



# ***PR 2005/84 - Income tax: Film Investment - 'Jindabyne' Selldown***

 This cover sheet is provided for information only. It does not form part of *PR 2005/84 - Income tax: Film Investment - 'Jindabyne' Selldown*

 This document has changed over time. This is a consolidated version of the ruling which was published on *1 June 2005*



## Product Ruling

### Income tax: Film Investment – 'Jindabyne' Selldown

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Potential participants may wish to refer to the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au) or contact the Tax Office directly to confirm the currency of this Product Ruling or any other Product Ruling that the Tax Office has issued.

#### **Preamble**

*The number, subject heading, **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 Tax Office **does not** sanction or guarantee this product. 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 participants 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 and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out 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, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office 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

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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.

### Tax law(s)

2. The tax laws dealt with in this Ruling are:
- section 26AG of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 79D of the ITAA 1936;
  - section 82KL of the ITAA 1936;
  - Division 5 of Part III of the ITAA 1936;
  - Division 10BA of Part III of the ITAA 1936;
  - section 124ZAG of the ITAA 1936;
  - section 124ZAO of the ITAA 1936;
  - Part IVA of the ITAA 1936;
  - Division 35 of the *Income Tax Assessment Act 1997* (ITAA 1997); and
  - section 995-1 of the ITAA 1997.

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

### Goods and Services Tax

3. In this Ruling, where applicable, all fees and expenditure referred to include Goods and Services Tax (GST) set out in the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). An entity is entitled to claim input tax credits for the GST included in its expenditure provided that the acquisition is a creditable acquisition under Division 11 of the GST Act.

### Changes in the Law

4. Although this Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Ruling. Any such changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

5. Taxpayers who are considering participating in the Project are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

**Note to promoters and advisers**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for participants in Produced Films such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Ruling is issued.

**Class of persons**

7. 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 (that is, being a party to the relevant agreement until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, each of these persons, referred to as 'New Investors', will be wholesale clients for the purpose of the *Corporations Act 2001* (refer to paragraphs 75 to 79).

8. 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, who otherwise do not intend to derive assessable income from it or are non-residents of Australia for the purposes of the ITAA 1936 or ITAA 1997.

**Qualifications**

9. The Commissioner rules on the precise arrangement identified in the Ruling. 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. The Ruling will be withdrawn or modified.

10. 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 part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration  
Attorney General's Department  
Robert Garran Offices  
National Circuit  
Barton ACT 2600

or posted at: <http://www.ag.gov.au/cca>

## Date of effect

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11. This Ruling applies prospectively from 1 June 2005, 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).

12. 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 commenced and the income year to which it relates has not yet commenced, this Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

## Withdrawal

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13. This Product Ruling is withdrawn and ceases to have effect after 30 June 2006. 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 arrangement specified below. Thus, the Ruling continues to apply to those persons, even following its withdrawal, who entered into the specified arrangement 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

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14. The arrangement that is the subject of this Ruling is described below. This description incorporates the following relevant documents or parts of documents lodged with the Tax Office:

- Application for a Product Ruling dated 31 March as constituted by documents provided on 1 April 2005 and 13 April 2005;
- **Production and Investment Joint Venture Deed** between April Films (Jindabyne) Pty Limited (Jindabyne Productions), Babcock & Brown Asset Holdings Pty Ltd (B&B or the Manager), KPMG Chartered Accountants (the Representative), the Investors and the Film Finance Corporation Australia Limited (FFC), dated and signed on 20 January 2005 and received by the Tax Office on 1 April 2005;

- **Head Distribution Agreement** between the Investors and the FFC, dated and signed on 20 January 2005 and received by the Tax Office on 1 April 2005;
- **Sub Distribution Agreement** between the FFC, April Distribution Pty Ltd (April Distribution) and the Representative, dated and signed 20 January 2005 and received by the Tax Office on 1 April 2005;
- Completion Guaranty (Completion Guarantee) between B&B, the FFC and Cinefinance LLC (Cinefinance), dated and signed on 20 January 2005 and received by the Tax Office on 1 April 2005;
- Draft Information Memorandum, including Application Form, prepared by B&B, dated April 2005 and received by the Tax Office on 1 April 2005;
- Draft **Agency Deed** between B&B (the Agent) and New Investors, undated and received by the Tax Office on 1 April 2005;
- Draft **Assignment Deed** between FFC or B&B Films, New Investors and B&B;
- Jindabyne Deed between Jindabyne Productions, B&B, the Representative, FFC and B&B Films (Jindabyne) Pty Limited (B&B Films), undated and received by the Tax Office on 1 April 2005;
- 'Jindabyne' Deed of Variation #1 to the Production and Investment Joint Venture Deed (Deed of Variation) between Jindabyne Productions, B&B, the Representative, the Investors and FFC, undated and received by the Tax Office on 1 April 2005;
- Collection Account Management Agreement, undated and received by the Tax Office on 1 April 2005; and
- A Provisional Certificate under section 124ZAB.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

15. In accordance with the above documents, an Investor who participates in the arrangement must be a wholesale client as defined in section 761G of the *Corporations Act 2001*. A wholesale client is explained in paragraphs 75 to 79 in the Explanation area of this Product Ruling.

16. The documents highlighted are those that the Investors enter into. There are no other agreements, whether formal or informal, and whether or not legally enforceable, which an Investor, or an associate of the Investor will be a party to that are part of the arrangement to which this Ruling applies. The effect of the agreements is summarised as follows.

