


IT 2476 - Income tax : taxation incentives for Australian film industry

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TAXATION RULING NO. IT 2476

INCOME TAX : TAXATION INCENTIVES FOR AUSTRALIAN FILM
INDUSTRY

F.O.I. EMBARGO: May be released

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1183763	FILM CERTIFICATES	124K, 124ZAB, 124ZAC
	FILM BUDGET	124ZAD, 124ZAFA(1)
	PRODUCER/CONTRIBUTOR	124ZAFA(1) (a)
	DONATION OF SERVICE	124ZAFA(1) (d) (iv)

OTHER RULINGS ON TOPIC IT 2111, IT 2377

PREAMBLE The purpose of this Ruling is to clarify a number of issues which have arisen in relation to the interpretation and operation of the provisions of the income tax law relating to investment in Australian films. The provisions are contained in Divisions 10B and 10BA of the Income Tax Assessment Act.

2. Division 10B of the Act provides, amongst other things, that capital expenditure incurred in acquiring rights in or under copyrights relating to Australian films may be deducted over two income years. The two year write-off concession is available for the capital cost of Australian film rights in cases where the rights or films to which they relate are first used for the purpose of producing assessable income after 21 November 1977.

3. In the alternative, Division 10BA of the Act provides concessional treatment for capital expenditure incurred on or after 1 October 1980 in relation to an Australian film. Where a taxpayer has, under a contract entered into after 19 September 1985, expended capital moneys in producing, or by way of contribution to the cost of producing an Australian film an amount calculated as 120% of the capital expenditure incurred is an allowable deduction. The deduction is allowable in the year of income the expenditure is incurred.

RULING Certificates - Division 10B and Division 10BA

4. For an income tax deduction to be allowed under Division 10BA the relevant film must be certified by the Minister for Arts, Sport, the Environment, Tourism and Territories as a "qualifying Australian film", i.e., a film which qualifies as an "eligible film" and an "Australian film" under Division 10BA.

5. Broadly, an "eligible film" is a feature film, documentary, telemovie or mini-series of television drama produced wholly or substantially for exhibition to the public in cinemas or on

television. An "Australian film" is a film made wholly or substantially in Australia (or in an external Territory) which has a significant Australian content, or a film that is made in terms of an agreement between the Australian Government and the Government of another country.

6. In determining whether a film has a significant Australian content for the purposes of qualifying as an "Australian film" section 124ZAD requires the Minister to have regard to certain specified matters:- the subject matter of the film; the place where the film is made; the nationality and residence of the participants, i.e., the actors, director, producer, etc. and the owners of the film; the source of the finance for the film; the details of the production expenditure of the film; and any other matters the Minister considers relevant.

7. For an investment in an Australian film to be deductible under Division 10B the film needs only to be certified by the Minister as an "Australian film". The definition of an "Australian film" in subsection 124K(1) of Division 10B is the same as the definition in Division 10BA. However, in determining whether a film has a significant Australian content for the purposes of qualifying as an "Australian film" under Division 10B, the Minister is not required by the provisions of subsection 124K(1A) to take into account details of the production expenditure of the film.

8. The question has arisen whether a separate certificate will be required in order to claim a deduction under Division 10B if the Minister has already certified the film to be a "qualifying Australian film" under Division 10BA.

9. The matters to be considered under Division 10B and Division 10BA when determining significant Australian content are not identical. As indicated above, Division 10BA specifies an additional matter which must be taken into account, i.e., the details of the production expenditure of the film. On the other hand, the matters listed for consideration when determining whether a film has a significant Australian content are not exhaustive. Each Division provides that the Minister shall have regard to any other matters that the Minister considers to be relevant.

10. A decision that a film has a significant Australian content in terms of Division 10BA is required to be made having regard to the details of the production expenditure of the film. If those details have no bearing on the decision, then the same decision would arise under Division 10B. Even where the details of production expenditure are relevant to the Minister's decision, the details are also able to be taken into account in determining significant Australian content under Division 10B since that Division requires the Minister to have regard to any other matter that the Minister considers to be relevant in determining the issue.

11. It is considered, therefore, that a film that satisfies the requirements of a "qualifying Australian film" under Division

10BA will usually, if not always, qualify as an "Australian film" for Division 10B. On this basis, a certificate for a film issued under Division 10BA is considered sufficient to allow deductions for investment in the film under Division 10B.

