



PR 2000/87 - Income tax: Yoram Gross-EM TV Pty Ltd film 'Old Tom'

 This cover sheet is provided for information only. It does not form part of *PR 2000/87 - Income tax: Yoram Gross-EM TV Pty Ltd film 'Old Tom'*

 This document has changed over time. This is a consolidated version of the ruling which was published on *28 June 2000*



Product Ruling

Income tax: Yoram Gross-EM TV Pty Ltd film 'Old Tom'

Contents	Page
What this Product Ruling is about	1
Date of effect	10
Withdrawal	12
Arrangement	13
Ruling	37
Explanations	39
Detailed contents list	59

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**, **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 derived 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 'Old Tom', 'the Film' or as 'the Project'.

Tax law(s)

2. The tax laws dealt with in this Ruling are:
- Division 10BA of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936);
 - Section 26AG (ITAA 1936);
 - Part IVA (ITAA 1936);
 - Section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997);

Unless otherwise stated, all legislative references that follow are in relation to the ITAA 1936.

Class of persons

3. The class of persons to which 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 terms expire, and deriving assessable income from this involvement as a result (as set out in the description of the arrangement).

4. The class of persons to which 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.

Qualifications

5. The Commissioner rules on the precise arrangement identified in the Ruling.

6. 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.

7. Note: without limiting the generality of the term, a ‘material difference’ this may arise in relation to a variation in the facts of the arrangement described in the Ruling. It may also arise in circumstances where additional transactions or arrangements (including financing arrangements) are entered into that, when viewed as a whole with the arrangement described in the Ruling, will produce a different taxation consequence from the arrangement described in this Ruling.

8. 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 might be that the arrangement is one that would have attracted the application of a tax avoidance provision. A material difference may also arise where an investor enters into or benefits from any device which limits or eliminates the risk in respect of the amount contributed by the investor.

9. A Product Ruling may only be reproduced in its entirety. Extracts may not be reproduced. As each Product Ruling is copyright, apart from any use as permitted under the *Copyright Act 1968*, no Product Ruling may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Manager, Legislative Services, AusInfo, GPO Box 1920, Canberra ACT 2601.

Date of effect

10. This Ruling applies prospectively from 28 June 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).

11. 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

12. This Product Ruling is withdrawn on 1 July 2001 and ceases to have effect on and from that date. The Ruling continues to apply, in respect of the tax laws 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 people, 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 the persons' involvement in the arrangement.

Arrangement

13. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents form part of and are to be read with this description. The relevant documents incorporated in this description of the arrangements are:

- Application for a Product Ruling dated 9 May 2000 received from KPMG on behalf of Yoram-Gross-EM.TV Pty Limited ('YG-EM').
- The legal agreements and material documents which govern the terms of the financing structure, comprising:
- a Production and Investment Joint Venture Deed to be entered into between YG-EM, the Representative and the Division 10BA Investors ('the Investors');
- an Option Agreement entered into between Leigh Hobbs and Yoram Gross Village Roadshow Pty Limited and Assignment Agreement between Leigh Hobbs and YG-EM;
- a Co-Production Agreement to be entered into between YG-EM and Millimages;
- an Inter Party Agreement to be entered into between YG-EM, Yoram Gross Distribution Pty Limited ('YGD'), Atlantis Alliance ('AA'), Film Finances Inc and Imperial Bank;
- a Corporate Guarantee to be entered into between AA and Imperial Bank;
- a Deed of Assignment to be entered into between Imperial Bank and the Investors;

- a Deed of Assignment to be entered into between Imperial Bank and YG-EM;
 - a Supervision Deed to be entered into between Film Finances Inc, Millimages and YG-EM;
 - a Completion Deed to be entered into between Film Finances Inc, EM.TV & Wavery BV ('EM.TV'), the Australian Broadcasting Corporation ('ABC'), YG-EM and the Representative;
 - an Underwriting Agreement to be entered into between Content Capital Limited, YG-EM and the Representative;
 - a YGD Distribution Licence agreement to be entered into between YG-EM, YGD and the Representative;
 - a YGD Production and Investment Agreement to be entered into between YG-EM, EM.TV and YGD;
 - an AA Distribution Agreement to be entered into between AA and YG-EM;
 - Production Licence and Investment Agreement to be entered into between YG-EM, YGD and the ABC;
 - a Licence Agreement to be entered into between YGD and Nickelodeon Australian Management Pty Limited ('Nickelodeon').
 - A Production Facilities Agreement entered into between YG-EM and Novanim Studios.
 - A Loan and Security Agreement to be entered into between the Investors and Imperial Bank.
 - A Provisional Certificate under Section 124ZAB.
 - An Australian/French Co-production Certificate.
 - Letter received from KPMG dated 19 June 2000.
14. The details of the arrangement are summarised as follows.

