



# ***PR 2005/102 - Income tax: Multimedia Investment - 'Indigenous Australians'***

 This cover sheet is provided for information only. It does not form part of *PR 2005/102 - Income tax: Multimedia Investment - 'Indigenous Australians'*

 This document has changed over time. This is a consolidated version of the ruling which was published on *20 July 2005*



## Product Ruling

### Income tax: Multimedia Investment – 'Indigenous Australians'

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#### **Preamble**

*The number, subject heading, **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

#### **No guarantee of commercial success**

The Tax Office **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products and how the product fits an existing portfolio. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described, participants lose the protection of this Product Ruling. Potential participants may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential participants should be aware that the Tax Office will be undertaking review activities to confirm the arrangement has been implemented as described below and to ensure that the participants in the arrangement include in their income tax returns income derived in those future years.

#### **Terms of use of this Product Ruling**

This Product Ruling has been given on the basis that the person(s) who applied for the Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Ruling.

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

## What this Product Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons who take part in the arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as 'the project' 'the Product' or 'the arrangement'.

### Tax law(s)

2. The tax laws dealt with in this Ruling are:
- Division 40 of the *Income Tax Assessment Act 1997* (ITAA 1997);
  - section 995-1 of the ITAA 1997;
  - section 79D of the *Income Tax Assessment Act 1936* (ITAA 1936);
  - section 82KL of the ITAA 1936;
  - Division 5 of Part III of the ITAA 1936;
  - Division 10B of Part III of the ITAA 1936; and
  - Part IVA of the ITAA 1936.

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

### Goods and Services Tax

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

### Business Tax Reform

4. The Government is currently evaluating further changes to the tax system in response to the Ralph Review of Business Taxation and continuing business tax reform is expected to be implemented over a number of years. Although this Ruling deals with the laws enacted at the time it was issued, future tax changes may affect the operation of those laws and, in particular, the tax deductions that are allowable. Where tax laws change, those changes will take precedence over the application of this Ruling and, to that extent, this Ruling will be superseded.

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

**Note to promoters and advisers**

6. Product Rulings were introduced for the purpose of providing certainty about tax consequences for investors in projects such as this. In keeping with that intention, the Tax Office suggests that promoters and advisers ensure that potential investors are fully informed of any changes in tax laws that take place after the Ruling is issued. Such action should minimise suggestions that potential investors have been negligently or otherwise misled.

**Class of persons**

7. The class of persons to whom this Ruling applies is those persons who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (that is, being a party to the relevant agreement until their term expires), and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling, each of these persons, referred to as 'Investors', will be wholesale clients for the purpose of the *Corporations Act 2001* or will have accepted an offer which qualifies as a small scale offer for the purpose of the *Corporations Act 2001*.

8. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

**Qualifications**

9. The Commissioner rules on the precise arrangement identified in the Ruling. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out, the Ruling has no binding effect on the Commissioner. The Ruling will be withdrawn or modified.

10. 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  
Attorney General's Department  
Robert Garran Offices  
National Circuit  
Barton ACT 2600

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

## Date of effect

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11. This Ruling applies prospectively from 20 July 2005, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

12. If a taxpayer has a more favourable private Ruling (which is legally binding), the taxpayer can rely on the private Ruling if the income year to which the private Ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private Ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

## Withdrawal

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13. This Product Ruling is withdrawn on 30 June 2007 and ceases to have effect on and from that date. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement, or the persons' involvement in the arrangement.

## Arrangement

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14. The arrangement is the Multimedia Investment – Indigenous Australians and is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Application for a Product Ruling and Product Ruling Checklist dated 11 February 2005 in respect of MultiMedia Investment – 'Indigenous Australians' as constituted by documents received in the Tax Office on 16 February 2005, 4 March 2005, 9 March 2005, 14 March 2005, 21 March 2005, 11 May 2005, 3 June 2005, 17 June 2005 and 11 July 2005 and additional correspondence dated 4 March 2005, 14 March 2005, 21 March 2005, 20 April 2005, 11 May 2005, 26 May 2005 and 3 June 2005;

- Draft Information Memorandum for the project received in the Tax Office on 17 June 2005;
- Draft Production and Investment Agreement for the project between Tamora Pty Ltd as trustee for the Barrie Machin Family Trust (the 'Production Company') and the Investor, received in the Tax Office on 11 July 2005;
- Memo of Understanding dated 7 December 2004 between the NEIB Aboriginal Corporation, Tamora Pty Ltd ('Tamora') and those people represented by the NEIB Aboriginal Corporation;
- Draft Fee Deferral Agreement between the Production Company and Doctor Barry Machin, received in the Tax Office on 4 March 2005; and
- Draft Sponsorship Document between the Production Company and the Sponsor, received in the Tax Office on 4 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.

15. The documents highlighted are those which Investors enter into or become a party to. There are no other agreements, whether formal or informal, and whether or not legally enforceable, that an Investor, or any associate of an Investor, will be a party to.

