


PR 2009/40 - Income tax: Film Investment - 'Hell for Leather'

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Product Ruling

Income tax: Film Investment – ‘Hell for Leather’

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ⓘ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner’s opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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 scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product 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 Product Ruling.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1936* (ITAA 1936) unless otherwise indicated. In this Product Ruling this scheme is referred to as 'Hell for Leather', 'the scheme', 'the Project' or simply as 'the Film'.

Class of entities

2. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Investors.

3. The class of entities who can rely on those tax benefits consists of entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Project Agreements mentioned in paragraph 21 of this Ruling on or before 30 June 2009. They must have a purpose of staying in the scheme until it is completed (that is, being a party to the relevant agreements until their term expires), and deriving assessable income from this involvement.

4. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:

- intend to terminate their involvement in the scheme prior to its completion, or who otherwise do not intend to derive assessable income from it;
- are accepted into this Project before the date of this Product Ruling or after 30 June 2009;
- are not a wholesale client for the purposes of section 761G of the *Corporations Act 2001* (Corporations Act) or will not accept a personal offer within the meaning of section 1012E of the Corporations Act;
- participate in the scheme through offers made other than through the Information Memorandum for the Film; or
- are non-residents of Australia for the purposes of the ITAA 1936 or the *Income Tax Assessment Act 1997* (ITAA 1997).

Superannuation Industry (Supervision) Act 1993

5. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The Tax Office gives no assurance that the product is an appropriate investment for a superannuation fund. The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

6. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 21 to 46 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

8. This work 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
Copyright Law Branch
Attorney-General's Department
National Circuit
Barton ACT 2600

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Date of effect

9. This Product Ruling applies prospectively from 10 June 2009, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 10 June 2009 until 30 June 2009 being the closing date for entry into the scheme. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities for the income year ending 30 June 2009.

10. However the Product Ruling only applies to the extent that there is no change in the scheme or in the entity's involvement in the scheme.

Changes in the law

11. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of this Product Ruling and, to that extent, this Product Ruling will have no effect.

12. Entities who are considering participating in the scheme 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

13. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes 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 Product Ruling is issued.

Goods and Services Tax

14. All amounts and percentages referred to in this Product Ruling exclude the Goods and Services Tax (GST), unless otherwise specified. The transactions in respect of this scheme will, where appropriate, ordinarily have GST implications. Those GST implications are outside the scope of this Product Ruling. Parties to this Product Ruling should seek independent advice in respect of GST. Parties to this Ruling can also submit an application for a private ruling from the Tax Office in respect of the application of the GST law to their particular circumstances.

Ruling

Division 10BA

15. A deduction is available to an Investor in the Film under Division 10BA of Part III (Division 10BA) for the income year ended 30 June 2009 for 98.078% of the money paid by, or on behalf of, the investor on or before 30 June 2009 as capital contributions toward the production of Film.

16. A deduction is not available unless each of the following occur on or before 30 June 2009:

- the production budget of \$2,159,883 has been achieved; and
- each Investor's Production Investment Agreement has been executed.

17. 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, in excess of those stated above (section 124ZAG).

Partnership and section 26AG

18. For the year ending 30 June 2009 and subsequent years of income, Investors who initially acquire 50% of the Copyright in the Film will comprise a tax law partnership for the purposes of Division 5 of Part III of the ITAA 1936 (see definition of 'partnership' in section 995-1 of the ITAA 1997). All amounts received by the Partnership as consideration for the use of, or the right to use, the Investors' Copyright interests are assessable income of the Partnership under section 26AG of the ITAA 1936 in the income year in which they are received. The partners (Investors) will receive income jointly from the commercial exploitation of their Copyright interest in the Film. However, pursuant to subsection 26AG(9) of the ITAA 1936, 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 (Investors). 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.

Non-commercial losses, and anti-avoidance provisions

Division 35 of the ITAA 1997 and Part IVA of the ITAA 1936

19. Where an Investor contributes capital money on or before 30 June 2009 towards the production of the Film as set out at paragraphs 30 to 41 of this Ruling, the following provisions of the ITAA 1936 or the ITAA 1997 have application as indicated:

- losses arising from investing in the Film are not within the scope of Division 35 of the ITAA 1997; and
- the relevant provisions in Part IVA of the ITAA 1936 will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Assumptions

20. 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 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 by the Division 10BA Investor, being 30 June 2009. 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 Investor, at the relevant time, expects to become one of the first owners of the Copyright in the Film when the Copyright comes into existence (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 Environment, Water, Heritage and the Arts will be met and a final certificate 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) 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);
- (k) 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));
- (l) 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;
- (m) 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'; and
- (n) 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.