## Background

17. On 24 November 2004 a Product Ruling, PR 2004/111, issued in respect of the Project to produce a film entitled 'Jindabyne'. Provisional Certificate number P06769 dated 27 August 2004 has been issued by the Department of Communications, Information Technology and the Arts in respect of the Film to be made by the Production Company. The certificate is currently in force in relation to the Film and states that the proposed film will, when completed, be a 'qualifying Australian film' for the purposes of Division 10BA.

18. The total budgeted cost of the Film is \$14,289,046 which comprises direct production costs of \$13,441,084 and Non-Deductible Expenses of \$847,962.

19. In order to allow production of the Film to commence the Jindabyne Deed ('the Selldown') was executed. Under the Selldown, the FFC and B&B Films agreed to invest in the Film as Current Investors. The Manager agreed to endeavour to obtain New Investors to enter into an Assignment Deed with either the FFC or B&B Films (as applicable) to acquire their interest or part of their interest in the Film.

20. A New Investor is required to be a wholesale client as defined in section 761G of the *Corporations Act 2001* (refer to paragraphs 75 to 79).

21. This product ruling applies in relation to the New Investors who enter into an Agency Deed and Assignment Deed. Product Ruling PR 2004/111 applies in relation to Current Investors.

## The Participants

22. The parties involved in the arrangement are:

- **Current Investor:** An investor who signed an Investment Deed on or prior to 20 January 2005, incurred capital expenditure in acquiring an interest in the Copyright in the Film and was accepted by the Manager in accordance with the Production and Investment Joint Venture Deed.
- **New Investor:** A person who:
  - signs an Agency Deed after 20 January 2005, before 30 June 2005 and before the Completion of the Film;
  - is accepted by the Manager in accordance with the Agency Deed; and
  - incurs capital expenditure in acquiring an interest in the Copyright of the Film via the Assignment Deed.
- **Investor:** Current and New Investors.

- **Manager:** B&B has been appointed to act as Manager on behalf of the Investors, pursuant to clause 5.1 of the Production and Investment Joint Venture Deed. The duties of the Manager are listed in section 12 of the Information Memorandum as follows:
  - Acting as trustee in respect of the Trust Account;
  - Accepting or rejecting applications from Potential Investors;
  - Establishing and maintaining the register of Investors;
  - Entering into the Completion Guarantee as agent for and on behalf of Investors;
  - Monitoring compliance with the terms of the Production and Investment Joint Venture Deed;
  - After retirement of the Representative (upon receipt of a final Division 10BA certificate for the Film), perform the role of the Representative; and
  - Disbursing to Investors (1) Investor proceeds (upon their receipt from the Collection Account Manager) and (2) the Minimum Distribution Guarantee.
- **Representative:** KPMG Chartered Accountants have been appointed as Representative to act on behalf of the Investors (clause 4.1 of the Production and Investment Joint Venture Deed). The duties of the Representative are listed in section 12 of the Information Memorandum as follows:
  - Representing the interests of the Investors and entering into documentation as agent for and on behalf of Investors;
  - Keeping accounts in relation to the Trust Account and various other accounts;
  - Monitoring compliance with the terms of the Production and Investment Joint Venture Deed, and using reasonable steps to recover any loss suffered by the Investors from a breach of any deed or agreement;
  - Reporting to Investors (through the Manager) of all significant developments in the Film's production; and
  - Sending, where required, audited accounts to Investors after receiving same from the Production Company.

- **Production Company:** Jindabyne Productions is the Production Company and has agreed to produce and complete the Film pursuant to clause 3.1 of the Production and Investment Joint Venture Deed and deliver the Delivery Materials to the Head Distributor (the FFC) in accordance with the Head Distribution Agreement.
- **Head Distributor:** The FFC is the Head Distributor in respect of the Film under the terms of the Head Distribution Agreement.
- **Sub-Distributor:** April Distribution is the Sub-Distributor in respect of the Film under the terms of the Sub-Distribution Agreement.
- **Completion Guarantor:** Cinefinance LLC (Cinefinance) is the Completion Guarantor for the Film under the terms of the Completion Guaranty.
- **Collection Account Manager:** Fintage Collection Account Management B.V. (Fintage House) is the Collection Account Manager under the terms of the Collection Account Management Agreement.

## Defined terms

23. Terms which have been defined within the relevant documents to the arrangement include the following:

- **Additional Net Proceeds** means the following proceeds received by the Production Company after deduction of any payments from such proceeds as specified in the Production and Investment Joint Venture Deed:
  - (a) money received from Insurances relating to the Marketing of the Film;
  - (b) money obtained in connection with any claim relating to the Film Assets;
  - (c) interest accruing on money in the Production Account;
  - (d) awards and prizes other than those made to individuals for contributions to production of the Film and those made to the Film but customarily paid to individuals for contributions to the production of the Film; and
  - (e) proceeds of sale of any production assets,and includes interest accruing on money in the Proceeds Account.
- **Agent** means B&B.

