where it has significant New Zealand content.

For non-New Zealand films, the deduction for film production expenditure is spread over two income years, beginning in the year of completion. In general, 50 percent of the production expenditure is deductible in the year of completion and the remainder is deductible in the following year. An exception to this applies where the income from the film derived in the year of completion exceeds the 50 percent deduction. In this case, the deduction in the year of completion is the minimum of the total production expenditure or the income derived from the film. Any remaining expenditure is deductible in the following income year.

There are also spreading rules in relation to expenditure incurred in acquiring film rights. Where the film is a feature film (a film that is produced primarily and principally for exhibition in a cinema), the deduction is prorated over the 24-month period beginning in the month in which the film was completed. Where the film is a non-feature film, 50 percent of the production expenditure is deductible in the year of completion and the remainder is deductible in the following year. Similar to non-New Zealand films described above, the exception also applies to this rule. The exception meaning where income from the rights in the film derived in the year of completion exceeds the 50 percent deduction, a deduction is allowed to the extent of the income.

The above rules do not apply to advertising films or commercials. In these circumstances, the production expenditure is deductible when incurred.

Other Expenditures
Certain other expenditures cannot be deducted, for example, any expenditures on capital account, such as the purchase of land, goodwill, and investments. Neither can the acquisition of plant and machinery be deducted, although tax depreciation can be deducted at specific rates. Additionally, certain day-to-day expenditure is not fully deductible, such as business entertainment, or not deductible at all, such as expenditure that is too remote from any business purpose.

Losses
To the extent that a production company has incurred tax losses, those losses can only be carried forward and offset against future income. The losses cannot be offset against prior period income.

Unlike certain other territories, there is no time restriction for utilizing such trading losses, although there are rules that restrict the availability of loss relief following a change in ownership of a company.

Recent developments (as of August 30, 2017)

Permanent establishment

In March 2017, the New Zealand Government proposed a rule to prevent large multinational entities (global turnover of more than EUR 750 million) avoiding a permanent establishment by using a New Zealand-related party to support local sales activities. The deemed permanent establishment rule will apply:

- Where there are sales to New Zealand consumers or businesses;
- A related entity in New Zealand (e.g., a subsidiary or dependent agent) carries out activities in New Zealand (e.g., using local employees) to bring about those sales;
- Some or all of the sales are not attributed to a New Zealand permanent establishment; and
- The arrangement is designed to defeat the intention of New Zealand's double tax treaties.

This is aimed at what the New Zealand Government considers in-country sales, rather than sales "to" consumers in a country (e.g., online sales). However, it is worth noting that use of third party as well as related party sales channels can create a New Zealand permanent establishment under the proposals.

On August 3, 2017 the New Zealand government released its decisions on the BEPS package and a variety of reports. Officials recommended that the deemed permanent establishment rule should have a narrower application – to "avoidance arrangements" only. The detail of that rule is subject to further consultation. While it is not yet clear what the avoidance rule will be, the original proposals contained factors to be assessed in applying the deemed permanent establishment rules (e.g., involvement of a low-tax jurisdiction, low return for the New Zealand activities). These are likely to be part of the definition.

Transfer pricing

The recent proposals also include a number of changes aimed at strengthening New Zealand's transfer pricing rules, which will:

- Allow the New Zealand tax authorities to disregard transactions where it concludes the legal form does not align with economic substance, and re-characterize these transactions to impute what it considers to be "arm's length";
- Put greater onus on taxpayers to justify their related party transfer pricing positions by shifting the burden of proof for transfer pricing disputes to the taxpayer; and
- Extend the period that the New Zealand tax authority can dispute transfer pricing matters to seven years.

It is likely that the above mentioned rules will apply from April 1, 2019. While these rules should not impact most nonresident industry participants relative to their current position, it is important the rules are considered when considering New Zealand projects.

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 a New Zealand-resident film distributor/producer receives income from unconnected, nonresident companies, but suffers overseas withholding tax, the New Zealand-resident film distributor/producer is normally able to rely on New Zealand's wide range of double tax treaties to obtain relief for the tax suffered. If no such treaty exists between the territories concerned, it could expect to receive credit for the tax suffered under domestic law.

Indirect Taxation

GST

GST is a broad-based consumption tax payable on most supplies of goods and services at 15 percent. However, certain supplies (e.g., exports) are zero-rated, while others (e.g., financial services) are exempt.

