TR 2002/13 - Income tax: Australian films - Division 10B - tax avoidance schemes

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Taxation Ruling
Income tax: Australian films - Division 10B - tax avoidance schemes

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Preamble

The number, subject heading, ***Class of person/arrangement, Date of effect*** *and* ***Ruling*** *parts of this document are a 'public ruling' for the purposes of Part IVAAA of the* ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner. The remainder of the document is administratively binding on the Commissioner. 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.*

*[**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.]*

What this Ruling is about

1. This Ruling examines tax avoidance schemes connected with films. Specifically, it examines tax benefit transfers under which film makers who cannot benefit directly under Division 10B of Part III of the *Income Tax Assessment Act 1936* ('ITAA 1936') enter into contrived financial (and other) arrangements with taxpayers who obtain the benefit of the Division 10B deductions with little or no commercial exposure to the success or failure of the film. These practices distort the tax concession intended by Division 10B.

2. Division 10B contains provisions which ensure that the tax concession will be available in a variety of factual circumstances. The analysis presented in this Ruling is intended to provide guidance to those taxpayers wishing to invest in Australian films and to access the Division 10B tax concession. The Division 10B tax concession will *prima facie* be available to investors in cases other than those described in paragraphs 4 and 6, or which have similar effects; that is, cases where the arrangements are not geared to achieve results such as those listed in paragraph 31.

3. This Ruling does not deal with:

(i) investments under the Film Licensed Investment Company measures;

(ii) the source of income under film distribution agreements with non-residents or section 79D of the ITAA 1936;

(iii) arrangements under which investors are actually exposed to the real risks and benefits of ownership of certified Australian films; or

(iv) property other than Australian films which from 1 July 2001 is subject to Division 40 of the *Income Tax Assessment Act 1997* ('ITAA 1997') and which from the 1998 – 99 income year to 30 June 2001 is subject to Division 373 of the ITAA 1997.

Class of person/arrangement

4. This Ruling applies to persons who enter into or carry out the following or a similar arrangement:

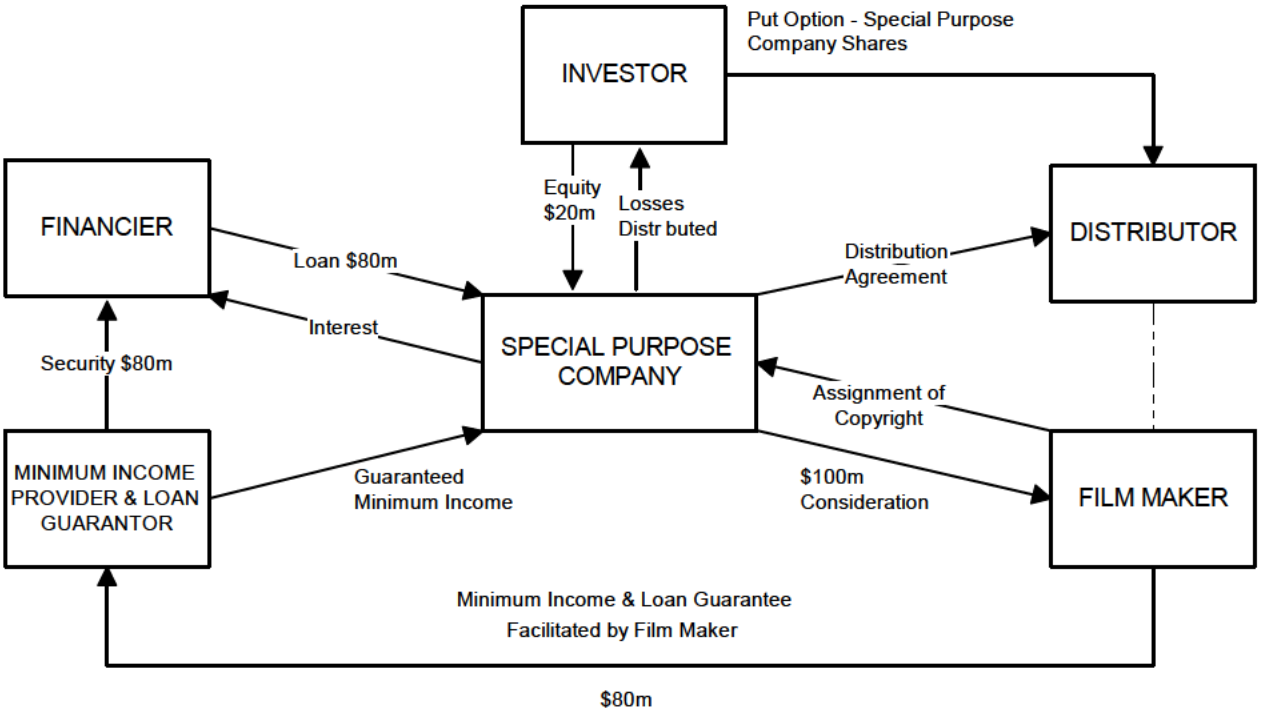
- An investor acquires or establishes a special purpose company as a wholly owned subsidiary;
- The special purpose company acquires an Australian film from a film maker for an amount referable to the cost of production;
- The investor makes a capital contribution to the special purpose company. The amount of the capital contribution is typically between 20% and 25% of the amount payable by the special purpose company to acquire the film;
- A loan is taken out by the special purpose company. The amount of the loan is typically between 75% and 80% of the amount payable by the special purpose company to acquire the film;
- The loan is guaranteed by the film maker or by an entity nominated by the film maker;
- The investor's capital contribution and the loan are used by the special purpose company to fund the purchase of film copyright from the film maker. The copyright is purchased pursuant to an assignment agreement between the special purpose company and the film maker;
- The special purpose company claims tax deductions over two years under Division 10B for the price of the film copyright. Its tax deduction in each year is transferred to the investor under the group loss transfer provisions. This results in a tax saving to the investor;

- The capital contribution/loan ratio is such that the special purpose company's tax saving applicable to the Division 10B deductions exceeds the investor's capital contribution;
- At the time that the special purpose company acquires copyright, it is obliged to enter into a distribution agreement with a distributor which is an associate of the film maker, effectively as a condition of being able to acquire the copyright. Typically the distribution agreement grants to the distributor the exclusive right and licence to distribute and exploit the film;
- Typically the distributor is entitled to the copyright if there is a default or insolvency event by the special purpose company;
- In consideration for entering into the distribution agreement the special purpose company is given an income entitlement based on a profit sharing formula;
- Under the profit sharing formula the distributor is typically entitled to recover a substantial distribution fee, distribution expenses, supervisory fees, an overhead charge, financing costs, and the cost of production of the film. The special purpose company secures an entitlement to a percentage share of any further amount, if it arises;
- In the event of any default by the distributor (not being a repudiatory breach) the special purpose company typically has no right to terminate the distribution agreement. Instead the investor can exercise a put option to dispose of its shares in the special purpose company, thereby terminating the investor's involvement;
- The investor typically acquires a put option over the shares it holds in the special purpose company. The put option is exercisable in the event of certain exceptional specified circumstances or at a specified time typically not earlier than six years after the date in which the put option is acquired and provides that the investor may dispose of the shares to the distributor, to the film maker, or to another entity nominated by the distributor or by the film maker for a nominal sum;
- The film maker separately ensures that a minimum income, approximately equal to the special purpose company's interest commitment in respect of its borrowing, will be payable to the special purpose

company in consideration for entering into the transaction documents;

- The special purpose company can require the guarantor to fund repayment of the loan.