The Project

15. The production of an animated television series of 26 episodes featuring 'Old Tom', a cartoon character created by Leigh Hobbs;

- 'Old Tom' has appeared in four popular children's books published by Puffin Books, in Australia and the United Kingdom.

PR 2000/87

- A provisional certificate no. PO5638 has been issued by the Department of Communications, Information Technology and the Arts to Yoram Gross-EM.TV Pty Ltd ('YG-EM') on 30 June 1999 pursuant to Section 124ZAB(3);
- YG-EM has acquired all rights to the work from Leigh Hobbs excluding certain publishing rights
- 'Old Tom' is to be co-produced by YG-EM and Millimages, a French Production Company, pursuant to a co-production agreement made under the Australia-France Co-production Treaty.
- Production commenced in January 2000 and the television series is currently scheduled for completion and delivery by 30 September 2001.
- The budget for production of the television series is \$12,017,129. The budget for the Australian component of the production is \$7,210,407. The budget for the French component of the production is \$4,806,722.

16. The funding for the production of the television series is to be contributed by the following parties:

Millimages	\$	4,806,852
Investor(s)	\$	3,700,000
YG-EM	\$	1,748,136
EM.TV Wavery BV ('EM.TV')	\$	1,502,141
ABC	\$	<u>260,000</u>
		<u>\$12,017,129</u>

17. The ownership of the copyright in the television series will be divided amongst the following parties:

	%
Millimages S. A.	40.00
YG-EM	25.05
Investors	20.00
EM.TV	12.50
ABC	<u>2.45</u>
	<u>100.00</u>

18. 'Old Tom' has a potential not only to generate income from exhibition of the Film on television but also from video sales, pay

television, CD-ROMs etc. In addition, there will be opportunities for merchandising sales.

19. It is expected that the Investors will derive income from exploitation of the Film in excess of the amount of their investment in the Film.

20. The minimum interest of an individual Investor in the Film is \$500,000 unless the Investor is otherwise a sophisticated Investor under the Corporations Law.

21. The maximum contribution required from Investors is \$3.7M. There is a restriction on the number of Investors to 19.

22. No Prospectus is required to be lodged with the Australian Securities and Investment Commission in relation to this project.

23. The Project will be partially completed in Australia (60%) and partially in France (40%). The records relating to the Australian production will be kept by YG-EM at its premises.

The participants

24. Mr David Alan Sharp of Greenwood BKT and Mr Adrian Howard Abbott of Abbotts Accountants Advisory Pty Limited will jointly and severally act as the Investors Representative.

25. YG-EM (ACN: 001 046 680) will act as the producer of the Film. The film will be partially completed at the company's studios and partially completed in France.

26. YGD (ACN: 001 760 541) will act as the head distributor of the Film. Sub-licences have been granted to the ABC and Nickelodeon.

27. Distribution and additional rights (for example, merchandising, interactive and music) have also been granted to Millimages, AA and EM.TV.

Financing arrangements

28. YG-EM, the Representative and the Investors will enter into a Production and Investment Joint Venture Deed ('the Deed') to partly fund the production of the series. Investors will agree to contribute \$3.7M to the joint venture. Of this amount, US\$1.2M will be financed by way of money borrowed from Imperial Bank and the balance will be contributed from the Investors' own funds.

29. Each Investor will acquire a proportional, undivided legal and beneficial interest as tenants in common of the copyright in the series. The Investors will acquire 20% of the interests in the copyright as well as enjoying certain advanced priority in relation to the distribution of

the profits from the Film (clause 2.1 of the Deed). The Investors will exclusively license YG-EM to exploit all their rights in the Series and the Underlying Rights in return for Licence fees payable in accordance with Schedule Nine of the Joint Venture Deed ("Disbursement Schedule"). Under the Disbursement Schedule the Investors are entitled to the first US\$1.2 Million of revenue from all sources.