Most supplies and purchases of goods and services made by film producers and distributors are taxable at the standard rate. Supplies of goods and services to persons outside New Zealand can often be zero-rated (i.e., GST charged at 0 percent)—this may appeal to foreign companies producing films in New Zealand as this allows GST incurred in New Zealand to be recovered without a flow-through cost to the offshore party. Credits are available for GST paid on goods and services purchased by the film producer/distributor for the purpose of making taxable (at the standard or zero rate) supplies.

On April 1, 2014, new rules were introduced that allow a nonresident to register for GST in New Zealand and claim input tax credits for the GST on their New Zealand costs, irrespective of whether they are making any taxable supplies in New Zealand. Nonresident GST registration allows companies incurring costs in New Zealand, but who do not receive consideration from New Zealand for the supply of their productions, to recover GST on any costs incurred in New Zealand. The rules require that the nonresident person is making supplies for consideration outside New Zealand.

Customs Duties

The New Zealand Customs Service, rather than the Inland Revenue Department, levies and collects GST on imported goods and goods liable to excise duty. (Currently, only fuel, alcoholic beverages and tobacco products are subject to excise duty.) The New Zealand Customs Service collects the GST, as if it were customs duty, and the tax is imposed irrespective of whether the importer is registered for GST. This GST may be levied on imported equipment, for example. If the importer is GST-registered, the importer is able to claim GST paid to customs as if it were normal GST paid on goods and services.

The New Zealand Customs Service also levies and collects customs duty, which is levied on an ad valorem basis on certain imports.

Digital Media

In the past, media could only be supplied to audiences through a few distribution channels. However, the market for media is increasingly moving to a digital format. Businesses can now provide content such as films, TV shows, and other media, to customers through cloud-based computing and the Internet. This enables businesses to reach a global audience easily, which is something the market and the tax authorities have not seen before.

New Zealand tax law (and tax law globally) has been developed for the old market with little consideration for the digital media model. As such, the market shift to digital media has raised issues in relation to whether the old tax rules capture the "fair" amount of tax in New Zealand (and other countries).

The digital media model brings into question the ability of organizations to partake in "profit shifting" by supplying productions to a global audience via the Internet, but basing their operations in jurisdictions with relatively low tax rates. International tax treaties provide relief from tax for the digital economy on the basis that a digital presence in a country does not generally constitute a permanent establishment, through which a taxable presence is generally created.

With regard to GST/VAT on imported services, in 2015 the OECD released 43 guidelines that establish an international set of principles for determining when countries should have the right to tax such digital supplies.

The New Zealand response has been to amend domestic tax legislation to impose GST at the border on imported services ("remote services"), including supplies made digitally.

We briefly outline below how the current rules apply to the supply of digital media in New Zealand in respect of GST and income tax, as well as what we expect to change.

Income Tax

Current Rules

The supply of digital media in New Zealand to a New Zealand business or consumer arguably has a source in New Zealand. As such, New Zealand would prima facie seek to tax this income.

Under domestic law, no New Zealand income tax is currently payable on direct sales where the nonresident seller has no presence in New Zealand in relation to its sales (either in its own right or through another entity) and simply supplies goods or services from overseas to New Zealand customers. There is no New Zealand source income where a nonresident simply sells goods and services from abroad into New Zealand.

In addition, New Zealand is a party to a number of tax treaties with other countries. As a general rule, businesses are only subject to New Zealand tax on the profits attributable to a permanent establishment in New Zealand. As the definition of permanent establishment does not contemplate or include a digital presence, in most cases, suppliers of digital media would not have a permanent establishment in New Zealand. As such, under the current rules, we would expect the supply of digital media (by foreign businesses in New Zealand) to not be subject to New Zealand tax.

Therefore even if the nonresident's income had a New Zealand source, the New Zealand tax authorities would be prevented from taxing it under any applicable double tax treaty.

GST

Current Rules

GST is chargeable on the supply of goods or services in New Zealand. Supplies made by a New Zealand resident are automatically treated as made in New Zealand. The supply of digital media is, therefore, subject to GST if a New Zealand resident makes the supply.