5. The following diagram illustrates the key features of a typical arrangement.



6. This Ruling also applies to persons who enter into or carry out the following or a similar arrangement:

- A company, trust, partnership or individual acquires rights as owner of, or licensee under, copyright in relation to a film which is an Australian film for the purposes of Division 10B from a film maker. The acquisition price is referable to the cost of production;
- All, or all but an insignificant part, of the rights are transferred, sublicensed, or become exploitable by the film maker or an associate of the film maker. This is achieved by way of:
  - an assignment;
  - an exclusive distribution agreement, or otherwise, either immediately or soon after the film rights are acquired; or

- a put and/or call option (or an embedded put and/or call option) in respect of the rights, such option being granted by or to the film maker or an associate of the film maker either immediately or soon after the film rights are acquired, where it is reasonable to assume that the option will be exercised;

- The company, trust, partnership or individual, or an associate, obtains finance either directly or indirectly from the film maker or an associate of the film maker, or a guarantee by the film maker or an associate of the film maker. The finance represents a substantial part of the price of acquiring the film rights;
- The net income likely to be derived from the film by the company, trust, partnership or individual, or by the shareholders, partners, or beneficiaries, or by those ultimately interested therein, will be less than the value to them of the tax benefits obtained by them under the arrangements;
- Guarantee arrangements ensure that the company, trust, partnership, or individual, or the shareholders, partners or beneficiaries, will not have to fund the part of the price of acquiring the film rights that was financed by the loan;
- The combined effect of the loan and guarantee arrangements and the tax saving ensures there is little or no financial risk associated with the investment.

7. Where elements of an arrangement vary from those noted in paragraphs 4 and 6, the consequences for the investor may be the same, depending on the overall interaction of the elements of the varied arrangement. Whether this is so will require consideration of the circumstances of the particular case.

8. In paragraphs 13 to 32 of this Ruling:

- a reference to an investor is a reference to an investor as in paragraph 4 and any shareholders in a company, beneficiaries of a trust, partners in a partnership or other persons who may reasonably be expected to obtain tax benefits in excess of their relevant income as in the fourth dot point in paragraph 6;
- a reference to a special purpose entity is a reference to a special purpose company as in paragraph 4 and a company, trust, partnership or individual which acquires rights as owner of, or licensee under,

copyright in relation to a film which is an Australian film for the purposes of Division 10B as in the first dot point in paragraph 6;

- a reference to an assignment is a reference to an assignment as in paragraph 4 and an acquisition of copyright as owner or licensee as in the first dot point in paragraph 6;
- a reference to a distribution agreement is a reference to a distribution agreement as in paragraph 4 and any mechanism by which the exploitation rights in relation to a film are obtained by the film maker or associate as in the second dot point in paragraph 6; and
- a reference to a distributor is a reference to a distributor as in paragraph 4 and the film maker or an associate of the film maker as in the second dot point in paragraph 6.

9. The Explanations are based on the arrangement identified in paragraph 4. However, the principles contained therein also apply to the arrangement identified in paragraph 6.

Background

10. Division 10B enables 'the owner' of a 'unit of industrial property' to deduct the capital expenditure (not otherwise deductible) in acquiring the unit.

11. 'The owner' of a 'unit of industrial property' is defined in subsection 124K(1) to mean 'the person who **possesses** the rights in respect of that unit of industrial property' (emphasis added).

12. A 'unit of industrial property' is also defined in subsection 124K(1) and means the rights, including equitable rights, possessed by a person as the owner of, or licensee under, a patent, copyright or design. The rights are those possessed by a person under an Australian law or equivalent rights possessed by a person under a foreign law.

Ruling

Division 10B

The special purpose entity is never the owner of the film

13. The special purpose entity is never 'the owner' of the film as defined in subsection 124K(1) and Division 10B has no application.

14. The typical transaction documents purport to simultaneously transfer the rights from the film maker to the special purpose entity and dispose of them to the distributor. There is never a measurable period of time during which the special purpose entity possesses the rights. The integrated nature of the assignment and distribution agreements and the terms of the various other transaction documents have the effect that the film maker or its associate, the distributor, are the only parties which ever have effective possession and control of the copyright. The special purpose entity cannot be said ever to truly possess the copyright.

Alternatively, the special purpose entity becomes the owner of the film

Disposal in whole

15. If the special purpose entity becomes 'the owner', we consider that the special purpose entity immediately disposes of all of its rights relating to the copyright under the distribution agreement. In particular, the general tenor of the distribution agreement constitutes an in substance disposal in whole of the copyright to the distributor. In these cases subsection 124M(4) applies and no section 124M deduction is allowable.

16. Where there has been a disposal in whole, the availability of any deduction is considered under section 124N. The section 124N deduction is the difference between the residual value at the time of disposal as determined under section 124S and the amount of consideration for the disposal as determined under section 124T. Where a film is acquired and is immediately disposed of in whole, the section 124S residual value of the film is equal to its cost.

Cost

17. Where the parties are not dealing at arm's length in relation to the acquisition, cost is determined pursuant to the provisions of subsections 124R(3) and (4). Having regard to matters such as the loan guarantees and the granting of options, we are satisfied that the relevant parties to these arrangements are not dealing with each other at arm's length in respect of the acquisition and the disposal of the copyright.

18. The application of subsections 124R(3) and (4) is not excluded by reason that the investor or the special purpose entity may argue that it is dealing at arm's length with other parties in entering into the overall arrangement.

19. The cost of the film for the purposes of subsections 124R(3) and (4) should properly be based on the value to the special purpose

entity of its interest in the distribution agreement rather than the cost of production, or that cost plus a mark-up. In our view that value would be substantially less than the amount allocated under the assignment agreement. The value of the other benefits obtained by an investor, the special purpose entity, or any of their associates under other agreements within the arrangement, should be deducted from the amount payable under the assignment agreement as an indication of the value of the special purpose entity's interest in the distribution agreement. The arm's length cost of the film to the special purpose entity should not exceed that value.

Consideration for the disposal

20. Where there has been an immediate disposal in whole, the amount of consideration in respect of the disposal for the purposes of section 124T would be the arm's length value of the film as determined under subsection 124T(2) less any assessable amounts payable under the distribution agreement as determined under subsection 124T(3). The arm's length value cannot change between the time of acquisition and the immediate disposal. No payments accrue under the distribution agreement between the time of acquisition and the immediate disposal. The residual value at the time of disposal would be equal to the amount of consideration for the disposal and there would be no amount deductible under section 124N.

Disposal in part

21. Alternatively, if the distribution agreement constituted a disposal of copyright in part by way of the grant of an exclusive licence such that the distributor is a licensee and therefore an 'owner' for the purposes of subsection 124K(1), there can still be no residual value for the purposes of section 124M.