30. Content Capital will also enter into an Underwriting Agreement. The Underwriting Agreement will provide that in the event the series is not fully subscribed, Content Capital will agree to contribute any shortfall, not exceeding \$1.25M, (Clause 1.1 of the Underwriting Agreement) in the production budget provided the Representative has received binding written commitments for Investors to contribute A\$2.45M by 30 June 2000. It has been agreed by Content Capital and YG-EM that in the event that such a shortfall in the production budget of \$1.25M or less exists at 30 June 2000, the shortfall will be met by contributions from Content Capital and YG-EM of up to \$500,000 and \$750,000 respectively.

31. In consideration for the grant of the AA Distribution Agreement, AA has agreed to guarantee that revenues from its territories will reach at least US\$1.2M within the twelve months following delivery of the Film. Pursuant to clause 4 (a) of the AA Distribution Agreement; Alliance Atlantis Motion Picture Distribution Inc agrees to guarantee US\$240,000 and Alliance Atlantis Television Distribution Limited agrees to guarantee US\$960,000. If the revenues derived by AA from its territories are less than this figure, AA must pay the shortfall to YGD at this time (subsequently referred to as the 'AA Minimum Guarantee'). Under the YGD Distribution Agreement and the Joint Venture Deed, the AA Minimum Guarantee is payable to the benefit of Investors.

32. As indicated above, in respect of 'Old Tom' Imperial Bank is willing to provide loan funding of up to US\$1.2M (in US dollars) to Investors in the Film on a full recourse basis, on the basis of the following security:

- Assignment by the Investors as tenants in common of 5% of each Investor's right, title and interest in the copyright in the Film. Upon full repayment of all loans to the Investors (clause 4 of the Deed of Assignment between Imperial Bank and the Investors), the Investors' interest in the copyright will revert automatically to them.
- Assignment by YG-EM of the Minimum Guarantee provided by AA (clause 2(aa) of the Inter-Party Agreement).

- A letter of credit to be provided by a Canadian Bank to secure payment of 20% of the Minimum Guarantee (clause 2(aaa) of the Inter-party Agreement) subject to Mandatory Delivery being effected.
- A ‘corporate’ guarantee provided by Alliance Atlantis Communications Inc in respect of the obligation to pay the AA Minimum Guarantee.
- The assignment by YG-EM of the whole of its right, title, and interest in the Film, including copyright and any underlying rights (‘the Rights’) pursuant to clause 1.1 of the Deed of Assignment between YG-EM and Imperial Bank.
- Under the Disbursement Schedule the first US\$1.2 million to which the Investors are entitled, including the AA Minimum Guarantee, is payable to Imperial Bank.

33. Upon full repayment of the loans by the Investors, all rights will revert automatically to YG-EM (clause 4 of the Deed of Assignment) to be dealt with in accordance with the Joint Venture Deed. In the event that YG-EM’s Rights in the Series are exploited by Imperial Bank, the proceeds derived from the exploitation of the Rights, being proceeds to which the Investors have no entitlement, cannot be used by Imperial Bank to reduce amounts owing by the Investors pursuant to their loan agreements.

34. The fact that income may be derived by Imperial Bank from exploitation of YG-EM’s Rights in ‘Old Tom’ will not impose any limitation on Imperial Bank with respect to the recovery of any outstanding amounts owing by Investors under their loan agreements.

35. Upon full repayment of the loans by the Investors, all Rights will revert automatically to YG-EM (clause 4 of the Deed of Assignment), Imperial Bank will be under an obligation to pay to YG-EM any proceeds derived on exploitation of the YG-EM’s Rights in the series upon the Investors repaying their loans to Imperial Bank.

36. This Ruling does not apply if an Investor enters into a finance arrangement with any of the following features:

- there are split loan features of the type referred to in Taxation Ruling TR 98/22;
- entities associated with the Project are involved, or become involved, in the provision of finance to Investors for the Project (other than described above in paragraph 32 – 35);

- there are indemnity arrangements, or other collateral agreements, in relation to the loan, designed to limit the borrower's risk;
- 'additional benefits' are or will be granted to a borrower, for the purposes of section 82KL, or the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arms length;
- repayments of principal and payments of interest are linked to derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project, but will be transferred (by any means, and whether directly or indirectly) back to the lender, or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or terms or conditions are not arms length.