- **Assignee** means those referred to in the first column of Schedule A of the Assignment Deed.
- **Assignor** means either the FFC or B&B Films, as applicable, in the Assignment Deed.
- **Budget** means the budget for the Film set out in the Second Schedule and as varied in accordance with the Production and Investment Joint Venture Deed.
- **Budgeted Cost** means the sum so described in Part A of the Fourth Schedule and as varied in accordance with the Production and Investment Joint Venture Deed, being the total of the Budget (including the Budgeted Non-Deductible Expenses).
- **Budgeted Non-Deductible Expenses** means the sum so described in Part A of the Fourth Schedule and as varied in accordance with the Production and Investment Joint Venture Deed, being the total of the Non-Deductible Expenses specified in the Budget.
- **Closing Date** means the date as agreed between the Manager, the Representative, the FFC and the Production Company.
- **Collection Account** means the bank account(s) in favour of the parties of the Collection Account Management Agreement (other than the Collection Account Manager) and established by the Collection Account Manager according to the Collection Account Management Agreement.
- **Collection Account Management Agreement** means the agreement between the Collection Account Manager and, inter alia, the Investors, the Manager, the Production Company, the Head Distributor and the Sub-Distributor in respect of the collection and disbursement of Gross Receipts and which is approved by the Representative and the Production Company. It is acknowledged that all proceeds under the territorial distribution agreements are due to the Sub-Distributor, all proceeds under the Sub Distribution Agreement are due to the Head Distributor (the FFC) and all proceeds under the Head Distribution Agreement are due to the various parties entitled to a share of Gross Receipts including the Investors.
- **Completion** means the time at which the first full length, edited, synchronised, end-titled and credited copy of the Film (known as the 'answer print'), has been struck which is suitable for exhibition to the public and **Complete** or any other derivation has a corresponding meaning.

- **Completion Agreement** means any agreement or deed between the Production Company and the Completion Guarantor in respect of the Film, and which is approved by the Representative.
- **Completion Date** means the date so described in Part B of the Fourth Schedule and as may be varied in accordance with the Production and Investment Joint Venture Deed, being the date of Completion of the Film.
- **Completion Guaranty** means any agreement or deed between the Investors, the Head Distributor and the Completion Guarantor under which the Completion Guarantor agrees to Complete the Film and provide sufficient money for that purpose.
- **Copyright** means all existing and future copyright (as defined by subsection 124ZAA(1)) subsisting in the Film in accordance with the *Copyright Act 1968* and copyright under the law of a country other than Australia but does not include the ancillary rights.
- **Delivery** means the first provision to all relevant parties entitled to delivery of all of the Delivery Materials as required by each transaction document and **Deliver** has a corresponding meaning.
- **Delivery Date** means the date so described in Part B of the Fourth Schedule or such later date as the Representative, the Production Company and the Head Distributor may agree, being the first date that Delivery of the Delivery Materials is due according to any transaction document, subject to extension in accordance with clause 3.19(a) of the Production and Investment Joint Venture Deed.
- **Delivery Materials** means the materials required to be produced and delivered to the Distributor (or its nominee) by the Delivery Date, as specified in the Thirteenth Schedule of the Production and Investment Joint Venture Deed.
- **Disbursement Schedule** means the manner, order and priority of disbursement of Gross Receipts contained in the Eighth Schedule of the Production and Investment Joint Venture Deed.
- **Distribution Rights** means all rights to Market the Film (including the Copyright and the ancillary rights) granted to the Head Distributor under the Head Distribution Agreement.

- **Film Assets** means the underlying rights, the Film, the Copyright, the production assets (other than hired or leased assets and until sold in accordance with the Production and Investment Joint Venture Deed) and the Marketing Materials.
- **FFC Non-Deductible Contribution** means the sum so described in Part A of the Fourth Schedule and as varied in accordance with the Production and Investment Joint Venture Deed, payable by the FFC to the Production Company towards the Budgeted Non-Deductible Expenses pursuant to the Production and Investment Joint Venture Deed.
- **Gross Receipts** means all proceeds resulting from the Marketing of the Film (including Additional Net Proceeds) actually received by the Head Distributor, the Sub-Distributor, the Production Company or the Collection Account Manager and includes any interest earned on Gross Receipts pursuant to the Collection Account Management Agreement (but excludes the Minimum Distribution Guarantee and bank and government charges on the Collection Account), to be disbursed by the Collection Account Manager in accordance with the Disbursement Schedule.
- **Holding Trust Account** means the bank account opened by the Agent in accordance with clause 3 of the Agency Deed.
- **Investment** means the amount of money as specified, and paid, by a New Investor in an Agency Deed as consideration for becoming an initial owner of Copyright and obtaining the right to share in the Gross Receipts of the Film as specified by in the Production and Investment Joint Venture Deed.
- **Marketing** includes:
  - (a) promoting, marketing, advertising, selling, assigning, licensing, hiring, leasing, distributing, exhibiting, televising, screening and otherwise exploiting:
    - the Film;
    - the Copyright;
    - the underlying rights, and
    - the administration thereof;
  - (b) protecting and enforcing Copyright and the underlying rights and prosecuting infringements of the Copyright and the underlying rights;

- (c) enforcement of and ensuring compliance with, the terms of sub-licences to Market the Film; and
  - (d) creation and use of the Marketing Materials, and **Market** has a corresponding meaning.
- **Marketing Materials** means advertising, promotional and publicity material specifically created to Market the Film and paid for from the Budgeted Cost or from Gross Receipts as a producer marketing expense or acquired from any territorial distributor.
- **MDG Payment Date** means 31 January 2011.
- **Non-Deductible Expenses** means any expenses in connection with the production and the Marketing of the Film which are not capital moneys expended by way of contribution to the cost of production of the Film, as defined under Division 10BA.
- **Overage** means any sum over the Budgeted Cost or any sum over the Budgeted Non-Deductible Expenses required:
  - (a) to produce and Complete the Film;
  - (b) to Deliver the Delivery Materials;
  - (c) for the Film to be accepted by the Head Distributor or the Sub-Distributor in accordance with the Head Distribution Agreement or the Sub-Distribution Agreement respectively; and
  - (d) to the extent the Budget includes producer marketing expenses and other items associated with Marketing, Market the Film up to total of such items in the Budget, as contemplated by the Budget and the Production and Investment Joint Venture Deed and any agreement relating to the Film, after deduction of any sum paid by the Completion Guarantor.
- **Proceeds Account** means the bank account opened by the Manager in accordance with clause 10.2 of the Production and Investment Joint Venture Deed, into which the Additional Net Proceeds shall be deposited for payment to the Collection Account Manager in accordance with the Production and Investment Joint Venture Deed.
- **Production Account** means the bank account opened by the Production Company in accordance with clause 15.1 of the Production and Investment Joint Venture Deed and any further accounts, if and when opened by the Production Company in accordance with that clause.