22. In the event of an immediate disposal in part, the residual value of the rights retained by the special purpose entity is the cost of the copyright less the consideration for the disposal in part. However, under these arrangements the whole of the exploitable rights acquired by the special purpose entity in relation to the film have been transferred to the distributor and the special purpose entity retains no residual exploitable rights. Therefore, the arm's length value of the part disposed of is equal to the arm's length value of the copyright acquired. Accordingly there is no residual value pursuant to section 124S and no amount deductible under section 124M.

Recouped expenditure - the application of section 82KL

23. Section 82KL of the ITAA 1936 applies to the arrangement to deny any deduction as the expenditure is 'relevant expenditure' incurred as part of a 'tax avoidance agreement' and the expenditure is effectively recouped under the arrangement.

Eligible relevant expenditure

24. An amount paid by a taxpayer in relation to the acquisition of a film which is an Australian film for the purposes of Division 10B is eligible relevant expenditure (subsection 82KH(1F) and paragraph (h) of the definition of 'relevant expenditure' in subsection 82KH(1)).

Tax avoidance agreement

25. These arrangements constitute a 'tax avoidance agreement' under subsection 82KH(1) for the purposes of section 82KL.

Additional benefit

26. An arrangement which involves deductible expenditure by a taxpayer being financed wholly or partly by a loan which will be effectively repaid by another person is a 'recoupment arrangement'. An amount recouped under a recoupment arrangement is an 'additional benefit' (subsection 82KH(1) and paragraph 82KH(1F)(b)).

27. Under these arrangements a loan is obtained by the special purpose entity to finance the acquisition of film rights. The loan is effectively guaranteed by the film maker. It is reasonable to expect that the special purpose entity will be acquired by the film maker or nominee of the film maker prior to the repayment of the loan. In addition it is reasonable to expect that the guarantor will be relied upon to enable repayment of the outstanding debt, or that other steps will be taken to satisfy the borrower's loan obligations without repayment of the debt.

28. This results in the following possible 'additional benefits':

- a non-recourse loan that is not repaid; and
- amounts payable by the guarantor to enable repayment of the loan.

Expected tax saving

29. An investor or the special purpose entity will have an 'expected tax saving' (subsections 82KH(1) and (1B)) through the tax deduction obtained by the special purpose entity.

30. Section 82KL will apply to disallow the deductions claimed by the special purpose entity where the amount of the non-recourse loan, the amounts payable by the guarantor, or the amount of the unpaid loan at the time when an option is exercised, plus the expected tax saving equals or exceeds the amount of the deductions.

General anti-avoidance provisions - the application of Part IVA

31. The arrangements described in paragraphs 4 and 6 are schemes as defined in section 177A of the ITAA 1936. In particular, the arrangements are schemes which achieve the following results:

- the contrived transfer of a tax benefit to an investor or the special purpose entity, or the contrived sharing of a tax benefit between an investor, the special purpose entity and the film maker;
- the lack of any financial risk to an investor or the special purpose entity;
- the obtaining of a circumscribed level of profit by an investor or the special purpose entity, achieved by means of tax savings, whether the film performs well or poorly, with additional gains of only a limited kind and available only in exceptional circumstances;
- expected tax savings to an investor or the special purpose entity in excess of the expected actual cost to which the investor or the special purpose entity is exposed as a result of participating in the arrangement;
- deductions to the special purpose entity exceeding the income it is likely to earn from the arrangement;
- the provision of funds, from sources other than the investor and the special purpose entity, to enable repayments of loans without those amounts being income of the special purpose entity; and
- retention by the film maker of effective control of the film at all times, and receipt and retention of profits by the distributor commensurate with ownership.

32. A reasonable person would therefore conclude that the sole or dominant purpose of a person or persons entering into or carrying out the scheme is to enable the special purpose entity to obtain a tax

benefit in the form of a Division 10B deduction and/or the investor to obtain a consequential tax benefit.

Date of effect

33. This Ruling applies to years of income commencing both before and after its date of issue.

34. This Ruling does not apply to taxpayers, to the extent that it conflicts with the terms of a 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).

Note: as part of the *Tax Laws Amendment (2007 Measures No. 5) Act 2007*, Division 10B is being phased out as follows:

- applications for certificates under Division 10B will not be accepted after 25 September 2007;
- the first deduction available under Division 10B will only be available in relation to the 2008-09 year of income or an earlier year of income.

Previous Rulings

35. An overview of the operation of Division 10B and Division 10BA of the ITAA 1936 is provided in Taxation Ruling IT 2629.

Explanations

Division 10B

The special purpose company is never the owner of the film

36. In this arrangement the typical transaction documents simultaneously transfer the rights from the film maker to the special purpose company and from the special purpose company to the distributor. The transfer of the rights from the film maker to the special purpose company is conditional on the disposal of those rights to the distributor. There is never a period of time during which the special purpose company possesses the rights. The effect of the transaction documents is that the film maker does not surrender effective possession or control of the rights in respect of the film given the relationship between the film maker and the distributor. Rather, having regard to the 'back to back' nature of the assignment and distribution agreements and the integrated nature of the various other agreements, the arrangement ensures that the rights in respect of the

film remain at all times with the film maker or its associates. The film maker is never divested of control over the copyright purportedly assigned.

37. From the time of the assignment agreement and throughout the period of the distribution agreement, the distributor has the exclusive right, with respect to the film, to do all of the acts in the nature of copyright as specified in section 86 of the *Copyright Act 1968*.

38. The nature of copyright in relation to a cinematograph film is set out in section 86 of the *Copyright Act 1968* which states:

> **'Nature of copyright in cinematograph films**
>
> 86. For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a cinematograph film, is the exclusive right to do all or any of the following acts:
>
> (a) to make a copy of the film;
>
> (b) to cause the film, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
>
> (c) to communicate the film to the public.'

39. Any entity which does not have the exclusive right to do such acts cannot be said to have copyright in the film since copyright does not subsist otherwise than by virtue of the provisions of the *Copyright Act 1968*.

40. Section 124M applies to a person who is an owner of a unit of industrial property. If the special purpose company is to be regarded as such an owner, there must be some period of time during which the special purpose company 'possesses' the rights in respect of the film. Possession implies custody or control, that is, the right to use and the right to exclude the use of others. In circumstances where the special purpose company is never permitted to carry out such fundamental acts of ownership as copying and publicly screening the film, it is clear that the special purpose company does not have effective possession of the film.

41. The emphasis in Division 10B on the concept of possession rather than the concept of ownership, indicates that the term 'the owner' is to have a meaning for the purposes of Division 10B rather different to the more conventional meaning of, for example, the holder of title. Division 10B is clearly intended to apply only to an effective owner, as opposed to a strictly legal but practically ineffective owner. It is immaterial whether, on a narrow construction or literal reading of the transaction documents, legal title rests with the special purpose company.

42. Accordingly, the special purpose company is never 'the owner' of a unit of industrial property, as defined in subsection 124K(1).