Beginning October 1, 2016, New Zealand now collects GST on a nonresident's supply of remote services to a New Zealand resident customer who is not registered for New Zealand GST. These new rules apply to the supply of digital media (and other services) on the basis that such a supply constitutes a remote service (as defined below).

The key elements that determine whether the new rules apply are:

— Whether the offshore supplier supplies remote services defined as "services where, at the time of performance of the service, there is no necessary connection between the physical location of the recipient and the place of physical performance;"

— Whether the supply is to a New Zealand resident customer, as determined on the basis of two pieces of non-conflicting evidence supplied by the customer; and

— Whether the New Zealand customer is registered for New Zealand GST. Where the New Zealand customer is registered, there is no supply for New Zealand GST purposes (although the overseas supplier may opt to treat it as taxable at 0 percent in order to recover GST input tax). Offshore suppliers must treat New Zealand customers as not registered, unless the customer states that they are registered or provides their GST registration number.

Where the rules do apply, offshore suppliers need to register for and return GST in New Zealand if their total annual supplies exceed NZD 60,000.

Personal Taxation

Nonresident Artists

New Zealand's tax treaties generally provide that nonresident artists are only taxable in New Zealand to the extent to which they perform services in New Zealand. The tax authorities would also seek to tax income received outside New Zealand in connection with a New Zealand performance, unless it relates to services carried on outside New Zealand.

If a nonresident artist receives any payment arising from or as a consequence of a New Zealand activity, the New Zealand payer is obliged to deduct withholding tax and account for this tax to the authorities. The rate of withholding tax varies depending on whether the artist is a nonresident entertainer (20 percent) or a nonresident contractor (15 percent).

Nonresident artists are only taxable on remuneration received in respect of services performed in New Zealand. Provided that genuine services are performed outside New Zealand and an arm's length fee is payable for those services by the production company, no tax is levied in New Zealand on those payments.

Fringe benefit tax ("FBT") is levied on the employer at up to 49.25 percent in respect of benefits, such as employer-provided cars, free or low interest loans, goods and services sold at a discount or provided free by an employer, and expenses paid on behalf of an employee. However, certain items are not subject to FBT or withholding tax, such as the use of certain commercial vehicles where private use is restricted, residential accommodation provided to an employee living away from home, and a number of other minor items.

The employer is entitled to an income tax deduction for FBT against its assessable income.

Resident Artists

Resident artists are treated either as employees or independent contractors, depending on how the arrangement is structured. Film production workers are, by default, independent contractors unless engaged under a written employment agreement that provides that the person is an employee.

Independent Contractors

If the resident artist contracts through a company, he or she is subject to the ordinary company tax rules. However, if more than 80 percent of the company's income is derived from a single source for services provided by a single individual, and the income derived is more than NZD 70,000, the income is attributed to the individual and taxable at the individual's marginal tax rate.

Where a payment is made to a resident artist or a "behind-the-camera" person (e.g., a director or behind-the-scenes support staff) who is not an employee, the payer is obliged to deduct withholding tax at 20 percent and account for this tax to the authorities.

Employees

Income Tax Implications

Film producers/distributors who have employees performing services in New Zealand are obliged to make regular, periodic payments to the New Zealand tax authorities in respect of the employees' personal tax liabilities arising from salaries or wages paid to them. Deductions are made under the "pay as you earn" ("PAYE") system. New Zealand employers deduct PAYE based on tax tables supplied by the tax authorities where the tables are designed to approximate the rates applicable on annual salaries.

Social Security Implications

Employers are not liable for superannuation contributions in respect of payments of salaries or wages made to a New Zealand employee unless they are a New Zealand resident (e.g., a New Zealand subsidiary or New Zealand branch).

New Zealand employees may "opt out" of being members of a Kiwisaver superannuation fund. If the employees have not "opted out" the employer will be liable to make employers contributions to the scheme, matching the employees' contribution of at least 3 percent of total salary. However, where the employer makes contributions to a superannuation scheme, they are required to deduct specified superannuation contribution withholding tax in the same manner and at the same rates as PAYE.

Employers of New Zealand employees are obliged to deduct from their employees' salaries and wages the employees' Accident Compensation Corporation ("ACC") levy. The rate is currently NZD 1.39 per NZD 100 of the employee's earnings, but capped at NZD 1,696.67. The levy is deducted in accordance with the PAYE system.

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