

IT 2533 - Income tax: film and video tape royalties - whether licensor's liability to tax is calculated on gross or net receipts

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TAXATION RULING NO. IT 2533

INCOME TAX: FILM AND VIDEO TAPE ROYALTIES - WHETHER
LICENSOR'S LIABILITY TO TAX IS CALCULATED ON GROSS OR
NET RECEIPTS

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1011234	FILM AND VIDEO TAPE ROYALTIES LIABILITY TO TAX AT SOURCE	DIVISION 13A 136A(2)

PREAMBLE The income tax liability of parties under film and video licence agreements involving non-resident licensors was recently considered in this Office. A variety of licence agreements were examined which provided for an allocation of receipts from distribution between the non-resident licensor of a film or video and the Australian resident licensee.

2. In some cases, for example, the licensee was entitled to deduct from the gross distribution receipts, prior to calculating the agreed percentage amount of receipts payable to the licensor, certain listed expenses incurred in obtaining and distributing the film or video.

3. Section 136A, in conjunction with the Income Tax (Film Royalties) Act 1977, imposes liability to income tax at the rate of 10% upon income derived by a non-resident as consideration for the use of, or the right to use films and video tapes, deemed to have been derived from a source in Australia. This Ruling considers whether the gross distribution receipts - or some lesser amount - should be treated as royalties derived by the non-resident licensor for purposes of section 136A.

RULING 4. Because of the variety of rights, obligations and terms of payment which can exist between film licensor and licensee a licensor cannot be assumed to be beneficially entitled to 100% of the gross distribution of receipts in every case. The amount of income derived by way of consideration, and therefore the relevant amount for the purposes of section 136A will depend on the terms of the licence agreement in each case.

Licensor entitled to 100%

5. Where under the terms of a licence agreement the gross receipts of distribution are clearly derived as consideration by the licensor, the whole of the receipts should be treated as royalties for the purposes of section 136A. This will be the

case where the agreement either specifically states the licensor's entitlement to the gross receipts or, alternatively, where the agreement states that the licensee contracts with exhibitors and others on behalf of the licensor. In both cases, the licensor's liability under section 136A would be calculated as 10% of the gross film or video receipts without deduction of any expenses.

Licensor not entitled to 100%

6. Where, however, no agency relationship is created between the licensor and the licensee under the licence agreement, and the facts do not otherwise indicate the existence of such a relationship, the licensor cannot be said to be entitled to the total amount of receipts generated under the agreements entered into by the licensee with exhibitors.

7. In such cases, where the licensor is entitled to a certain percentage of the receipts rather than the total receipts, only the percentage to which the licensor is entitled, plus an amount equal to the sum of any expenses paid by the licensee on behalf of the licensor, will constitute royalties for the purposes of section 136A.

8. Where the licence agreement requires the licensee to incur specific expenses on behalf of the licensor out of gross receipts prior to calculation of the licensor's share of receipts - i.e., turnover tax or other taxes payable by the licensor, legal expenses to protect copyright, and any other expenses for which one would ordinarily expect the licensor to be personally liable - the amount of such expenses would constitute royalties for the purposes of section 136A. Regard should also be had to Taxation Ruling No. IT 2283 which covers the treatment of the costs of prints paid to non-residents where a relatively small fee is paid for the use of, or the right to use, a film.

9. Except where the agreement provides that the licensee contracts with exhibitors and others on behalf of the licensor, expenses incurred by a licensee which relate to the distribution or exhibition of the film would not be regarded as being incurred on behalf of the licensor and would therefore not be considered to be royalty payments under section 136A.

10. In cases where the licensor is not entitled to 100% of gross receipts, the appropriate calculation of tax under section 136A is therefore 10% of the licensor's entitlement under the licence agreement plus 10% of all expenses incurred by a licensee on behalf of the licensor.

11. Calculations of tax payable on royalties derived after the date of this Ruling should be made in accordance with this Ruling.

COMMISSIONER OF TAXATION
25 May 1989