Alternative view

43. Submissions have been received which argue that the effect of typical transaction documents is that the special purpose company is the owner of the copyright. In particular, some submissions note that although the distributor exclusively distributes and exploits the film pursuant to the distribution agreement, the special purpose company remains entitled to exercise certain limited rights consistent with ownership. For example, it is said that the special purpose company has the right to commence legal proceedings for infringement of copyright and to claim damages in respect of any such infringement. It is argued that the retention of such limited rights supports the proposition that the special purpose company has become and does remain the owner of the film, but has chosen to surrender certain rights.

44. We reject this view. We believe that such submissions do not directly address the point that the special purpose company is never 'the owner' for the purposes of Division 10B. In general, the integrated nature of the assignment and distribution agreements and the terms of the various other transaction documents have the effect that there is never any acquisition by the special purpose company. In particular, the limited rights which may accrue to the special purpose company are insignificant and essentially worthless when compared to the totality of rights which ordinarily accrue to the owner of a unit of industrial property. In these arrangements, even the rudimentary rights ostensibly retained by the special purpose company may themselves, in a practical sense, be surrendered to the distributor.

Alternatively, the special purpose company becomes the owner of the film

Disposal in whole

45. On the assumption that the special purpose company does become an 'owner' for the purposes of Division 10B, the distribution agreement amounts in substance to a disposal of all of the rights possessed by the special purpose company in relation to the copyright. Therefore, the film could not have a residual value in relation to the special purpose company 'as at the end of the year of income', because the special purpose company is not the relevant person for the purposes of section 124S. No subsection 124M(1) deduction is therefore available to the special purpose company. Additionally,

subsection 124M(4) denies any section 124M deduction to the special purpose company.

46. In our view there is a disposal in whole for the purposes of Division 10B as the holder of copyright in a film simply has the exclusive right to do certain things in respect of that film. Whilst the arrangement may, at law, initially create that right in the special purpose company, the distribution arrangements immediately create effectively the same rights in the distributor. The film maker is the assignor of the copyright and at the same time the distributor is the recipient of a virtually identical set of rights. The arrangement essentially removes from the special purpose company, in business terms, what it gives to the special purpose company in the same terms.

47. Furthermore, the distribution agreement has certain terms and conditions which are consistent only with an assignment agreement and lacks certain terms and conditions which are normally associated with a distribution agreement that does not dispose of the whole of the copyright. For example, the security arrangements have the effect that the distributor is entitled to the copyright if there is a default or insolvency event by the special purpose company where, if there were no assignment intended, the copyright should continue to be an asset of the special purpose company. Similarly, the special purpose company may only terminate the distribution agreement in the event of a repudiatory breach (that is, in limited circumstances).

48. In determining whether the distribution agreement is appropriately regarded as constituting an assignment of copyright rather than the grant of a licence we have referred to *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, by Staniforth Ricketson and Christopher Creswell, Lawbook Co., 2001. At paragraph 14.430 (page 93) the following is stated:

> 'Given the multiplicity of ways in which agreements affecting copyright may be expressed, it is impossible to lay down any precise rules as to their construction. Furthermore, the decided cases in this area (which are often very old) provide little assistance. However, it is clear that in order to ascertain the true meaning of the words in any particular agreement, all its terms must be construed together and its overall effect must be ascertained. Thus, no particular magic attaches to the fact that words such as "sole right" or "sole and exclusive right" are used: such words are equally consistent with the grant of an exclusive licence as with a partial assignment. Likewise, the fact that words such as "assignor" and "assignee" or "licensor" and "licensee" are used, may not be determinative of the status of the agreement if its other terms indicate that the opposite is intended.'

49. Our conclusion in relation to the characterisation of the distribution agreement is supported by the decision of the Full Federal Court in *Nomad Films International Pty Ltd v. Export Development Grants Board* (1986) 66 ALR 427. Smithers J stated (at 442):

> 'If one looks at the form of the operative words … of the distribution agreement one finds a "grant" of "an exclusive licence to distribute the film throughout the world", together with a statement that the licence "shall confer upon the distributor exclusive right throughout the world" to perform the very acts the right to perform which are said by s 86 of the *Copyright Act 1968* to constitute the copyright in the film. That section provides, "copyright is the exclusive right to do all or any of the following acts". A licence is something which authorizes the licensee to perform certain acts. But the agreement under consideration confers something different, namely the exclusive right to do the acts in question. This is repetitive of s 86. It certainly describes a situation in which, to the limited extent specified, the owner of the copyright is conferring upon the licensee the very rights which constitute his copyright.'

50. Further, the Federal Court decision in *Wilson v. Weiss Art Pty Limited* (1995) 31 IPR 423 provides confirmation, in the context of agreements concerning copyright, that the substance of an arrangement is relevant to determining its legal consequences. Hill J stated (at 432):

> 'Ultimately, the question whether there has been an assignment … will depend upon whether the writing or the terms of the agreement reflects or reflect an intention on the part of the assignor to effect an assignment of, or to agree to, assign copyright. In reaching a conclusion upon intention the commercial significance of the transaction to the parties will, no doubt, form part of the surrounding circumstances to be considered …'.

51. In our view the 'surrounding circumstances' in this arrangement demonstrate that at all times the film maker or its associates maintain effective possession and control of the film.

52. On the basis that the rights in relation to copyright in the film are disposed of in whole, the application of section 124N needs to be considered. Subsection 124N(1) allows a deduction for the difference between the residual value of the film to the special purpose company at the time of disposal and the consideration receivable by the special purpose company in respect of the disposal. Residual value is determined in accordance with section 124S. The consideration receivable is determined in accordance with section 124T.

Cost

53. Subsections 124R(3) and (4) apply to determine the cost of a film to an assignee where the assignor and the assignee are not dealing at arm's length. In our view the special purpose company and the film maker are not dealing at arm's length in relation to the assignment. As was the case in *Collis v. FC of T* 96 ATC 4831; (1996) 33 ATR 438, one party has submitted the exercise of its will to the wishes of another party.

54. The application of subsections 124R(3) and (4) is not excluded by reason that the investor may argue that it is dealing at arm's length with the other parties in the context of the overall arrangement.

55. The integrated nature of the various transactions and agreements entered into in connection with these arrangements and the terms of the agreements indicate that the parties to the arrangements are not dealing at arm's length in relation to the assignment to the special purpose company and the licensing to the distributor.

56. For example, we do not accept that a film maker and a special purpose company are dealing at arm's length in relation to an assignment of film copyright where the film maker or another party by arrangement with the film maker agrees to:

- guarantee by way of a security deposit, or by other arrangements having a similar effect to a security deposit, the payment of a minimum income to, and the loan repayment obligations of, the special purpose company; and/or
- purchase the special purpose company for a nominal sum at a specified time pursuant to a put option granted to the investor which owns the special purpose company.

57. Because of the availability of the guarantee and the put option, there cannot be true bargaining in relation to the acquisition price under the assignment agreement and the profit sharing formula under the distribution agreement. It follows that, even if the investor could be regarded as dealing at arm's length with the film maker or the distributor in relation to the arrangement as a whole, neither the investor nor the special purpose company is dealing at arm's length in relation to the purchase of the film copyright by the special purpose company from the film maker. The overall arrangement, far from showing that the parties are really at arm's length in relation to the acquisition of the copyright, demonstrates that they are not dealing with each other at arm's length.

