



***TD 2006/2 - Income tax: for the purposes of Division 376 of the Income Tax Assessment Act 1997 , are some insurance premiums excluded from film production expenditure?***

 This cover sheet is provided for information only. It does not form part of *TD 2006/2 - Income tax: for the purposes of Division 376 of the Income Tax Assessment Act 1997 , are some insurance premiums excluded from film production expenditure?*

 This document has changed over time. This is a consolidated version of the ruling which was published on *25 June 2008*



## Taxation Determination

Income tax: for the purposes of Division 376 of the *Income Tax Assessment Act 1997*, are some insurance premiums excluded from film production expenditure?

**1 This Ruling provides you with the following level of protection:**

This publication (excluding appendices) 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, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any under-paid 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.

**[Note:** This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

### Ruling

1. Yes, film production expenditure for the purposes of Division 376 of the *Income Tax Assessment Act 1997* (ITAA 1997) does not include all insurance premiums. It excludes premiums incurred by way of or in relation to the financing of a film.
2. Insurance policies are incurred by way of or in relation to the financing of a film when the risk they insure is a risk to the financing of the film production. Such a risk is one that requires additional finance (whether to complete the production, to repeat a step in the production process, or to meet financier payment or financial security requirements). Such policies provide for the payment of a benefit to cover the additional production expense of further production activities likely to be required by the insured event, or the production expense lost because of the insured event, or to cover required minimum payments to financiers. Examples include 'film producer's indemnity' insurance, paying for additional costs or losses in film-making resulting when sickness, injury or death prevent a named person from performing their duties in making the film; 'extra expense' insurance, paying for additional costs of film-making arising from interruption, postponement or cancellation of the film; 'negative film risk' insurance, paying for the additional costs of re-shooting due to loss or damage to exposed film or recorded tape; 'weather insurance', covering additional production costs resulting from adverse weather; and 'faulty stock, camera and processing' insurance, paying for additional costs of re-shooting due to stock, camera or processing faults. 'Completion guarantee' insurance, assuring additional funding to complete film-making if specific costs go over budget, is the most general kind of policy

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incurred by way of or in relation to the financing of a film. Such policies may be specifically limited in their payout by reference to the expenses or to particular expenses contemplated in the budget for the film.

## **Date of effect**

3. This Determination applies both before and after its date of issue. However, the Determination 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

3A. Furthermore, this Determination only applies in relation to films that commenced principal photography or production of the animated image before 8 May 2007.

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**Commissioner of Taxation**

1 March 2006

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## Appendix 1 – Explanation

**①** *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.*

### Explanation

4. Division 376 of the ITAA 1997 entitles an Australian film production company to a refundable tax offset for certain Australian production expenditure the company incurs in making a certified and completed film. The offset requires qualifying Australian production expenditure (QAPE) of at least \$50 million, or if QAPE is at least 70% of total production expenditure then it need only exceed \$15 million.
5. The amount of the tax offset is 12.5% of the company's QAPE on the film (section 376-10 of the ITAA 1997).
6. Generally speaking, QAPE is so much of the production company's production expenditure on the film as is on goods and services provided, land located, or goods used, in Australia. Some special Australian inclusions are added, and are added to production expenditure (section 376-45 of the ITAA 1997). Some expenditures are excluded, particularly all expenditures incurred when the production company is not Australian (section 376-50 of the ITAA 1997).
7. Similarly, production expenditure is incurred in or in relation to making the film, or is reasonably attributable to using equipment or facilities for making the film or activities in making the film. Making the film is defined, and a number of expenditures are specifically excluded from being production expenditure. Financing expenditure is excluded from production expenditure.
8. Financing expenditure, defined as expenditure incurred by way of or in relation to the financing of the film, and including returns payable on amounts invested in the film and expenditure in relation to raising or servicing finance for the film, is specifically excluded under Item 1 of the table in section 376-35 of the ITAA 1997.
9. Expenditure incurred in relation to raising the finance for a film would include the establishment costs of obtaining a loan, such as fees paid to intermediaries. This would also include expenditure incurred in relation to obtaining insurance cover that is itself a financing cost (such as brokers' fees).
10. Premiums for insurance that relates to a risk to film finance that has been obtained is clearly expenditure which 'relates' to obtaining finance. Where the financier intends to rely on the proceeds of the insurance policy to ensure or secure repayment of its money, and requires the insurance to be taken out for that reason, the relationship between the premium and obtaining finance is even clearer. 'Completion guarantee' insurance is of this kind. The completion guarantor effectively uses its money to complete the film as originally agreed upon and generally pays the necessary production expenses directly. Often 'completion guarantee' cover will be obligatory to assure distributors, foreign talent, and financiers that the film will be completed and delivered.
11. The money received under an insurance policy may be sought both to indemnify against a loss suffered in producing the film and to provide finance for the film production (or in relation to the provision of finance to the film production). The question here is whether the purpose of the insurance is to finance the completion of the film or to finance repeating a wasted step in the production of the film (or to assure the repayment of the financier) if the relevant circumstances arise. Where an insurance policy provides money to continue shooting the film in the event that costs exceed available finance, or provides