12. This decision does not apply in the converse situation i.e., a certificate issued pursuant to Division 10B does not necessarily meet the requirements of Division 10BA. The most obvious reason is that under Division 10BA the film must qualify not only as an "Australian film" but also as an "eligible film". Moreover, a deduction under Division 10BA is allowed ultimately only where a "final certificate" has been issued by the Minister in respect of the film. A "final certificate" is specifically defined as a certificate issued under section 124ZAC of Division 10BA.

13. The provisions of Division 10BA authorise the Minister to refuse certification of a film which has a significant Australian content if it also has a significant non-Australian content. These provisions extend the Minister's power to deny certification rather than extend the Minister's power to authorise or grant certificates. They have no bearing on the question of whether a film that has been certified under Division 10BA will also satisfy the requirements for certification under Division 10B.

Increase in Film Budget

14. It may occur that the funds budgeted and subsequently raised to produce a film are insufficient to complete production due to circumstances not envisaged at the time the original budget was formulated. Consequently, it may be necessary for additional contributions to be raised to fund the increase in the budget. The question has arisen whether deductions would be allowed to investors under Division 10BA for the additional contributions and whether the raising of those contributions would affect the eligibility for deduction of existing investments in the film.

15. Section 124ZAFB allows an income tax deduction for capital moneys contributed to the cost of producing an eligible film. Subparagraph 124ZAFB(1)(d)(iv) requires that in order for contributions to be deductible a production contract, or a production contract together with one or more underwriting contracts, under which funds equal to "the estimated cost of production of the film" are agreed to be expended on the film, must be entered into by the end of the financial year in which moneys were first expended in, or contributed towards, the production of the film.

16. The subparagraph requires only that funds equal to the estimated cost of production be agreed to be expended by the end of the relevant year of income. It is recognised that the actual cost of production cannot be known prior to completion of the film. Therefore, if funds covering the estimated cost are secured, an income tax deduction is allowable for contributions to the film even though the estimate may subsequently prove to be incorrect and additional finance may be required.

17. Where additional funds are raised to finance an increase in the film's budget, the question whether a deduction is allowable for the additional contributions and whether the arrangement used to raise those contributions alters the eligibility of existing investments for deduction can only be answered in the light of the facts of each case.

18. As a general proposition, it is possible to raise additional funds to complete the production of a film within the provisions of Division 10BA if care is taken to ensure the arrangement does not infringe the provisions of the Division. Where additional contributions are raised prior to completion of the production of the film, but within the terms of an existing production contract, there would ordinarily be no reason to deny a deduction for the additional contributions - provided, of course, the original budget for the film was a bona fide estimate of the cost of production and the other conditions of Division 10BA are satisfied.

Operation of two bases of deduction - Section 124ZAFB

19. Under section 124ZAFB there are two distinct bases for allowing an income tax deduction for moneys invested in an Australian film. A deduction is allowable in respect of capital moneys expended in producing a film or a deduction is allowable in respect of capital moneys expended by way of contribution to the cost of producing a film.

20. The first base for allowing a deduction in respect of an Australian film is seen to apply to a person who pays money directly on the production of a film, i.e., a film producer who produces an eligible film in his or her own right on capital account and who expends money directly on the production of the film. The second base, the more typical method of financing a film, is where independent outside investors contribute funds to be used in the production of a film.

21. It is important to distinguish between the two bases of deduction provided in paragraph 124ZAFB(1) (a) because, where moneys are expended by way of contribution to the cost of producing a film, i.e., under the second base, a deduction is only allowable if the additional requirements listed in paragraph 124ZAFB(1) (d) are satisfied. Broadly those requirements are -

- (a) moneys contributed to the cost of producing the film must be deposited in a film account established under the Australian Film Industry Trust Fund;
- (b) a production contract, or a production contract together with one or more underwriting contracts, securing the estimated cost of production of the film must be entered into by the end of the financial year in which moneys are first expended in, or contributed towards, the production of the film; and

- (c) a declaration under section 124ZADA must be lodged with the Commissioner within the prescribed period.

22. On the other hand, a person producing an eligible film on his or her own account who expends money on the production of the film is not required to satisfy the requirements listed in the preceding paragraph in order to be eligible for a deduction.

Donation of services

23. The question arises as to whether a taxpayer may be allowed a deduction under Division 10BA in respect of the cost of services provided to the production of a film. An example is where a producer donates services to the film's production free of charge and then seeks an income tax deduction based upon the fee forgone.

24. Under Division 10BA an income tax deduction is allowable only where a taxpayer has expended moneys in producing, or by way of contribution to the cost of producing, a film. If moneys are not expended there is no entitlement to a deduction. Accordingly, no deduction is allowable in respect of services provided free of charge to the production of a film.

COMMISSIONER OF TAXATION
9 June 1988