- **Relevant Period** means from the date of execution of the Production and Investment Joint Venture Deed to the date forty five (45) days after the MDG Payment Date.
- **Selldown** refer paragraphs 24 to 26.
- **Territory** means the world.
- **Trust Account** means the bank account opened by the Manager in accordance with clause 8.1 and operated by the Manager and the Representative on behalf of the Investors in accordance with the Production and Investment Joint Venture Deed.
- **Underage** means any part of the Budgeted Cost not spent on the Production and Completion of the Film and Delivery of the Delivery Materials and includes any sum treated or applied as Underage under the Production and Investment Joint Venture Deed.

### **The Selldown**

24. Under the Jindabyne Deed, B&B Films and the FFC have contributed the amounts of \$4,000,000 and \$2,973,060 respectively, as Current Investors, towards the direct production costs of the Film.

25. Under the Selldown the Manager will attempt to procure New Investors for the Project. B&B Films and the FFC will assign their interest in the copyright of the Film to the New Investors. B&B Films and/or the FFC, as applicable, will be reimbursed for the cost of their capital contribution to the Film from the amounts contributed by the New Investors after they have been paid into the Production Account.

26. New Investors will make capital contributions towards the direct production costs through entering an Agency Deed and Assignment Deed. No prospectus will be lodged with regard to the Selldown and the New Investors will be wholesale clients as defined in section 761G of the *Corporations Act 2001* (refer to paragraphs 75 to 79).

### **Jindabyne Deed**

27. The FFC and B&B Films have contributed as Current Investors in the Film (clauses 3 and 4). The Manager has agreed to secure New Investors to enter into the Assignment Deed with the Agent (clause 5).

28. The funds deposited by the New Investors into the Production Account from the Holding Trust Account will be applied by the Production Company to reimburse B&B Films and/or the FFC for their investment in accordance with the order set out in clause 6.

29. There are no underwriting or similar fees payable to B&B Films in respect of their investment (clause 7.1). The FFC is entitled to an underwriting fee (FFC Fee) in respect of their Investment as specified in clause 7.2. The FFC Fee is payable from the Manager's entitlement to Gross Receipts.

## **Application Form**

30. To invest in the Film a New Investor will need to complete the Application Form and Agency Deed attached to the Information Memorandum. On signing the Application Form and the Agency Deed the New Investor agrees to be bound by the terms of the Assignment Deed, Production and Investment Joint Venture Deed and any other documents the Representative or Manager may execute on their behalf. The New Investor will acknowledge the Representative and Manager act as their agent only and authorise the Manager to hold their Investment in the Holding Trust Account until the Assignment Deed is executed.

## **Agency Deed**

31. The Agency Deed is between the Agent and the New Investor. Under the Agency Deed, the New Investor appoints the Agent to act on its behalf and the New Investor proposes to enter into an Assignment Deed.

32. Under clause 1 a New Investor agrees to invest the sum specified in the Deed and pay that amount to the Agent immediately on execution of the Deed. The Agent agrees to hold the New Investor's Investment in the Holding Trust Account until the date the Assignment Deed is executed. Upon execution of the Assignment Deed the Agent will pay the Investment to the Production Company.

## **Assignment Deed**

33. The Assignment Deed is between the Assignor, each Assignee and the Agent. The Assignor assigns to the Assignee the Assignor's right, title and interest as a tenant-in-common in the Copyright of the Film, a share of the MDG and entitlement to share in the Gross Receipts (clause I).

34. Under the Assignment Deed the parties agree to be bound by the provisions of the Production and Investment Joint Venture Deed as an Investor (clause I).

35. The Assignee's interest in the Film Assets, including Copyright and share of Gross Receipts, is for the duration determined by the provisions in the Production Investment Joint Venture Deed (clause II).

## **Deed of Variation**

36. The Manager and the Representative will enter into the Deed of Variation with the Current Investors, the Production Company and the FFC in order for the Assignment Deed to be annexed to the Production and Investment Joint Venture Deed.

37. Under clause 3 of the Deed of Variation the Production and Investment Joint Venture Deed remains in full force and effect apart from the annexure of the Assignment Deed.

### **Production and Investment Joint Venture Deed**

38. The Manager and the Representative will enter into the Production and Investment Joint Venture Deed with the Investors, the Production Company and the FFC to produce the Film. The Investors, the Representative and the Production Company will appoint the Manager as the manager of the Project in accordance with clause 5.1.

39. The Investors, the Manager, and the Representative will form a joint venture for the purpose of funding the production of the Film (clauses 2.1 and 2.2). Investors have agreed to contribute \$13,441,084, being the total Budget less the Non-Deductible Expenses contributed by the FFC, to the joint venture.