Ruling

37. Subject to the assumptions listed in the following paragraph:
- A deduction is available in the year a contribution is made pursuant to Division 10BA for contributions to be made by the Investors to the cost of production of 'Old Tom'.
 - Interest incurred in respect of funds borrowed by the Investors to make their contributions will be deductible to the Investors under section 8-1 of the ITAA 1997, but only to the extent of film income which is received.
 - The proceeds distributed to the Investors from the gross proceeds of the Film are assessable to the Investors upon receipt (Section 26AG – ITAA 1936).
 - The anti-avoidance provisions in Part IVA will not be applied to deny deductibility or to accelerate assessability of the above amounts.
38. This Ruling is made subject to the following assumptions:
- (a) The Investor was a resident of Australia for tax purposes at the time the money was expended (subparagraph 124ZAFA(1)(b)(i));

- (b) The investment moneys contributed by the Investors will be used by YG-EM by way of contribution to the cost of producing the film. Moneys contributed by the Investors towards the cost of production of the film will be directly expended in the production of the film (paragraph 124ZAF(1)(a) read in conjunction with subsection 124ZAA(6)).
- (c) At the relevant time, a provisional certificate (section 124ZAB) or a final certificate (section 124ZAC) is in force in relation to the film;
- (d) Each Investor, at the relevant time, expects to become one of the first owners of the Copyright in the film when the copyright comes into force (subparagraph 124ZAF(1)(c)(i));
- (e) Each Investor, at the relevant time, intends to use the interest in the copyright for the purpose of producing assessable income from the exhibition of the film as mentioned in subparagraph 124ZAF(1)(c)(ii);
- (f) There will be in force a declaration lodged in respect of the film in accordance with subsection 124ZAD(1) by a person accepted by the Commissioner under subsection 124ZAD(2) as an appropriate person to make such a declaration (subparagraph 124ZAF(1)(d)(iii));
- (g) Before the expiration of six months after the time when the film is completed, an application will be made for a final certificate in accordance with section 124ZAC, otherwise the provisional certificate shall be deemed never to have been in force (subsection 124ZAB(10));
- (h) All requirements of the Department of Communications, Information Technology and the Arts will be met and final certificates will be issued;
- (i) The film will be completed and the Investors' interest in the copyright in the film will be used for income producing purposes within two years after the close of the financial year in which the contributions are made (subsection 124ZAF(2));
- (j) By reason of the said capital moneys being expended, the investor will become one of the first owners of the Copyright in the film before 1 July 2002;
- (k) In producing the film:

- where an amount is expended by a person ('the film producer') for the supply of goods or the provision of services; and
 - the Commissioner is satisfied that the film producer and the person supplying the goods or providing the services are not dealing with each other at arm's length in relation to the transaction;
 - that the amount of moneys expended on the supply of those goods or the provision of those services will not exceed the amount of moneys that would have been expended by the film producer if the film producer and the person supplying the goods or providing the services had dealt with each other at arm's length (section 124ZAJ);
- (l) At the time the investor expends the capital moneys by way of contribution to the cost of producing the film, the investor is at risk, according to the definition of 'risk' in subsection 124ZAM(2), with respect to an amount equal to or greater than the amount of those capital moneys expended (subsection 124ZAM(1));
- (m) No pre-sale arrangements, distribution rights agreements, distribution guarantee agreements, or other like agreements, have been, or will be, entered into in circumstances where such agreements would put funds into the hands of the investors, by loan or otherwise, to enable them to expend capital moneys by way of contribution to the cost of producing the film;
- (n) In the event of any underage, the Producer will expend the underage amount on the production and marketing of the film in a manner that will preserve the status of the film as 'qualifying Australian Films'.
- (o) The dominant purpose of the investors is to make a commercial return from their investment in the film and the arrangements will be executed in the manner described in this Ruling.
- (p) Non-deductible expenditure associated with the Project in respect of Division 10BA, will be paid out of funds other than Investors' contributions.

Explanations

The ‘directly expended’ requirement

39. Subsection 124ZAA(6) requires that capital money contributed to the production of a film must be ‘expended directly in producing [the] film’ in order for a deduction under Division 10BA to be available.

40. Paragraph 8 of Taxation Ruling IT 2111 discusses this requirement. It states: ‘Direct expenses on a film production which qualify for a deduction under Section 124ZAA can generally be described as **those relating to the production process** as distinct from those associated with financing or marketing of the Film. Such expenses would **typically include amounts paid for the acquisition of story rights and the surveying of locations, payments to the producers, directors and cast, and the costs of insurance of production associated risks, drawing up performers’ contracts and the building of sets and scenery**’ (emphasis added).

41. Our view is that the ‘directly expended’ requirement is not met at the point in time when the Investors, make payments to YG-EM in respect of the budget for the Film. Rather, the extent of the application of the money by the YG-EM to elements of production will ultimately determine the portion of the Investors’ contribution that meets this requirement. Generally, this will not be known until after the completion of the Film.