58. Accordingly, the cost of the film for the purposes of Division 10B 'shall be taken to be the cost of the unit [to the film maker] or the

value of the unit at the time of the purchase [by the special purpose company] whichever is the less.' We say that the 'value' is the value of the rights possessed by the special purpose company as the owner of the copyright in the circumstances where the special purpose company is obliged to deal with those rights at all times thereafter in accordance with the arrangements entered into. This is because those rights are so circumscribed that their value, in the context of these kinds of arrangements, is always substantially less than the cost of the film.

59. In our view the cost of the film for the purposes of subsections 124R(3) and (4), and therefore for the purposes of calculating the residual value under section 124S, would be substantially less than the amount allocated under the assignment agreement. This value should be based on the value to the special purpose company of its interest in the distribution agreement rather than the cost of production to the film maker plus a percentage mark up.

60. The guarantees and put option have substantial value, but no part of the payment by the special purpose company is allocated to them. However, it is reasonable to attribute a substantial portion of the amount payable under the assignment agreement to other elements of the arrangements, including the value of the guarantees and the put option. The arm's length cost of the film should not exceed the difference between the amount payable under the assignment agreement and the value of other benefits obtained by the investor and the special purpose company under other agreements within the arrangement.

Consideration for the disposal

61. Based on the matters referred to in paragraphs 55 to 57, we say that the parties are not dealing at arm's length in relation to the disposal under the distribution agreement. Under subsection 124T(2) the consideration receivable would equal the value of the unit to the special purpose company at the time of its disposal. In the present circumstances we consider that the value of the unit to the special purpose company at the time of its disposal under the distribution agreement would equal the residual value of the unit determined in accordance with section 124S. As the value of the special purpose company's rights in relation to copyright cannot change between the time of their acquisition by the special purpose company and their immediate disposal, the consideration for the disposal by the special purpose company is equal to the residual value.

62. The consideration receivable under subsection 124T(2) may then need to be adjusted on account of any amounts receivable under the distribution agreement which are to be included in assessable income under provisions other than Division 10B. The only amounts

'receivable by the owner in respect of the disposal' that may be regarded as satisfying the test 'to be included in the assessable income of the owner' for the purposes of subsection 124T(3) would be amounts receivable by the special purpose company under the profit sharing formula in the distribution agreement. There would be no adjustment for the minimum income which is payable in consideration for the special purpose company entering into the transaction documents, as this is not in respect of the disposal of the film copyright.

Alternative views

63. Submissions have been received, supported principally by reference to the case of *Granby Pty Ltd v. FC of T* 95 ATC 4240; (1995) 30 ATR 400 (*Granby*), that the special purpose company and the film maker are dealing at arm's length.

64. We reject this view. In *Granby*, there was no evidence that one party accepted instruction from another party to the exclusion of independent analysis, and accordingly the parties were held to be dealing at arm's length. There, the parties were dealing at arm's length over the acquisition of an asset although the price paid was less than the market value of the asset. But, as Lee J said (at 95 ATC 4244; 30 ATR 404):

> 'That is not to say, however, that parties at arm's length will be dealing with each other at arm's length in a transaction in which they collude to achieve a particular result, or in which one of the parties submits the exercise of its will to the dictation of the other…'

In these arrangements the assignment agreement is conditional upon the special purpose company accepting the terms of the distribution agreement, and the special purpose company is unable to enter into any independent distribution or licence arrangements. The investor and the special purpose company are presented with a 'suite' of essentially predetermined and non-negotiable transaction documents. We believe that the principles which underpin the decision in *Granby* clearly support our conclusion that the relevant parties in these arrangements cannot be said to be dealing at arm's length in relation to the assignment agreement or the distribution agreement.

65. Further submissions have been received as to the determination of the market value of the film. An alternative view has been advanced that the cost of the film for the purposes of section 124R is simply the amount allocated under the assignment agreement.

66. We reject this view. In the case of a willing but not anxious buyer acquiring copyright in a film from a willing but not anxious seller (on condition that immediately upon acquiring copyright the

buyer must enter into a particular distribution agreement), a fair price will be referable to an expected rate of return. In these arrangements the fair price will be substantially less than the cost of production plus a percentage mark up. As indicated at paragraphs 58 to 60, we believe that the 'value' is the value of the rights possessed by the special purpose company in circumstances where the special purpose company is obliged to deal with those rights in accordance with the arrangements entered into.

Disposal in part

67. Alternatively, if there has not been a disposal in whole, the distribution agreement has the effect of making the distributor 'a licensee under … a … copyright' for the purposes of the definition of a 'unit of industrial property' in subsection 124K(1), and therefore an 'owner' for the purposes of Division 10B. The distribution agreement will constitute a disposal in part as the rights possessed by the distributor as licensee will not, as a matter of drafting, be expressed in identical words to the rights possessed by the special purpose company as the assignee under the assignment agreement.

68. If the distribution agreement does constitute a disposal in part of the special purpose company's rights in relation to copyright, the film will have no residual value to the special purpose company for the purposes of section 124S. Subsection 124T(2) provides that the consideration receivable by the special purpose company for the partial disposal will be the value of the part of the copyright acquired by the distributor at the time of its disposal to the distributor. In these arrangements, the special purpose company effectively disposes of all exploitable rights in relation to the copyright. It retains nothing of any value. Accordingly the consideration receivable will be taken to be equal to the cost of the copyright to the special purpose company. Where linked simultaneous transactions occur involving the acquisition of an asset and its effective immediate disposal, it is not accepted that the value of what is acquired and the value of what is disposed of can be different.

Alternative view

69. Submissions have been received to the effect that the granting by the special purpose company of an exclusive right to distribute the film does not result in a disposal of the copyright either in whole or in part. We note that these submissions are not forcefully made since they admit to 'uncertainty' in both the United Kingdom and Australian authorities and commentaries as to whether a licence of copyright involves the grant of an interest and, if so, how that interest should be characterised.

70. We reject this view. No case law has been cited to directly support these submissions. In the absence of any compelling authority to the contrary, we believe that the distribution agreement is in substance a disposal of the copyright such that, for the purposes of Division 10B, the special purpose company cannot be regarded as the 'owner'. The special purpose company must be taken to have disposed of the copyright if it does not retain the rights outlined in section 86 of the *Copyright Act 1968*. If in these arrangements there has been a disposal in part, the special purpose company retains nothing of any value (as explained in paragraph 68). Accordingly, there is no residual value for the purposes of section 124M.

Recouped expenditure – the application of section 82KL

71. Section 82KL of the ITAA 1936 is a specific anti-avoidance provision that operates to deny an otherwise allowable deduction for certain expenditure incurred by the taxpayer, but effectively recouped. Under subsection 82KL(1), a deduction for 'eligible relevant expenditure' is disallowed where the sum of the 'additional benefit' plus the 'expected tax saving' in relation to that expenditure equals or exceeds the 'eligible relevant expenditure'.