16. In accordance with the above documents, an Investor who participates in the arrangement must be a wholesale client or have accepted an offer that is a small scale offering. This Ruling does not apply unless:

- the Investor is a wholesale client as defined in section 761G of the *Corporations Act 2001*; or
- the Investor has accepted a 'personal offer' of a small scale offering for the purpose of the *Corporations Act 2001*.

17. Each of these categories is explained in paragraphs 58 to 65 in the Explanation area of this Product Ruling.

### **The Participants**

18. The parties involved in the arrangement are:

- each Investor, being a purchaser of a number of copyright interests who licences them to derive assessable income;
- Tamora Pty Ltd as trustee for the Barrie Machin Family Trust will produce and market the Product under the terms of the Production and Investment Agreement; and

- each Sponsor, who will pay a Sponsorship Fee towards the production of the Product.

## Defined terms

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

- **Budget** means the budget for production of the Product as it appears in Annexure A of the Production and Investment Agreement as varied from time to time.
- **Budget Total** means the total of the Budget specified in Annexure A of the Production and Investment Agreement, namely the sum of \$440,000 including GST or as varied.
- **Complete the Product** means to make the first full length, edited, synchronised, titled and credited version of the Product (known as the final version) suitable to be seen in public or communicated to the public as both CD Rom and DVD.
- **Completion Date** means the date of Completing the Product.
- **Copyright** means:
  - (a) copyright subsisting in the Product by virtue of Part IV of the *Copyright Act 1968* (Cth) including future copyright;
  - (b) copyright in the Product in accordance with the law of a country other than Australia including future copyright; and
  - (c) rights in the Product in the nature of or analogous to the rights in (a) and (b) of this paragraph in accordance with the law of Australia or any other country.
- **Cut-Off Date** means five years from the Completion Date.
- **Deferred** means the subject of an agreement with the Production Company to the effect that payment will be made from Proceeds.
- **Investment Account** means the Credit Union Account described as the Investment Account.
- **Investment Amount** means the total aggregate amount invested by the Investor in the Product, being \$1,100 per Unit (including GST).
- **Investment Application** means an application pursuant to the Production and Investment Agreement to become an Investor in relation to one or more Units.

- **Marketing Expenses** means costs and expenses incurred and substantiated by the Production Company in relation to Marketing the Product including those of the type listed in Schedule 2 of the Production and Investment Agreement.
- **Marketing Materials** means materials created to Market the Product, including posters, still photographs and artwork.
- **Marketing the Product** includes:
  - (a) manufacture, promotion and exploitation of DVDs and CD Roms comprising the Product;
  - (b) promotion and exploitation of the Copyright;
  - (c) securing to the Investors the Copyright;
  - (d) protecting and prosecuting infringements of the Copyright;
  - (e) obtaining any benefit from export market development schemes and export expansion schemes and statutory licences in accordance with the *Copyright Act 1968* (Cth) in relation to the Product; and
  - (f) creation and use of the Marketing Materials.
- **Minimum Subscription** means the receipt by the Production Company of applications equalling the Budget Total less the total of any Deffereds and Sponsorship.
- **Overage** means any sum over the Budget Total required to produce and Complete the Product as contemplated by the Budget and the Production and Investment Agreement.
- **Proceeds** means gross revenue after deduction of the following:
  - (a) Marketing Expenses; and
  - (b) any Tax required to be withheld from gross revenue (to the extent that the Production Company is not entitled to a credit or rebate in respect of such Tax),

derived by the Production Company from Marketing the Product and generally exploiting the Product throughout the world, whether in accordance with an agreement that came into effect before or after the date of the Production and Investment Agreement and received by the Production Company in accordance with the Production and Investment Agreement, and includes without limitation:

- (a) money received from sales or hire of CD Roms and DVD's incorporating the Product;
  - (b) export market development grants in relation to Marketing the Product internationally;
  - (c) money received from Insurances relating to Marketing the Product and payments into the Proceeds Account;
  - (d) money obtained in connection with any Claim relating to the Product, Product Assets or Copyright;
  - (e) awards or prizes other than:
    - (i) those made to individuals for contributions to the production of the Product; and
    - (ii) those made to the Product but customarily paid to individuals for contributions to the production of the Product;
  - (f) interest accruing on money in the Proceeds Account; and
  - (g) any Underage;
- but does not include Sponsorship.
- **Proceeds Account** means the Credit Union Account described as the Proceeds Account in the Production and Investment Agreement, held by the Production Company as an interest bearing account into which the Proceeds are to be paid.
  - **Product** means the Aboriginal heritage training package to be prepared for sale or hire in CD Rom and DVD form, to be called Indigenous Australians.
  - **Product Assets** means the Product, the Copyright and the Marketing Materials.
  - **Production Account** means the former Investment Account at the time the preconditions to proceeding are met.
  - **Sponsors** refers to those persons who provide financial assistance, whether through the provision of money, services or goods in exchange for acknowledgement in the Product as a sponsor but who do not share in the profits generated by the Product.
  - **Sponsorship** means financial assistance provided by the Sponsors.