Scheme

21. The scheme is the Film Investment – Hell for Leather and is described below. This scheme incorporates the following documents:

- Application for a Product Ruling lodged on 20 May 2009 as constituted by documents provided on 20 and 21 May 2009 and additional correspondence dated 21 May 2009;
- Draft Investment Memorandum for Hell for Leather, received on 21 May 2009;

- Draft **Production Investment Agreement** (PIA) between Baldwin Films Pty Ltd (the Production Company), the Investor's Representative and the Investor, received with the application for a Product Ruling on 20 May 2009;
- Draft Disbursement Schedules for Gross and Net Receipts received with the application for a Product Ruling on 20 May 2009;
- Draft Hell for Leather Budget received with the application for a Product Ruling on 20 May 2009; and
- a Provisional Certificate under section 124ZAB issued by the Department of Environment, Water, Heritage and the Arts, dated 8 March 2005.

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

22. The documents highlighted include those that Investors may enter into. For the purposes of describing the scheme to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which an Investor, or any associate of an Investor, will be a party to, which are a part of the scheme. In this Ruling the term 'associate' has the meaning given by section 318.

23. In accordance with the above documents, an Investor who participates in the scheme must be a wholesale client. This Ruling does not apply unless the Investor is a wholesale client for the **purposes of section 761G of the Corporations Act or will accept a personal offer within the meaning of section 1012E of the Corporations Act**. The meaning of wholesale client and personal offer are explained in the Information Memorandum for this Project.

24. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

The Participants

25. The entities involved in the scheme are:

- **Investor:** a person, who signs a PIA and incurs capital expenditure in acquiring an interest in the Copyright in the Film.
- **Investor Representative:** an Investor Representative will be appointed and will act as one of the necessary signatories of the Trust Account in accordance with the PIA (clause 10.1).

- **Production Company:** Baldwin Films Pty Ltd will act as the Production Company and agrees to produce and complete the Film pursuant to clause 4.4 of the PIA.
- **Distributor:** such company(s) either in Australia or elsewhere appointed by the Production Company to market and distribute the Film or Ancillary Rights in any territory in the world.

Defined terms

26. Terms which have been defined within the relevant documents to the scheme include the following:

- **Ancillary Rights** means any rights which the Production Company may have or acquire in respect of the Film including publishing the script, and books derived from the script; producing computer games, worldwide web site; exploiting merchandising related to the title of the Film and characters or scenarios from the Film and trade marks related to the Film; and to produce further cinematographic films from the script and the Film (in the form of prequels, sequels and spin-off audiovisual productions).
- **Budget** means the budget to produce the Film.
- **Budgeted Cost** means the cost of production of the Film as provided for in the Budget (including the Budgeted Non-Deductible Expenses).
- **Completion Date** means the date of completing the Film which shall be no later than 30 June 2011.
- **Copyright** means:
 - (a) any copyright under the Copyright Act;
 - (b) any copyright under the laws of a country other than Australia; and
 - (c) rights in the nature of or analogous to the rights in (a) or (b) under the law of Australia or any other country.
- **Expiry Date** means the date 7 years after the Completion Date.

- **Film** means a cinematograph film (being a telemovie or feature film) provisionally entitled 'Hell for Leather' and includes all parts, prints, copies, trailers and versions whether differentiated by re-editing, cutting, dubbing, subtitling or otherwise and whether embodied in any article or thing now devised or yet to be devised including film in gauges, video-tape, video cassette, video-disc, laser disk and CD-ROM and the like motion picture, television or other audiovisual production.
- **Gross Proceeds** means the balance of all money (excluding governmental funding, grants or rebates) received by the Distributor or Production Company from marketing the Film and exploitation of the Ancillary Rights after deduction of any distributor's, exhibitor's or agent's commission or expenses, royalties, residuals, bank's charges, transaction taxes or other deductions which are bona fide and made at arm's length.
- **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.
- **Overage** means any amount in excess of the Budgeted Cost required to complete the Film which is expended by the Production Company.
- **Parties** means the parties to the PIA.
- **Production Account** means the bank account opened by the Production Company in accordance with clause 4.1 of the PIA.
- **Production Investment** means the amount set out in Item 2 of the Schedule to the PIA.
- **Schedule** means the schedule to the PIA.
- **Trust Account** means the bank account opened by the Production Company in accordance with clause 2.1 and operated by the Production Company and the Investor Representative on behalf of the Investors in accordance with the PIA.
- **Underages** mean any part of the Budgeted Cost not spent on the Production of the Film.