42. The Investors Representative will pay the Investor’s application money to YG-EM for application towards the production costs. In doing this, YG-EM is to ensure that funds contributed by Investors are only expended on items within the film production budget, with non-deductible expenditure to be met from funds contributed by EM.TV, the ABC, and YG-EM.

43. In determining the amount that is ‘directly expended’ on the production of the Film, we will also consider the ultimate application of any funds obtained by the YG-EM as ‘underage’. In this regard, YG-EM has agreed any underage will be expended on the production of the Film in a manner that will preserve the status of the Film as a Qualifying Australian Film.

44. Quantification of the amount of money directly expended on the production of a film, and consequently the deduction available under Division 10BA, can only be determined after a film has been produced. To do this, a full audit of the application of the film production funds would normally be required. The practice of conducting an audit of the contribution account that is held by Production Company (known as an audit of the ‘film fund’) is considered inadequate in this regard.

45. Accordingly, while a deduction should be available in respect of the contributions made by Australian Investors, the deduction will be withdrawn with retrospective effect if the amounts contributed are not directly expended on the Film or the movies.

The ‘at risk’ rule

46. Section 124ZAM reduces claims for Division 10BA deductions where the Commissioner is satisfied that a taxpayer was not at risk in respect of any part of the expenditure of capital moneys the taxpayer made by way of contribution to the cost of producing a film. Subsection 124ZAM(2) specifies the amount of risk is the amount of loss that, in the Commissioner’s opinion, would be suffered by reason of the taxpayer’s said capital expenditure where no income is derived from the taxpayer’s interest in the copyright of the Film, other than excepted income as defined in subsection 124ZAM(3).

47. Paragraph 13 of Taxation Ruling IT 2111 discusses the ‘at risk’ rule and states the rule:

48. ‘... does not operate to affect the deductions available to Investors where pre-sale arrangements or the sale of distribution rights are effected prior to completion of the Film unless the arrangements put funds into the hands of Investors - by loan or otherwise - to enable them to make their contributions to the costs of film production. Similar considerations apply in respect of a distribution guarantee arrangement under which an amount may be paid to Investors by a producer or another person in exchange for distribution rights, if a specified return is not achieved within a particular period (e.g., a specified percentage of the Film budget within 2 years). Payments under an arrangement of that kind would also not offend the ‘at risk’ rule.’

49. The ‘at risk’ rule applies to an investor’s risk of loss before and after completion and distribution of the Film. Any arrangement which limits an investor’s risk of loss can breach the ‘at risk’ rule. Certain types of common industry arrangements affecting risk during production of the Film are accepted as not offending the ‘at risk’ rule. This acceptance does not extend to arrangements which put funds into the hands of Investors to enable them to make their contributions to the costs of film production. This cannot be taken to mean that post-completion arrangements are also acceptable if they do not put funds into the hands of Investors to enable them to make their contributions. The position in paragraph 13 of IT 2111 is limited to the situations expressly mentioned.

50. The arrangement ruled on does not contain any features which attract the operation of section 124ZAM.

Non-arm's length transactions

51. Where, in producing a film, an amount is expended by a person ('the film producer') for the supply of goods or the provision of services, subsection 124ZAJ(1) allows the Commissioner to reduce deductions under Division 10BA for such amounts where he is satisfied that:

- the film producer and the person supplying the goods or providing the services were not dealing with each other at arm's length in relation to the transaction; and
- the amount of moneys expended on the supply of those goods or the provision of those services exceeds the amount of moneys that would have been expended by the film producer if the film producer and the person supplying those goods or providing those services had dealt with each other at arm's length.

52. The Commissioner will not be in a position to determine whether his discretion in subsection 124ZAJ(1) ought to be exercised until such time as the Film and the movies have been produced. Furthermore, to make such a determination, a full audit of the application of each film and movies production funds would normally be required.

53. Accordingly, while a deduction should be available in respect of capital moneys expended by Investors by way of contribution to the cost of producing the Film of the Fund before the end of the financial year ending 30 June 2000, the deduction will be reduced with retrospective effect if the Commissioner determines that a producer of the Film of the Fund dealt with a supplier of goods or a provider of services, in the course of producing the Film, in circumstances where the parties were not dealing at arm's length and the producer paid more for the goods or the services than the producer would have paid had the transaction been at arm's length.

