



PR 2000/2 - Income tax: Macquarie Film Corporation Ltd

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Product Ruling

Income tax: Macquarie Film Corporation Ltd

Contents	Para
What this Product Ruling is about	1
Date of effect	7
Withdrawal	9
Arrangement	10
Ruling	30
Explanations	34
Detailed contents list	42

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Previous Rulings**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income desired in those future years.

Terms of Use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the Macquarie Film Corporation Limited (MFC), or just simply as 'the Project', or the 'product'.

Tax law(s)

2. The tax law(s) that are dealt with in this Ruling are:
- section 375-855 (ITAA 1997);
 - section 375-860 (ITAA 1997); and
 - Part IVA of the *Income Tax Assessment Act 1936* ('ITAA 1936').

Class of persons

3. The class of persons to whom this Ruling applies is those persons who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant agreements until their term expires) and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling those persons are referred to as 'Investors'.

4. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it. It also does not include Macquarie Film Investments Pty Ltd, any associate of that entity, and any associate of MFC, within the definition of that term for the purposes of the ITAA 1997.

Qualifications

5. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:
- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
 - the Ruling will be withdrawn or modified.

Note: without limiting the generality of the term, a material difference may arise in relation to a variation in the facts of the arrangement described in the Ruling. It may also arise in circumstances where the person otherwise included in the class of persons enters into the arrangement as described, but also enters into transactions or arrangements (including financing arrangements) that, when viewed as a whole with the arrangement described in the Ruling, will produce a different taxation consequence for the arrangement. This might include, for example, where the investor borrows to enter into the arrangement by way of a limited or non-recourse loan and the overall consequence is that the arrangement is one that might attract the application of a tax avoidance provision.

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Date of effect

7. This Ruling applies prospectively from 16 February 2000, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

8. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

9. This Product Ruling is withdrawn and ceases to have effect after 30 June 2000. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following

its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Application for a product ruling dated 8 November 1999 received from Blake Dawson Waldron on behalf of Macquarie Film Corporation Limited ("MFC");
- Draft Prospectus prepared in respect of the invitation to apply for shares in MFC ("Shares");
- Constitution of MFC;
- Licence issued to MFC under the Film Licensed Investment Company Act 1998 ("FLIC Act");
- Draft Management Agreement between MFC and Macquarie Filmed Investments Pty Limited ("MFI");
- Further correspondence from Blake Dawson Waldron dated 21 December 1999 and 14 January 2000.

Note: certain information received from Macquarie Film Corporation Limited, Blake Dawson Waldron and Macquarie Film Investments Pty Ltd has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information Legislation.

11. For the purpose of describing the arrangements to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable:

- to which the Investor, or an associate of an Investor, will be a party.
- between MFC and MFI or any entity related to or associated with MFI.

12. The arrangement is an investment by an investor ("Investor") in shares in MFC (the "Project"). MFC is a public company established to raise capital for investment in the production, marketing and distribution of "qualifying Australian films". MFC has been

named as the grantee of a licence ("Licence") issued under the FLIC Act for the raising of concessional capital in the financial years ending 30 June 1999 and 30 June 2000 for investment in the production, marketing and distribution of "qualifying Australian films".

13. The amount of concessional capital which may be raised under the licence must not exceed \$20 million. MFC will issue a prospectus to raise up to \$18,484,500 from the public by the issue of ordinary shares in MFC. The minimum investment is \$5,000, being a subscription for 5,000 Shares at \$1.00 each.

14. Foreign ownership will be restricted to 33% of the issued capital of MFC. No individual or associated group of individuals may own more than 33% of the issued capital of MFC.

15. An amount equal to the number of Shares applied for multiplied by \$1.00 (the "Subscription Amount") must be tendered by the Investor with the application for the issue of Shares. An application fee equal to 5% of the Subscription Amount is payable upon application. This amount is fully refundable if Shares are not allotted and issued to the applicant.

16. Proceeds of the Offer will be placed on deposit with Macquarie Bank Limited ("MBL") bearing interest at full market rates.

17. MFC has absolute discretion to accept, accept in part or reject any or all applications received. MFC intends to allot Shares in the order of receipt of Applications.

18. There is no requirement that a minimum subscription be reached.

19. Shares which are issued to an Investor are fully transferable.

20. Funds will be committed to investment in film and television projects selected by MFC as and when required. Investments are expected to be in the form of contributions to the costs of producing and/or marketing films and television programs in accordance with the terms of the Licence. The investments by MFC will be managed by MFI.

21. Up to 5.75% of the Concessional Capital raised may be allocated to operational and administrative expenses of MFC.

22. Surplus funds will be distributed to shareholders as soon as Directors consider it practical to do so.

23. By subscribing for Shares the Investor agrees to be bound by the terms of the Constitution. The Constitution also provides that MFC must do its best to comply with the conditions of its Licence under the FLIC Act.

24. The Shares acquired by Investors will confer the following rights on Investors under the Constitution:

- limitation of liability to the Subscription Amount;
- right to receive notice, attend, speak and vote at General Meetings;
- right to receive payment of dividends as determined by the Board; and
- right to distribution of capital on winding up of MFC.

25. MFI is a subsidiary of MBL. MBL currently holds all of the issue capital of MFI. MFI will provide to MFC management services as set out in Schedule A to the Management Agreement.