Overview

27. The Project involves the production of a Film entitled 'Hell for Leather'. Provisional Certificate number P06942 dated 8 March 2005 has been issued by the Department of Environment, Water, Heritage and the Arts 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.

28. The total budgeted cost of the Film is \$2,159,883 which comprises direct production costs of \$2,118,383 (98.078%) and Non-Deductible Expenses of \$41,500 (1.922%).

29. Investors will make capital contributions towards the budgeted cost of production of the Film. An offer to invest in the Project will be made to Investors via the Investment Memorandum. Investors may be either:

- wholesale clients as defined in section 761G of the Corporations Act; or
- retail clients as part of a small scale offering as defined in section 1012E of the Corporations Act.

Production Investment Agreement

30. The PIA is between the Production Company, the Investor Representative, and the Investor.

31. The Investor agrees to invest the sum specified in Item 2 of the Schedule.

32. Pursuant to clause 2.3, the Production Company will deposit and hold the Production Investments in a Trust Account controlled by the Investor Representative pending the receipt of the total budgeted cost of the Film of \$2,159,883 by 30 June 2009. If the \$2,159,883 is not obtained, the Production Investments plus interest (if any) will be refunded to the Investors.

33. When the \$2,159,883 is obtained the funds will be transferred to a Production Account established by the Production Company in accordance with clause 4.2.

34. The Investors will be one of the first owners of Copyright in the Film. The Investors will hold the Copyright as tenants in common with the other copyright owners of the Film. The initial Copyright interests in the Film will be as follows:

Investors	50%
Production Company	50%

35. The Investor's entitlement to the ownership of a share of the Copyright of the Film will cease on the Expiry Date (clause 6.4). After the Expiry Date the Copyright will revert to the Production Company.

36. The Production Company agrees that it will, with all diligence, produce and complete the Film prior to the Completion Date as required by the PIA and as set out in the Budget.

37. The Production Company may re-allocate items of expenditure within the Budget at its absolute discretion provided that the production investment may not be expended on a greater proportion of Non Deductible Expenses (clause 4.5).

38. In relation to Overages, if the Budget for the Film has been expended and the Film is not yet completed the Production Company must arrange to pay any Overages from its own funds (clause 4.6). The Investors shall not be obliged to contribute more moneys in order for the Film to be completed without an additional agreement in writing from the Investors (clause 4.8).

39. Under clause 4.7 Underages shall be applied towards the enhancement of music and special effects for the Film.

40. In accordance with Item 7 of the Schedule the Gross Proceeds will be distributed as follows:

- (i) to the Investor pro-rata pari passu with the Other Investors until recoupment of 100% of the Production Investment; and
- (ii) thereafter, as to 50% to the Investor pro-rata pari passu with the Other Investors and 50% to the Production Company.

41. The Investors entitlement to a share of the Gross Proceeds will cease on the Expiry Date (clause 8.4).

Distribution

42. Under clause 6.2 of the PIA the Investor grants the Production Company the irrevocable exclusive licence throughout the universe to use, exploit and authorise the use and exploitation of the Copyright in the Film.

43. Clause 7 of the PIA provides for the Production Company having the exclusive right to carry out the marketing of the Film and exploitation of the Ancillary Rights as agent for the Investor.

44. No distributor has yet been appointed to handle domestic or overseas sales. The Production Company or an Australian distribution company appointed by it will undertake the distribution of the Film in Australia. An existing major Australian distribution company may be appointed to handle overseas sales. Alternatively, the controller of the Production Company may form an Australian distribution company to conduct overseas sales either directly or through one or more sales agents.

Finance

45. There is no financing facility offered by the Production Company or any other party to the scheme. Investors can fund their investment in the Project themselves or borrow from an independent lender. Investors cannot rely on any part of this Ruling if the Production Investment is not paid in full on or before 30 June 2009. An Investor who enters into a finance arrangement in respect of their investment in the Project may request a private ruling on the deductibility or otherwise of interest incurred.

46. 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;
- 'additional benefits' are or will be granted to the borrowers for the purpose 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-arm's length;
- repayments of the principal and payments of interest are linked to the derivation of income from the Film;
- the funds borrowed, or any part of them, will not be available for the conduct of the Film 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.

Commissioner of Taxation10 June 2009

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Division 10BA

The 'directly expended' requirement

47. 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.

48. 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).