Eligible relevant expenditure

72. Capital expenditure in respect of the acquisition of Australian films which is deductible under Division 10B is 'relevant expenditure' and may be 'eligible relevant expenditure'. 'Eligible relevant expenditure' (subsection 82KH(1F)) is 'relevant expenditure' incurred under a tax avoidance agreement where, under the tax avoidance agreement, the taxpayer (or an associate) obtains an 'additional benefit'.

Tax avoidance agreement

73. A 'tax avoidance agreement' for the purposes of section 82KL means 'an agreement that was entered into or carried out for the purpose, or for purposes that included the purpose, of securing that a person … would not be liable to pay income tax … or would be liable to pay less income tax …'.

74. An 'agreement' for the purposes of section 82KL means 'any agreement, arrangement, understanding or scheme …'. The arrangements described in paragraphs 4 and 6 constitute agreements.

75. Subsection 82KH(3) provides that 'an agreement shall be taken to have been entered into or carried out for a particular purpose, or for purposes that included a particular purpose, if any of the parties

to the agreement entered into or carried out the agreement for that purpose, or for purposes that included that purpose, as the case may be.'

76. A tax avoidance purpose will be present where results of the kind outlined in paragraph 31 are achieved.

Additional benefit

77. An 'additional benefit' (see the definition of 'additional benefit' at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit received which is additional to the benefit for which the expenditure is ostensibly incurred.

78. In these arrangements there are the following possible additional benefits:

- a non-recourse loan that is not repaid; and
- amounts payable by the guarantor to enable repayment of the loan.

79. The loan taken out by the special purpose company is considered to be non-recourse because the overall arrangement puts the special purpose company in the same risk position as if the loan had been provided to it on a non-recourse basis. In particular, we consider that the special purpose company would be unable to repay the loan without calling upon the guarantees.

80. We consider that the benefits identified in paragraph 78 are additional benefits. The benefits only have to arise 'in relation to that relevant expenditure being incurred'. The loan and the guarantee are benefits provided to the special purpose company because the special purpose company has agreed to make the payment to acquire the interest in the copyright under the assignment agreement. We say that this is part of the tax avoidance agreement.

81. For the purposes of the expression 'the amount or value of the additional benefit' in section 82KL, 'amount' refers to the face value of an additional benefit expressed in monetary terms, and value refers to the monetary value of property not expressed in monetary terms. The additional benefits referred to in paragraph 78 are expressed in monetary terms. Regardless of when these additional benefits arise, it is the face value that is the relevant amount of the additional benefit, not the market value or net present value.

Expected tax saving

82. The 'expected tax saving' (see the definition of 'expected tax saving' at subsections 82KH(1) and (1B)) is essentially the tax saving

whether by the taxpayer or another person if a deduction is allowed for the eligible relevant expenditure. The expected tax saving of the investor is:

(a) the amount of tax the investor would pay if the film deductions were not allowable to the special purpose company (and therefore no entitlement to a deduction for a group loss transfer would arise); less

(b) the amount of tax the investor would be liable to pay if the film deductions were allowable to the special purpose company and the resulting tax loss was transferred to the investor.

83. Section 82KL will apply to disallow the deductions claimed where the amount of the non-recourse loan, the amounts payable by the guarantor, or the amount of the unpaid loan at the time when the put option is exercised, as the case may be, plus the expected tax saving equals or exceeds the amount of the deductions for the cost of the film copyright.

84. Subsection 82KL(1) applies where the relevant events have occurred. However, subsection 82KL(2) allows the Commissioner to apply section 82KL to disallow a deduction where the relevant events may not have occurred but the Commissioner is satisfied that it might reasonably be expected at a later time, that the sum of the 'additional benefit' and the tax saving will exceed the eligible relevant expenditure. Given the likelihood that the special purpose company will not repay the loan without relying on the guarantee, or that the put option will be exercised, it might reasonably be expected that an additional benefit will be obtained at a later time.

85. Where the Commissioner has applied subsection 82KL(2), but later is satisfied that the particular circumstance relied upon to disallow the relevant deduction will not eventuate, the Commissioner will amend the assessment to allow a deduction for the expenditure (subsection 82KL(3)).

86. Subsection 170(10) enables the Commissioner to give effect to section 82KL by amending assessments of taxpayers at any time.

General anti-avoidance provisions – the application of Part IVA

87. For the general anti-avoidance provisions of Part IVA of the ITAA 1936 to apply, there must be a 'scheme' (section 177A) and a 'tax benefit' (section 177C). Additionally, it must be concluded that the scheme was entered into or carried out by a person or persons for the sole or dominant purpose of enabling the relevant taxpayer to obtain the tax benefit (section 177D). See, generally, *FC of T v. Peabody* (1994) 181 CLR 359; 94 ATC 4663; (1994) 28 ATR 344,

and *FC of T v. Spotless Services Ltd & Anor* (1996) 186 CLR 404; 96 ATC 5201; (1996) 34 ATR 183 (*Spotless*).

Scheme

88. The film arrangement described at paragraph 4 constitutes a 'scheme' for the purposes of Part IVA, given the wide definition of 'scheme'. Further, a tax benefit is obtained by the investor and by the special purpose company from the scheme.

89. The 'scheme' includes:

- the arrangement whereby the investor acquires or establishes the special purpose company;
- the agreements, undertakings, and courses of action and conduct through which the special purpose company purports to purchase the film from the film maker and to enter into the distribution agreement with the distributor;
- the payments made by way of the purchase of copyright, the funding for the purchase of copyright, the facilitation and servicing of the debt, the minimum income and any other income payments, the put option mechanism, and the mechanism whereby the film maker or an associate effectively repays the special purpose company's loan.

90. The parties to the scheme include the investor, the special purpose company, the film maker, the distributor, the promoter, the financier, and any guarantor.

Tax benefit

91. The 'tax benefit' to the special purpose company will be the deductions claimed in relation to the arrangement. The 'tax benefit' to the investor will be the deduction for the losses transferred to it by the special purpose company under the loss transfer rules in Subdivision 170-A of the ITAA 1997. The losses are generated in the special purpose company solely by its participation in the arrangement. But for the scheme, the deductions would not be available to the investor and the special purpose company.

Purpose

92. The real issue is whether the investor, or another person or persons, entered into or carried out the scheme, or a part of the scheme, for the sole or dominant purpose of enabling the investor

and/or the special purpose company to obtain a tax benefit. This has to be determined having regard to the eight factors referred to in paragraph 177D(b) of the ITAA 1936.

93. A scheme 'may be … both "tax driven" and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question of whether, within the meaning of Part IVA, a person entered into or carried out a "scheme" for the "dominant purpose" of enabling a taxpayer to obtain a tax benefit' (refer *Spotless* 186 CLR at 415-6; 96 ATC at 5206; 34 ATR at 188). A taxpayer's tax saving exceeding its real economic outlay may indicate a sole or dominant purpose of obtaining a tax benefit, notwithstanding that the investment may bear the character of a rational commercial decision.