money to repeat activities already funded from available finance, the premium is no more than a cost of obtaining contingent finance, and indistinguishable from an establishment fee for obtaining an overdraft or a draw-down facility. It is a payment in return for a right to have money, should it be needed, to be used to shoot the film. The premium for such insurance is expenditure incurred in relation to financing the film. The insurance is as a matter of substance to provide against the loss which would ensue to the financiers, as a result of an insured event preventing the producer from completing the film due to a lack of money. Where an insurance policy provides money to repay or assure the repayment of part of the film finance if an insured risk occurs, the premium is similarly in relation to the financing of the film.

12. Insurance policies such as: props, sets and wardrobes; miscellaneous equipment; money; and public liability have no particular connection with financing the film's completion. The risks these policies insure are not financing risks (although, like any risk, they may produce a financial cost). These policies apply to potential liabilities for risks to equipment or from unplanned and unintended events occurring in the course of making the film. In a sense, all insured risks affect the film's budget, but these insured risks are not paid out to recover wasted production expenditures or paid to meet and measured against additional production costs in completion of the film. Hired wardrobe need not be accidentally destroyed; other people's equipment need not suffer unintended damage needing compensation; money need not be lost or stolen so as to need replacement; harm need not be caused to third parties leading to public liability payouts. The premiums for these risks are expenditure in, or that relates to, actually making the film and are not expenditure in, or related to, obtaining finance for it.

13. Insurance policies such as: film producer's indemnity; negative film; faulty stock, camera and processing; and weather are mainly entered into for the purpose of ensuring that money or capital in excess of the film's budget (or to replace wasted production expenditure) will be available to complete the film if the budget is exceeded (or past production expenditure wasted) as the result of an occurrence of an insurable event. 'Completion guarantee' policies cover the additional cost of production at least where an insured event leads to that extra cost. The primary purpose for entering into any insurance policy of this kind is to ensure that sufficient capital will be available to complete the film (or repeat a wasted step in the production of the film) if an insurable event occurs, or to pay out the financier if the film is not completed.

14. Such insurance as that referred to in paragraph 13 above by its very terms shows the relationship between the loss insured against and the film's budget and finance, and expenditure for such insurance cover is financing expenditure – it is either incurred by way of or in relation to financing the film.

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## References

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*Previous draft:*

TD 2005/D52

- insurance expense

*Related Rulings/Determinations:*

TR 92/20

*Legislative references:*

- TAA 1953
- ITAA 1997 Div 376
- ITAA 1997 376-10
- ITAA 1997 376-35
- ITAA 1997 376-45
- ITAA 1997 376-50

*Subject references:*

- Australian films
- film tax offset
- films

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*ATO references*

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