Interest on borrowed funds

54. Interest incurred in respect of funds borrowed by the Investors, if any, to make their contributions will only be deductible in any year to the extent of film income derived in that year (subsection 124ZAO(2) of the ITAA 1936). Any excess interest may be carried forward to succeeding years of income for offset against future film income (subsection 124ZAO(3)).

Payment of interest by an Investor where an assessment is amended

55. Section 170AA provides that, where an amendment of an assessment increasing the liability of a taxpayer to tax is made, the taxpayer is liable to pay interest to the Commissioner on the amount by which the tax payable by the taxpayer under the amended assessment exceeds the tax payable by the taxpayer under the assessment that was amended.

56. Investors who expend capital moneys by way of contribution to the cost of producing a film should be aware of this provision because, should the circumstances surrounding the production of a 'qualifying Australian film' require the Commissioner to go back and reduce the deductions claimed by Investors in that film, section 170AA will have application. There is a discretion in subsection 170AA(11) under which the Commissioner can remit, in appropriate circumstances, the whole or part of the interest payable under section 170AA.

Part IVA

57. 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 arrangement subject to this Ruling will be a 'scheme'. The Investor will obtain, for example, a 'tax benefit' from entering into the scheme, in the form of a deduction allowable under the provisions in Division 10BA, that would not have been obtained but for the scheme. However, it is not possible to conclude, from the arrangement outlined in this ruling, that the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

58. An investor to whom this Ruling applies intends to stay in the scheme for its full term and derive assessable income from the exploitation of the Copyrights of the Film and the movies. Further, there are no features of the Project, as described in the said arrangement, that suggest that the Project is so 'tax driven' and 'so designed to produce a tax deduction of a certain magnitude', that the operation of Part IVA is attracted.

Detailed contents list

59. Below is a detailed contents list for this Product Ruling:

Paragraph

What this Product Ruling is about	1
Tax law(s)	2
Class of persons	3
Qualifications	5
Date of effect	10
Withdrawal	12
Arrangement	13
The Project	15
The participants	24
Financing arrangements	28
Ruling	37
Explanations	39
The ‘directly expended’ requirement	39
The ‘at risk’ rule	46
Non-arm’s length transactions	51
Interest on borrowed funds	54
Payment of interest by an Investor where an assessment is amended	55
Part IVA	57
Detailed contents list	59

Commissioner of Taxation

 28 June 2000

Previous draft:

Not previously released in draft form

- tax avoidance
- tax administration

Related Rulings/Determinations:

PR 98/1; PR 1999/95; TR 92/1;
 TR 92/20; TR 97/16; TR 98/22;
 TD 93/34; IT 2111;

Legislative references:

- ITAA 1936 10BA
- ITAA 1936 26AG
- ITAA 1936 82KL
- ITAA 1936 124ZAA
- ITAA 1936 124ZAA(6)
- ITAA 1936 124ZAB
- ITAA 1936 124ZAB(10)
- ITAA 1936 124ZAC
- ITAA 1936 124ZADA
- ITAA 1936 124ZADA(1)
- ITAA 1936 124ZADA(2)

Subject references:

- Australian films
- film income
- film industry
- interest expenses
- product Rulings
- public Rulings

PR 2000/87

- ITAA 1936 124ZAF A
 - ITAA 1936 124ZAF A(1)(a)
 - ITAA 1936 124ZAF A(1)(b)(i)
 - ITAA 1936 124ZAF A(1)(c)(i)
 - ITAA 1936 124ZAF A(1)(c)(ii)
 - ITAA 1936 124ZAF A(1)(d)(iii)
 - ITAA 1936 124ZAF A(1)(d)(iv)
 - ITAA 1936 124ZAF A(2)
 - ITAA 1936 124ZAJ
 - ITAA 1936 124ZAJ(1)
 - ITAA 1936 124ZAM
 - ITAA 1936 124ZAM(1)
 - ITAA 1936 124ZAM(2)
 - ITAA 1936 124ZAM(3)
 - ITAA 1936 124ZAO(2)
 - ITAA 1936 124ZAO(3)
 - ITAA 1936 Part IVA
 - ITAA 1936 Part III
 - ITAA 1936 170AA
 - ITAA 1936 170AA(11)
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D
 - ITAA 1997 8-1
 - ITAA 1997 104-10
 - ITAA 1997 118-30
-

ATO references:

NO 2000/6003

BO

FOI number: I 1021390

ISSN: 1039-0731