94. Part IVA will apply if a reasonable person would conclude that the sole or dominant purpose of the investor, the special purpose company or another person entering into or carrying out the scheme, or a part of the scheme, was to enable the investor and/or the special purpose company to obtain a tax benefit in connection with the scheme.

95. The relevant person who for the purposes of Part IVA may be judged objectively as having the dominant purpose of enabling the investor and/or the special purpose company to obtain a tax benefit may not be the investor or the special purpose company. It may be the person who designed the scheme or some other person who participated in carrying out the scheme or a part of the scheme.

96. Alternatively, the purpose, or purposes of the investor's professional advisers in recommending the scheme may be attributed to the investor entering into and carrying out the scheme on the basis of their advice (refer *FC of T v. Consolidated Press Holdings Limited (No. 1)* 99 ATC 4945, at 4973; (1999) 42 ATR 575, at 603 per French, Sackville and Sundberg JJ). On appeal this was confirmed by the High Court, particularly where the transactions in question are complex (refer *FC of T v. Consolidated Press Holdings Limited & Anor* 2001 ATC 4343, at 4360; (2001) 47 ATR 229, at 247 per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ). The investor may be judged objectively as having the dominant purpose of obtaining a tax benefit, albeit by reference to the purpose of the investor's professional adviser. Refer also *Vincent v FCT* [2002] FCA 656 where French J held that the purpose of a scheme's promoter was relevant to the application of Part IVA to a scheme.

97. The promotion of the scheme by others or the existence of a commercial purpose does not preclude the application of Part IVA. Part IVA will apply when the sole or dominant purpose under section 177D of any of the persons who entered into or carried out the scheme or any part of the scheme is to enable the investor and/or the special

purpose company to obtain a tax benefit in connection with the scheme.

98. In paragraph 31, arrangements with certain factors are identified as arrangements where a reasonable person would conclude that the sole or dominant purpose is to obtain a tax benefit. Each of those factors, on its own, may be insufficient to allow a reasonable person to draw the conclusion that the sole or dominant purpose was to obtain a tax benefit. However, a weighing of all those factors against any commercial elements of the arrangements produces that conclusion, particularly as funds from parties other than the investor or the special purpose company are guaranteed to be available to repay the loans, and the tax saving by the investor and/or the special purpose company exceeds the real economic outlay of the investor.

99. In our view the only relevant commercial purposes under these arrangements are those of the film maker and the distributor. When circular flows of funds are eliminated, the film maker is left with a cash benefit equal to the investor's equity contribution to the special purpose company, and the distributor is left with the exploitation proceeds. The investor's only real economic benefit arises through the tax saving attributable to the claimed income tax deductions.

100. In our view, the factors discussed in the following paragraphs indicate that a reasonable person would conclude that the sole or dominant purpose of a person or persons entering into or carrying out the scheme is to enable the special purpose company to obtain a tax benefit in the form of a Division 10B deduction and/or the investor to obtain a consequential tax benefit. On that basis, Part IVA would apply.

The contrived transfer of a tax benefit

101. The primary result under these arrangements is the transfer of a potential Division 10B deduction from the film maker to the special purpose company resulting in a tax loss which is then available to be transferred under the group loss provisions to the investor.

102. These arrangements involve a contrived transfer of the Division 10B tax benefits available to the film maker in relation to copyright. The form of the arrangement is such that ownership is purportedly held by a special purpose company which does not bear the normal risks and benefits of ownership. The substance of such a transaction is that the special purpose company is never the owner.

The immediate disposal of all effective rights in relation to copyright, on non-arm's length terms, following its acquisition

103. The assignment agreement and the distribution agreement are interrelated such that what the film maker assigns under the assignment agreement is immediately transferred to an associate of the film maker under the distribution agreement. As explained at paragraphs 55 to 57, we do not accept that the special purpose company is dealing at arm's length with the film maker and the distributor in relation to these agreements.

The lack of any financial risk to an investor or the special purpose company, and the manner in which the risk is removed

104. In these arrangements the investor is not subject to any financial risk in relation to the film when the tax saving and the put option are taken into account. The special purpose company is not subject to any risk because of the guaranteed income, and mechanisms to fund the loan repayment where the special purpose company receives insufficient income under the distribution agreement formula to repay the loan.

105. The special purpose company, being a wholly owned subsidiary of the investor, partly finances the deductible film expenditure through borrowings, and guarantees are provided for amounts which will equal the interest payments and the debt outstanding if there are insufficient profits. That is, to the extent that the deduction sought is in respect of expenditure funded by a loan with the repayment being covered by guarantees, it is in respect of expenditure which is not at risk.

The provision of guarantees to an investor or an associate

106. Payment of the minimum income amounts and repayment of the loan principal are guaranteed by security effectively provided by the film maker. The security is approximately equal to the principal and interest obligations of the special purpose company.

The use of the consideration for purchase of the copyright to effectively underpin the various guarantees

107. Where the assignment consideration is used to effectively underpin the various guarantees, there is a round robin arrangement within the definition in Taxation Ruling TR 2000/8. In particular, paragraph 27 of TR 2000/8 defines a round robin arrangement to include any mechanism employed to effect discharge of liabilities but

which does not, in reality, result in an equal enrichment of the creditor either by cash accretion or the gaining of valuable realisable assets.

108. In these schemes, a round robin arrangement exists where:

- the film maker transfers to the guarantor an amount equal to the amount to be borrowed by the special purpose company;
- that amount is placed on deposit with the lender;
- the special purpose company borrows that amount from the lender; and
- the amount borrowed by the special purpose company is then used, together with the funds the special purpose company has received from the investor, to pay the film maker for the copyright.

109. The special purpose company pays the acquisition cost of the film rights but the only real cash realised by the film maker is represented by the investor's contribution of funds to the special purpose company. There is no change in the overall level of cash in respect of the substantial sum financed through the borrowing.

110. Other financial mechanisms delivering a similar outcome such as the film maker or an associate providing security to the bank by way of funds or other property for the loan to the special purpose company are also considered to involve round robin arrangements.

111. A round robin arrangement is not determinative of tax avoidance in itself (refer *Howland-Rose & Ors v. FCT* [2002] FCA 246).

The matching of guarantees with the liabilities of an investor or an associate

112. The minimum income guarantee is designed to cover the special purpose company's interest obligations. The loan guarantee will satisfy the special purpose company's loan repayment obligations.

The effective presence of non-recourse loans

113. The loan to the special purpose company is a non-recourse loan within the definition provided by Taxation Ruling TR 2000/8 at paragraphs 20 to 22.

114. In these arrangements, a special purpose company is used and its only assets are the film rights and any guarantees it is able to call upon. The loan arrangements are effectively non-recourse because the

lender has no recourse beyond the film asset and the specified security given by the guarantor.

The potential to claim two tax benefits in relation to one amount outlaid

115. The investor effectively obtains the benefit of the Division 10B deductions through the group loss transfer provisions and may also obtain a tax deduction or loss on the sale of the shares it holds in the special purpose company.