40. The New Investors will contribute their Investment before 30 June 2005 and before the Completion of the Film. B&B Films and the FFC will be refunded their investment, or a proportion of their investment, in accordance with the terms of the Jindabyne Deed. Once the New Investors have contributed to the funding of the production of the Film, they will become part of the joint venture with the Current Investors and will be subject to all the terms and conditions of the Production and Investment Joint Venture Deed.

41. The Investors (both Current and New Investors) will be one of the first owners of Copyright and will acquire an undivided legal and beneficial interest in the Copyright as tenants in common, in accordance with clause 21.1. Initial Copyright interests in the Film will be as follows:

Investors:	75%
Production Company:	24%
FFC:	1%

42. The Production Company agrees to produce and Complete the Film pursuant to clause 3.1 and Deliver the Delivery Materials to the Head Distributor in accordance with the Head Distribution Agreement.

43. The Representative will be appointed to act on behalf of the Investors (clause 4.1). The duties of the Representative are outlined in clause 4.5 and section 12 of the Information Memorandum (refer to paragraph 22).

44. The Manager will be appointed to act on behalf of the Investors. The duties of the Manager are outlined in clause 5.3 and section 12 of the Information Memorandum (refer to paragraph 22).

45. The Production Company will submit a drawdown request and provided the conditions precedent in clause 13.3 of the Production and Investment Joint Venture Deed are satisfied then the Representative will notify the Manager and the Manager will arrange for payment from the Trust Account.

46. The funds will be used directly in the Project and will not be applied in other ways by the Representative (clause 14.3).

47. In relation to Overages, if the Budget for the Film has been expended and the Film is not yet completed and delivered, then the Production Company will contribute from its own funds or borrowings in order to Complete and Deliver the Film. The Investors do not, under any circumstances, have to contribute more moneys in order for the Film to be completed (clause 14.8).

48. In relation to Underages, if the Film is completed and delivered by the Production Company and the Budget has not yet been completely expended, then the Production Company is entitled to retain any excess funds from the Budget as an additional production fee (clause 14.9).

## **Head Distribution Agreement**

49. The Investors will grant exclusive Distribution Rights in respect of their interests in the Copyright in the Film to the FFC as Head Distributor of the Film, in accordance with clause 2 of the Head Distribution Agreement.

## **Sub-Distribution Agreement**

50. The FFC will then enter into a Sub-Distribution Agreement with the Sub-Distributor and the Representative, in accordance with clause 4 of the Head Distribution Agreement.

51. The Sub-Distributor undertakes to maximise the revenues derived from exploitation of the Distribution Rights in accordance with its best commercial judgement under Clause 4 of the Sub-Distribution Agreement.

## **Collection Account Management Agreement**

52. An independent Collection Account Manager will be appointed, in accordance with clause 5 of the Head Distribution Agreement, to ensure that those who are entitled to revenues from the Film will profit according to the terms of their respective agreements. Whilst the Collection Account Manager will collect revenues from territorial distributors and disburse the revenues in accordance with the obligations imposed on the FFC under the Head Distribution Agreement, all proceeds under the territorial distribution agreements are due to April Distribution, all proceeds under the Sub-Distribution Agreement are due to the FFC and all proceeds under

the Head Distribution Agreement are due to the various parties entitled to a share of Gross Receipts, including the Investors.

### **Disbursement Schedule**

53. The Production Company, the FFC, the Manager and the Investors will receive a share of the revenues distributed in accordance with the Disbursement Schedule in Exhibit B of the Head Distribution Agreement (also the Eighth Schedule of the Production and Investment Joint Venture Agreement), as per paragraphs 54 to 57.

### ***Recoupment of Budgeted Cost of the Film (paragraph F of Exhibit B)***

54. In payment to the following parties at the same time and in the following proportions until the total of Gross Receipts paid to the Investors and the Manager (in the aggregate) equals 100% of the Budgeted Cost of the Film:

The FFC:	7.0%
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The balance of 93% shall be disbursed as follows:

- (i) to the Manager until the Manager has received an amount equal to 10% of the Budgeted Cost of the Film;
- (ii) thereafter, to the Investors.

Provided that: 93% of the sums from time to time paid to the Collection Account Manager pursuant to clause 2 paragraph C of Exhibit B shall be deducted from the FFC's share and that amount shall be paid to the Manager for the account of the Manager and then the Investors in accordance with (ii) above.

### ***Further Recoupment by Investors and Recoupment by FFC (paragraph G of Exhibit B)***

55. In payment to the following parties at the same time and in the following proportions until the FFC's proportionate share of Gross Receipts from paragraph F of Exhibit B and this paragraph, prior to the redistribution of Collection Account Manager payments noted within paragraph F of Exhibit B and this paragraph, is one-third of the Budgeted Cost of the Film:

The Investors	50.0%
The FFC	50.0%

Provided that: 50% of the sums from time to time paid to the Collection Account Manager pursuant to paragraph C of Exhibit B (if not already deducted from the FFC's share under paragraph F of Exhibit B) shall be deducted from the FFC's share and paid to the Investors.

**Completion Bond (paragraph H of Exhibit B)**

56. In payment to the Completion Guarantor of any sum due to the Completion Guarantor in accordance with the Completion Guaranty.

**Net profit participation (paragraph I of Exhibit B)**

57. Following payment of sums equal to 3.33% of further Gross Receipts paid in respect of rights in the screenplay acquired from another party on a commercial in confidence basis, then the balance in payment to the following parties at the same time and in the following proportions (net profits):

The Investors	50.0%
Production Company	20.0%
The FFC	16.5%
The Manager	13.5%

Provided that: 83.5% of the sums from time to time paid to the Collection Account Manager pursuant to paragraph C of Exhibit B (if not already deducted from the FFC's share under paragraphs F and G of Exhibit B) shall be deducted from the FFC's share and paid to the Investors, the Manager and the Production Company pro rata pari passu.