49. The Tax Office view is that the 'directly expended' requirement is not met at the point in time when the Investors make payments to the Production Company in respect of the Budget for the Film. Rather, the extent of the application of the money by the Production Company 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.

50. 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 shall be applied towards the enhancement of music and special effects in a manner that will preserve the status of the Film as a 'qualifying Australian film'.

51. The Investors will pay the Production Investment to the Production Company which will use 98.078% of total funds for application towards the production costs. In doing this, the Production Company is to ensure that this proportion of funds contributed by investors is only expended on items within the Film's production Budget.

52. 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.

53. 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.

The 'at risk' rule

54. 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).

55. 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.

56. 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.

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

Non-arm's length transactions

58. 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.

59. 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.

60. 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 before the end of the financial year ending 30 June 2009, 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.

Relevant 24 month period

61. The relevant 24 month period referred to in subsection 124ZAF(2) commences from 30 June 2009, being the end of the financial year in which capital moneys were first expended by way of contribution to the cost of producing the Film.

Section 124ZAO

62. With the exception of deductions under section 124ZAF, section 124ZAO will operate to limit the amount of any deduction otherwise allowable in relation to the Film and in gaining or producing assessable income to which section 26AG relates. The deduction allowable in a year of income will be limited to the amount of film income which is derived from the Film (subsection 124ZAO(2)). Any excess deductions may be carried forward indefinitely and offset against future income from the Film (subsection 124ZAO(3)).

63. Section 124ZAO may apply in relation to deductions in respect of interest.

Partnership and section 26AG

64. The Investors in the Film will be considered to be a partnership for income tax purposes 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). Amounts received by a Partnership of Investors in a Film, from the exploitation of their Copyright interest in the Film, will be assessable income of the Investors under paragraph 26AG(1)(d) in the income year in which they are received. Although there exists a tax law partnership, subsection 26AG(9) of the ITAA 1936 provides that income of a partnership assessable under subsection 26AG(1) of the ITAA 1936 is taken to be income derived by the partners/Investors.

Part IVA – general tax avoidance provisions

65. 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).

66. The Film will be a 'scheme' and an Investor will obtain a 'tax benefit' from entering into the 'scheme', in the form of tax deductions available under Division 10BA that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

67. Investors to whom this Ruling applies will derive assessable income from the exploitation of their Copyright interest in the Film. There are no facts that would suggest that Investors have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no non-recourse financing or round robin characteristics, and no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) it cannot be concluded, on the information available, that Investors will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Payment of interest by an Investor where an assessment is amended

68. Section 280-100 of Schedule 1 of the *Taxation Administration Act 1953* (TAA) 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 shortfall 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.

69. 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 280-100 of Schedule 1 to the TAA will have application. There is a discretion in section 280-160 of Schedule 1 to the TAA under which the Commissioner can remit, in appropriate circumstances, the whole or part of the charge.

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

IT 2111; TR 98/22

Subject references:

- Australian films
- film income
- film industry
- product rulings
- schemes and shams
- tax administration
- tax avoidance

Legislative references:

- ITAA 1936
 - ITAA 1936 26AG
 - ITAA 1936 26AG(1)
 - ITAA 1936 26AG(1)(d)
 - ITAA 1936 26AG(9)
 - ITAA 1936 82KL
 - ITAA 1936 Pt III Div 5
 - ITAA 1936 Pt III Div 10BA
 - ITAA 1936 124ZAA(6)
 - ITAA 1936 124ZAB
 - ITAA 1936 124ZAB(10)
 - ITAA 1936 124ZAC
 - ITAA 1936 124ZADA(1)
 - ITAA 1936 124ZADA(2)
 - ITAA 1936 124ZAFA
 - ITAA 1936 124ZAFA(1)(a)
 - ITAA 1936 124ZAFA(1)(b)(i)
 - ITAA 1936 124ZAFA(1)(c)(i)
 - ITAA 1936 124ZAFA(1)(c)(ii)
 - ITAA 1936 124ZAFA(1)(d)(iii)
 - ITAA 1936 124ZAFA(1)(d)(iv)
 - ITAA 1936 124ZAFA(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 Pt IVA
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D
 - ITAA 1936 177D(b)
 - ITAA 1936 318
 - ITAA 1997
 - ITAA 1997 Div 35
 - ITAA 1997 995-1
 - TAA 1953
 - TAA 1953 Sch 1 280-100
 - TAA 1953 Sch 1 280-160
 - Copyright Act 1968
 - Corporations Act 2001 761G
 - Corporations Act 2001 1012E
 - SISA 1993
-

ATO references

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