116. To the extent that the tax loss transferred to the investor under Subdivision 170-A of the ITAA 1997 is attributable to the equity contributed by the investor, a further deduction or capital loss on the disposal of the investor's shares in the special purpose company under the put option would, in substance, be a second deduction in respect of the one amount outlaid.

The realisation of a commercial return by means of a tax concession

117. Under the scheme, the tax savings attributable to the Division 10B tax deductions exceed the investor's economic outlay, i.e., the cost of the shares it acquires in the special purpose company.

118. The attraction of the scheme to a potential investor is founded upon the assumption that the Division 10B deductions equal to the cost of the film to the special purpose company are available to the special purpose company and the resulting tax loss can be transferred to the investor under Subdivision 170-A.

119. Under the scheme, the tax saving applicable to the transfer of the tax loss exceeds the investor's effective net outlay and the investor will profit regardless of how the film performs. In substance the special purpose company is not purchasing a film in order to commercially exploit the film. Rather, the investor participates in the scheme in order to obtain a substantial tax saving.

120. If the tax savings are ignored, the arrangement will only be profitable if there are substantial amounts paid to the special purpose company pursuant to the distribution agreement. Viewed objectively, there is only a mere theoretical possibility, rather than a reasonable expectation, of any additional income arising under the distribution agreement. This reinforces the conclusion that the special purpose company is not acquiring the film copyright, and the investor is not contributing funds to the special purpose company, in order to benefit from the commercial exploitation of the film.

121. In these circumstances it is appropriate to apply the 'no sense' test found in *Spotless, Hart v. FC of T* 2001 ATC 4708; (2001) 48

ATR 317 and *Howland-Rose*. Without the tax saving, the arrangement makes no commercial sense.

The presence of dealings, which are not at arm's length, between the parties

122. The integrated nature of the transaction documents means that the parties to the scheme are not dealing at arm's length in relation to the scheme contracts, agreements and transactions.

123. The features of this arrangement which do not appear to involve arm's length dealings include the features identified in paragraphs 55 to 57.

The put option to the distributor or to another entity nominated by the film maker

124. The effect of the put option is that the investor disposes of its shares in the special purpose company for a nominal sum. The film is thereby effectively returned to the control of the film maker (or an associate). This is consistent with our view that neither the special purpose company nor the investor ever possessed any real rights in relation to the film.

Factors in paragraph 177D(b)

(i) The manner in which the scheme was entered into or carried out

125. The features outlined in paragraph 4 are relevant to the manner in which a scheme was entered into or carried out and indicate a lack of commerciality. Additional factors in relation to a specific arrangement would also be relevant.

(ii) The form and substance of the scheme

126. The form of the scheme involves a number of integrated transactions, as set out in paragraph 4, which include the assignment agreement between the film maker and the special purpose company and a distribution agreement between the special purpose company and the distributor. The film maker and the distributor are associates.

127. In substance the film maker, through an associate, retains effective possession of the film at all times. The only real transfers under the scheme involve a cash payment by the investor which passes through the special purpose company to the film maker and the effective transfer of Division 10B tax deductions from the film maker through the special purpose company to the investor.

(iii) The time at which the scheme was entered into and the length of the period during which the scheme was carried out

128. The scheme is entered into and all transaction documents become effective after the film is completed. The Division 10B deductions are available at that time. The scheme is carried out over the period during which the investor continues to own the shares in the special purpose company.

(iv) The result in relation to the operation of the ITAA 1936 or the ITAA 1997 that, but for Part IVA, would be achieved by the scheme

129. Deductions would be available to the special purpose company and the investor.

(v) Any change in the financial position of a relevant taxpayer that has resulted, or will result, or may reasonably be expected to result, from the scheme

130. The investor will always profit as a result of the scheme as the tax savings applicable to the investor's Subdivision 170-A deductions exceed the investor's investment in the scheme.

(vi) Any change in the financial position of any person who has, or has had any connection with a relevant taxpayer, being a change that has resulted, or will result, or may reasonably be expected to result, from the scheme

131. The film maker receives a profit equal to the amount which the investor pays into the scheme by way of the investor's equity contribution to the special purpose company.

(vii) Any other consequence for a relevant taxpayer, or for any person referred to in (vi), of the scheme being entered into or carried out

132. The scheme may give rise to further business opportunities for the investor such as the making of the loan to the special purpose company.

133. The special purpose company will have substantial tax losses to transfer, and it will never derive income equal to those losses. In essence the minimum income is matched by interest deductions, and the capital to repay the loan comes in to the special purpose company in a non-assessable form.

(viii) The nature of any connection between a relevant taxpayer and any person referred to in (vi)

134. The investor and the film maker are connected through the contractual arrangements in the scheme.

135. The special purpose company is a wholly owned subsidiary of the investor. The investor holds a put option over the shares in the special purpose company enabling it to sell the special purpose company to the film maker.

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TR 92/1; TR 92/20; TR 97/16; TR 2000/8; IT 2629

Subject references:

- investing in Australian Films
- copyright
- purpose of obtaining a tax benefit

Legislative references:

- ITAA 1936 79D
- ITAA 1936 82KH(1)
- ITAA 1936 82KH(1B)
- ITAA 1936 82KH(1F)
- ITAA 1936 82KH(3)
- ITAA 1936 82KL
- ITAA 1936 82KL(1)

- ITAA 1936 82KL(2)
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- ITAA 1936 Div 10B of Pt III
- ITAA 1936 124K(1)
- ITAA 1936 124M
- ITAA 1936 124M(1)
- ITAA 1936 124M(4)
- ITAA 1936 124N
- ITAA 1936 124N(1)
- ITAA 1936 124R(3)
- ITAA 1936 124R(4)
- ITAA 1936 124S
- ITAA 1936 124T
- ITAA 1936 124T(2)
- ITAA 1936 124T(3)
- ITAA 1936 170(10)
- ITAA 1936 Part IVA
- ITAA 1936 177A
- ITAA 1936 177C
- ITAA 1936 177D
- ITAA 1936 177D(b)
- ITAA 1936 177F
- ITAA 1997 Div 40
- ITAA 1997 Subdiv 170-A
- ITAA 1997 Div 373
- Copyright Act 1968 86
- Tax Laws Amendment (2007 Measures No. 5) Act 2007

Case references:

- Collis v. FC of T 96 ATC 4831; (1996) 33 ATR 438
- FC of T v. Consolidated Press Holdings Limited (No. 1) 99 ATC 4945; (1999) 42 ATR 575 (Federal Court); 2001 ATC 4343; (2001) 47 ATR 229 (High Court)
- FC of T v. Peabody (1994) 181 CLR 359; 94 ATC 4663; (1994) 28 ATR 344
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- Granby Pty Ltd v. FC of T 95 ATC 4240; (1995) 30 ATR 400
- Hart v. FC of T 2001 ATC 4708; (2001) 48 ATR 317
- Howland-Rose & Ors v. FCT [2002] FCA 246
- Nomad Films International Pty Ltd v. Export Development Grants Board (1986) 66 ALR 427
- Wilson v. Weiss Art Pty Limited (1995) 31 IPR 423
- Vincent v. FCT [2002] FCA 656

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