Paragraph I of Exhibit B also determines the disbursement of payments in the event the gross box office for the film in Australia reaching \$15,000,000.

**Minimum Distribution Guarantee**

58. As consideration for the exclusive licence of Copyright and the right to exploit the Film in all territories, the FFC will guarantee to pay an amount of \$5,276,071 to the Investors on the Minimum Distribution Guarantee (MDG) Payment Date. Provided the Film is completed and delivered, the FFC will be required to pay the MDG regardless of actual Film sales in each territory irrespective of the amount of sales derived from the Film.

**Sale of Copyright**

59. At the end of the transaction, the Investors will have the opportunity to sell their interest in the Copyright and their entitlement to gross and net receipts for market value in accordance with the procedure set out in the Third Schedule of the Production and Investment Joint Venture Deed.

60. Between four and six months prior to the end of the Relevant Period, the Manager will seek to appoint at least two agents to seek third party offers to acquire the Film. Each Investor, the Production Company, the FFC, the Sub-Distributor or Manager will have the

opportunity to match any initial offer so obtained. The Sub-Distributor will then have the opportunity to match any offer so obtained. All such offers will be communicated to the Investors, along with a report from an independent third party expert as to which offer is the best reflection of market value. If a majority of the Investors do not wish to accept the offer recommended by the expert, such Investors or the Sub-Distributor will purchase the outstanding interests of the Investors who wish to dispose of their interests, subject to the right of the Production Company to match the best offer.

### **Finance**

61. There is no finance facility offered by the Manager or any other party to the arrangement. Investors can fund their investment in the Film themselves, or borrow from an independent lender. Regardless of the source of loan funds, this Ruling will not apply to Investors if the Manager accepts their investment subject to finance approval by a lending institution and the full amount payable at the time of the Investment is not paid to the Manager on or before the execution of the Investment Deed or the Agency Deed and the Production and Investment Joint Venture Deed.

62. This Ruling does not apply if a finance arrangement entered into by an Investor to fund the Investor's Investment in the Film includes or has any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- the funding arrangements transform the Project into a 'scheme' to which Part IVA may apply;
- the loan or rate of interest is non-arm's length;
- repayments of the principal and payments of interest are linked to the 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 mechanism, 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
- entities associated with the Project are involved or become involved, in the provision of finance to Investors for the Project.

## Ruling

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### Division 10BA

63. A deduction is available to an Investor in the Film under Division 10BA for the amount contributed toward the direct production costs of the Film. No deduction is available under Division 10BA for an amount contributed toward the Non-Deductible Expenses. A New Investor is considered to have contributed to the direct production costs of the Film if the Agency Deed and Assignment Deed have been executed and the Investment has been paid into the Production Account before the completion of the film and the time when the Copyright first comes into existence.

64. Upon Completion of the Film, after the audit has been carried out by an independent auditor, Division 10BA deductions will be withdrawn from Investors to the extent that their investment moneys were spent on Non-Deductible Expenses (section 124ZAG).

### Partnership and section 26AG

65. For the year ending 30 June 2005 and subsequent years of income, Investors who initially acquire 75% of the Copyright in the Film will comprise a tax law partnership for the purposes of Division 5 of Part III (see definition of 'partnership' in section 995-1 of the ITAA 1997). The partners will receive income jointly from the commercial exploitation of their Copyright interest in the Film.

66. The New Investors will form a new tax law partnership with the Current Investors after the Assignment Deed and the Deed of Variation have been signed. The partners in the new tax law partnership will receive income jointly from the commercial exploitation of their Copyright interest in the Film.

67. All amounts received by the Partnership, including the MDG, in respect of the Film are assessable income of the Partnership under section 26AG in the income year in which they are received. This includes amounts received on the disposal of a Copyright interest. However, pursuant to subsection 26AG(9), any income received by a Partnership from the use of, or the right to use, the Copyright is taken to have been derived by the partners. No such income is taken into account for the purposes of calculating the net income or loss of the Partnership of any year of income and, if this is the only income derived by the Partnership, it will not be necessary to lodge partnership income tax returns. Any income derived will be taken to be the income of each Investor in proportion to their share in the partnership.

**Section 124ZAO**

68. Interest in respect of investment funds borrowed and any other revenue outgoings relating to the investment incurred by the New Investors to make their contributions may be deductible to the Investors in accordance with section 8-1 of the ITAA 1997, but only to the extent of film income which is derived from the Film (subsection 124ZAO(2)). Any excess interest and revenue outgoings may be carried forward indefinitely and offset against future income from the Film (subsection 124ZAO(3)). Film income includes the MDG.

69. The deductibility or otherwise of interest arising from loan agreements entered into with financiers is outside the scope of this Ruling. Refer to paragraphs 100 and 101 for further information.

**Division 35 of the ITAA 1997**

70. Division 35 of the ITAA 1997 will not apply on the basis that any losses which may arise are attributable to a passive investment which does not constitute a business activity.