26. MFI will receive a base management fee of either 0.75% or 3.5% of the amount paid as subscriptions for MFC shares. MFI will also receive a performance fee of 20% of the net amount received by MFC during the relevant quarter when cumulative net returns to MFC shareholders has reached 105%.

27. The Management Agreement states that the Goods and Services Tax is to be added to the fees payable to MFI.

28. MFC may terminate the Management Agreement without notice where:

- (a) MFI commits a material breach of its obligation under the Management Agreement and fails to rectify the breach within 10 business days of MFC giving notice for it to do so;
- (b) Any representations made by MFI under the Management Agreement are not true; or
- (c) MFI becomes bankrupt or is wound up.

29. MFI may assign its rights or subcontract the performance of its obligations to a third party with the consent of MFC. If the assignment or subcontract is with an entity related to MBL notice must be given to MFC but consent is not required.

Ruling

30. This ruling is subject to the assumptions listed below at paragraph 33 of this Ruling.

Sections 375-855 and 375-860

31. An Investor to whom Shares are issued in accordance with the prospectus will be entitled to a deduction for the Investor's Subscription Amount under section 375-855 of the ITAA 1997 in the income year in which the shares are issued.

Part IVA

32. Part IVA will not apply to deny a deduction under section 375-855 of the ITAA 1997 for the expenditure incurred by an Investor in respect of the Investor's Subscription Amount.

Assumptions

33. The Ruling, at paragraphs 31 to 32, is subject to the following assumptions:

- (a) The Investor pays the Subscription Amount for the issue of Shares in MFC;
- (b) The Licence will be held by MFC, and will be in force, at the time the Shares are issued to the Investor and the terms of the Licence will not be breached by MFC;
- (c) Where an Investor funds the Subscription Amount, in part or in full, through finance, all loan agreements will exhibit the following features:
 - (i) all loan terms will be on an arm's length basis;
 - (ii) borrowers will remain fully liable for the balance of the loan outstanding at any time, and lenders will take full legal action against defaulting borrowers;
 - (iii) none of the funds lent will be transferred back to the lender, or any associate, as part of any "round robin", or equivalent transaction;
 - (iv) the loan will not be a "spilt loan" of the type described in Taxation Ruling TR 98/22;
 - (v) there will be no indemnity, or equivalent agreement, to reduce the borrowers liability; and
 - (vi) repayments of principals and payments of interest will not be linked to derivation of income from the Project, and will be made regularly, commencing from, or about, the time of the making of the loan.

Explanations

Section 375-855

34. The provisions of section 375-855 provide that a taxpayer can deduct money paid for shares in a FLIC if the shares are issued to the taxpayer by the FLIC during the period in which the FLIC's concessional capital licence is in force.

35. Section 375-855(2) provides that a FLIC is a company which has been granted a licence to raise concessional capital under the FLIC Act (whether or not the licence has ceased to be in force).

36. MFC is the holder of a licence under the FLIC Act and is therefore a FLIC. MFC will issue Shares to the Investor while its concessional capital licence is in force.

Section 375-860

37. The cost of shares which meet the conditions under section 375-855 are deductible:

- (a) in the income year in which the shares are issued to the taxpayer under section 375-860(1) if the taxpayer pays for the shares in the same income year in which they are issued; or
- (b) in the income year in which the shares are issued to the taxpayer under section 375-860(2) where the shares were paid for in an earlier income year than that in which they are issued.

38. Investors must submit the Subscription Amount as payment for Shares at the time of making their application. Under the terms of the Licence, MFC must raise all concessional capital prior to 30 June 2000.

39. Investors will make payment of the Subscription Amount and be issued Shares in the income year ending 30 June 2000. Therefore, the Subscription Amount will be deductible under section 375-860(1).

Part IVA

40. For Part IVA to apply there must be a 'scheme' (section 177A); a 'tax benefit' (section 177C); and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D). The Project will be a 'scheme'. It commenced on the issue of the Prospectus. The Investors will obtain an initial 'tax benefit' from entering into the scheme, in the form of the deduction for the Subscription Amount that would not be

deductible except for the scheme. However, it is not possible to conclude that the scheme will be entered into or carried out with the dominant purpose of obtaining these tax benefits.

41. Investors to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the investments of MFC. There appears to be no specific indication of features of the Project, such as, for example, the Subscription Amount being “excessive”, and uncommercial, and predominantly financed by a non-recourse loan, that might suggest the Project was so ‘tax driven’ and so designed to produce a tax deduction of a certain magnitude that would attract the operation of Part IVA.

Detailed contents list

42. Below is a detailed contents list for this Ruling:

	Paragraph
What this Product Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	5
Date of effect	7
Withdrawal	9
Arrangement	10
Ruling	30
Sections 375-855 and 375-860	31
Part IVA	32
Assumptions	33
Explanations	34
Section 375-855	34
Section 375-860	37
Part IVA	40

Commissioner of Taxation

16 February 2000

PR 2000/2

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/1; TR 92/20; TD 93/34;
TR 97/16; TR 98/22; PR 1999/95

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- management fees expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams

- taxation administration
- tax avoidance
- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Legislative references:

- ITAA 1997 375-855
- ITAA 1997 375-860
- ITAA 1936 Pt IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D

ATO references:

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