**Section 79D**

71. Section 79D does not apply to deny or defer the deductions otherwise allowable.

**Section 82KL**

72. Section 82KL will not be applied to deny deductions otherwise allowable.

**Part IVA**

73. Part IVA will not apply to deny deductibility or to accelerate assessability of the above amounts.

**Assumptions**

74. This Ruling is made subject to the following assumptions:

- (a) The New Investor was a resident of Australia for tax purposes at the time the money was expended (subparagraph 124ZAF(1)(b)(i));
- (b) The investment moneys of the New Investors will be paid to the Production Company by way of contribution to the cost of producing the Film under a contract entered into on or before the end of the financial year in which the capital moneys are to be expended, being 30 June 2005 and before the completion of the film. The production contract will specify that the investment

moneys contributed represent the estimated cost of production of the Film (paragraph 124ZAF(1)(a) and subparagraph 124ZAF(1)(d)(iv));

- (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 New 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 New 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 a final certificate will be issued;
- (i) The Film will be completed and the New 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 New Investor will become one of the first owners of the Copyright in the Film before 1 July 2007;
- (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 New Investor expends the capital moneys by way of contribution to the cost of producing the Film, the New 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 New 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 Production Company will expend the Underage in a manner that will preserve the status of the Film as a 'qualifying Australian Film';
- (o) The dominant purpose of the New 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; and
- (p) Non-Deductible Expenses associated with the Film in respect of Division 10BA will be met by the Head Distributor.

## **Explanation**

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### ***Corporations Act 2001***

75. For this Ruling to apply, an offer for an interest in the Film must have been made to, and accepted by a New Investor, who qualifies as a wholesale client as defined in section 761G of the *Corporations Act 2001*.

76. A New Investor in the Film may be a person who is a wholesale client within the definition in section 761G. A person will be a wholesale client where the person satisfies one of the following tests:

- the 'product value test' (paragraph 761G(7)(a));
- the 'individual wealth test' (paragraph 761G(7)(c)); or
- the 'professional investor test' (paragraph 761G(7)(d)).

77. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'product value test' where:

- the minimum amount payable for the interests in the Film on acceptance of the offer by the person to whom the offer is made is at least \$500,000; or
- the amount payable for the interests in the Film on acceptance by the person to whom the offer is made and the amounts previously paid by the person for interests in the Film of the same class that are held by the person add up to at least \$500,000.

78. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'individual wealth test' where, it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made, that the person to whom the offer is made:

- has net assets of at least \$2.5 million; or
- has a gross income for each of the last 2 financial years of at least \$250,000 a year.

79. A participant in a managed investment scheme, referred to below as 'the person' or 'the person to whom the offer is made', will satisfy the 'professional investor test' where:

- the person is a financial services licensee; or
- the person controls at least \$10 million for the purposes of investment in securities.

## Division 10BA

### *The 'directly expended' requirement*

80. 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.

81. 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 124ZAF A 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).

82. The production budget for Jindabyne has been reviewed by KPMG in order to ensure that only expenses which will relate exclusively to the production process will be met from moneys contributed by the Investors. This review has been conducted with reference to the guidelines contained in Income Tax Rulings IT 2111 and IT 2629.

83. Whilst the production budget includes non-deductible expenses associated with the financing and marketing of the Film, this expenditure will be separately met by funds contributed by the FFC, in accordance with Part A of the Fourth Schedule of the Production and Investment Joint Venture Deed.

84. The Film has commenced production and the relevant production documents have already been executed. New Investors will pay their Investment money to the Agent, who will hold the money in the Holding Trust Account until the New Investor is accepted. Upon acceptance the Agent will deposit the Investment into the Production Account and the Production Company will reimburse B&B films and the FFC for their Investment amounts as per the Jindabyne Agreement. That is, the New investors' Investment will be used to replace the funds already provided by B&B Films and FFC as Current Investors.

85. The issue of whether funds contributed in this way satisfy the 'directly expended' requirement was considered in *Commissioner of Taxation v. Faywin Investments Pty Ltd (1990) 93 ALR 241; (1990) 90 ATC 4631; (1990) 21 ATR 256; (Faywin)*. The Federal Court considered that Division 10BA did not require that the money be able to be traced to actual expenditure, rather it was sufficient that there is, in a practical sense, a link between the contributions by the investor and the production expense. In *Faywin* the contributions of a new investor were paid into the production account and then, on the same day, the producer paid from the production account the same amount to an existing investor. The court found that the payment by the new investor qualified as being 'directly expended' on the production of the film.

86. It is considered that the Selldown arrangement is analogous with the *Faywin* decision and therefore the 'directly expended' requirement is satisfied. However, the extent of the application of the money by the Production Company to elements of production will ultimately determine the portion of the New Investors' contribution that meets this requirement. Generally, this will not be known until after the Completion of the Film.

87. The Production Company will submit a drawdown request when funds are required for production and the Representative will notify the Manager that the conditions for drawdown have been satisfied and the Manager will arrange for payment to the Production Company for application towards the production costs. In doing this, the Representative is to ensure that funds contributed by all the Investors are only expended on items within the Film production budget, with Non-Deductible expenditure to be met by funds contributed by the FFC.

88. 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 Production Company as Underage. In this regard, the parties have agreed that any Underage will be retained by the Production Company as an additional production fee in a manner that will preserve the status of the Film as a 'qualifying Australian film'.

89. 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 a production company (known as an audit of the Film) is considered inadequate in this regard.

90. Accordingly, where the New Investor acquires their interest in the Copyright of the film via the Assignment Deed a deduction should be available in respect of the investment made by the New Investors provided:

- the Investment is made before 30 June 2005 or the completion of the film, whichever is the earlier; and
- the Agent has paid the Investment into the Production Account before either B&B Films and FFC are reimbursed.

91. The deduction will be withdrawn with retrospective effect if the amounts contributed are not directly expended on the Film.

### ***The 'at risk' rule***

92. 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).

93. Paragraph 13 of Taxation Ruling IT 2111 discusses the 'at risk' rule and states the rule:

... 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 (for example, 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.

94. 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.

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

#### ***Non-arm's length transactions***

96. 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.

97. 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 has been produced. Furthermore, to make such a determination, a full audit of the Film's application and production fund would normally be required.

98. Accordingly, while a deduction should be available in respect of capital moneys expended by New Investors by way of contribution to the cost of producing the Film before the end of the financial year ending 30 June 2005, the deduction will be reduced with retrospective effect if the Commissioner determines that a producer of the Film 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.

**Partnership and assessable income**

99. The New Investors in the Film will be considered to be a partnership for income tax purposes with the Current Investors, after the Assignment Deed and the Deed of Variation have been signed, as they are in receipt of ordinary income or statutory income jointly (see the definition of 'partnership' in section 995-1 of the ITAA 1997). All amounts received by a Partnership of Investors in a Film, including amounts received on disposal of the Copyright in the Film, will be assessable income of the Investors under section 26AG in the income year in which they are received. Although there exists a tax law partnership, subsection 26AG(9) provides that income of a partnership assessable under section 26AG is taken to be income derived by the partners/Investors. The amounts received as income are payments for the right to use the rights attaching to a 'qualifying Australian film' possessed by the Investors in respect of a particular period.

**Interest on borrowed funds**

100. New Investors should note that the deductibility of interest is outside the scope of this Ruling (refer to paragraph 69). However, interest incurred on borrowed funds should be deductible provided the finance arrangement does not contain any of the features identified in paragraphs 61 and 62.

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

**Division 35 of the ITAA 1997**

102. Subsection 35-5(2) of the ITAA 1997 specifically provides that Division 35 of the ITAA 1997, which regulates the deduction of losses from non-commercial business activities, is not intended to apply to 'activities that do not constitute carrying on a business, for example, the receipt of income from passive investments'.

103. The transactions covered by the arrangement amount to an acquisition of passive investments and the deriving of income from those investments. Hence, Division 35 of the ITAA 1997 does not apply to the Project.

**Section 79D**

104. Section 79D does not apply where there are no 'foreign income deductions' (as defined in subsection 160AFD(9)).

105. The transactions covered by the arrangement do not give rise to 'foreign income deductions' because the deductions under Division 10BA do not relate to any 'assessable foreign income' (as defined in subsection 160AFD(9)). The income derived by the New Investors under the Head Distribution Agreement will have an Australian source and will not be 'assessable foreign income'.

106. The New Investors have no beneficial interest in the Gross Proceeds received from the Collection Account Manager. The New Investors have no entitlement to any withholding tax credits deducted from amounts paid under the Head Distribution Agreement. The New Investors are only entitled to amounts paid into, or credited to, the Trust Account held by the Manager.

#### **Section 82KL – recouped expenditure**

107. Section 82KL has no application to Division 10BA arrangements and is therefore not relevant to any deductions properly allowable to the Investors under Division 10BA.

#### **Part IVA**

108. 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.

109. 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. 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.

#### **Payment of interest by a New Investor where an assessment is amended**

110. Section 204 provides that where an amendment of an assessment increasing the liability of a taxpayer to tax is made, the taxpayer is liable to pay a general interest charge 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.

111. New 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 New Investors in that film, section 204 will have application. There is a discretion in section 8AAG of the *Taxation Administration Act 1953* under which the Commissioner can remit, in appropriate circumstances, the whole or part of the charge.

## Detailed contents list

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## Commissioner of Taxation

1 June 2005

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- Previous draft:*
- Not previously issued in draft form
- Related Rulings/Determinations:*
- PR 1999/95; PR 2004/111;  
IT 2111; IT 2629; TR 92/1;  
TR 92/20; TR 97/16; TR 98/22;  
TD 93/34
- Subject references:*
- Australian films
  - film income
  - film industry
  - interest expenses
  - product rulings
  - public rulings
  - schemes and shams
  - tax administration
  - tax avoidance
- Legislative references:*
- ITAA 1936 26AG
  - ITAA 1936 26AG(9)
  - ITAA 1936 79D
  - ITAA 1936 82KL
  - ITAA 1936 Pt III Div 5
  - ITAA 1936 Pt III Div 10BA
  - ITAA 1936 124ZAA(1)
  - ITAA 1936 124ZAA(6)
  - ITAA 1936 124ZAB
  - ITAA 1936 124ZAB(10)
  - ITAA 1936 124ZAC
  - ITAA 1936 124ZADA(1)
  - ITAA 1936 124ZADA(2)
  - 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 124ZAG
  - 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
  - ITAA 1936 124ZAO(2)
  - ITAA 1936 124ZAO(3)
  - ITAA 1936 160AFD(9)
  - ITAA 1936 Pt IVA
  - ITAA 1936 177A
  - ITAA 1936 177C
  - ITAA 1936 177D
  - ITAA 1936 204
  - ITAA 1997 8-1
  - ITAA 1997 Div 35
  - ITAA 1997 35-5(2)
  - ITAA 1997 995-1
  - TAA 1953 Pt IVAAA
  - TAA 1953 8AAG
  - GST Act 1999
  - GST Act 1999 Div 11
  - Copyright Act 1968
  - *Corporations Act 2001*
  - *Corporations Act 2001* 761G
  - *Corporations Act 2001* 761G(7)(a)
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