- **Underage** means the difference between the audited cost of the Product (excluding budgeted Marketing expenditure) and the Budget Total (excluding budgeted Marketing expenditure), where the Budget Total exceeds the audited cost. For the purposes of calculating the audited cost of the Product, insurance claims actually applied against costs incurred in the production of the Product, and any rebates, refunds, bonds or the like will be set against the costs of the Product.
- **Unit** means a unit of investment acquired by an Investor in accordance with the terms of the Production and Investment Agreement.

### **The Project**

20. The project is an unregistered managed investment scheme established to produce a multimedia product containing ethnographic material for training purposes called 'Indigenous Australians'. Two versions of the Product will be produced, one targeted at mining companies and one targeted at schools and the public.

21. The project will be established with funds contributed by Investors and Sponsors, to exploit the Copyright for the benefit of Investors during the term of the project. The project will commence on execution of the Production and Investment Agreement and is anticipated to cease 5 years after completion of the Product.

22. The Budget for the Product is \$440,000, of which \$39,600 is categorised as non-deductible expenditure.

23. If there are sufficient Investment Amounts from applications and Sponsorship, the Budget may be varied upwards by no more than 20% for the purpose of increasing the specific budget items of anthropological advice, writing, line production, marketing, legal and contingency. If the Budget is varied upwards, all Investment Amounts will be expended solely on direct costs of production and the level of Sponsorship will be sufficient to account for all non-deductible expenditure.

24. Certificate number 977, dated 25 January 2005, has been issued by the Department of Communications, Information Technology and the Arts in respect of the Film to the Production Company. This certificate is currently in force in relation to the Product and states that the proposed Product will, when completed, be an 'Australian Film' for the purposes of Division 10B of ITAA 1936.

25. Applicants can apply to invest in the project by completing the Investment Application form attached to the Information Memorandum. Applications must be for at least 10 Units of \$1,100 each or thereafter in multiples of one Unit. There will be up to 400 Units in the project on offer.

## **Production and Investment Agreement**

26. Under this Agreement, the Investors agree to invest in the production of the Product and the Production Company agrees to produce and market the Product.
27. The Product is intended to be marketed on CD Rom and DVD and thereafter will be retained by the Production Company as a general archive.
28. In consideration of payment of the Investment Amount the Investors will become the first owners of the legal and beneficial interest in that proportion of 50% of the Copyright in the Product as the total of Investment Amounts under the Agreement bears to the Budget Total as and when such Copyright comes into subsistence. The Production Company will be the owner of the remaining proportion.
29. The Investor will acquire a proportional, undivided legal and beneficial interest as tenant in common in the Investors' Copyright Interest. The Investor's Interest in the Investors' Copyright Interest will be equal to the proportional Interest that that Investor's Units bear to the total number of Units issued.
30. On the Cut-off Date, the Production Company may upon payment of a sum representing fair market value, on behalf of Investors, transfer the Investors' Copyright to the Production Company.
31. The Production Company will deposit any Investment Amount received from any Investor in the Investment Account. The Production Company will not use the Investment Account until the relevant Investor's Investment Application has been accepted and Minimum Subscription has occurred.
32. The Production Company may accumulate the Investment Amounts to 30 June 2006 and in its absolute discretion, accept or refuse any Investment Application in whole or in part.
33. The Production Company will not accept any Investment applications or use the Investment Account until such time as the following preconditions are satisfied:
- the Production Company has received Investment Applications totalling such amount as, together with any sum Deferred and the subject of Sponsorship, equals the Budgeted Total;
  - the total of Sponsorships received exceeds any expenditure anticipated to be non-deductible for the purpose of Division 10B of the ITAA 1936; and
  - a Product Ruling is issued by the Australian Taxation Office in relation to the production of the Product which confirms that the Investment Amount is deductible to the Investors.

34. Upon these Preconditions being satisfied, Investors whose Investment Application are accepted will become parties to this Agreement and the Investment Account will be deemed to be the Production Account and shall be renamed accordingly.

35. If by 30 June 2006 these preconditions have not been satisfied, the Production Company will immediately reimburse the Investment Amount to each Investor.

36. The Production Company agrees to apply the money in the Production Account only towards the production of the Product or by way of contribution to the cost of producing the Product. Sponsorship may be applied to the costs of producing the Product or other expenses.

37. Underages will be used to meet the costs of any of the following:

- (i) any Overage; and
- (ii) enhancements to the Product,

provided the costs are not non-deductible costs for the purposes of Division 10B, and to the extent not used for any of the above, shall be treated as Proceeds and paid into the Proceeds Account.

38. The Production Company must meet any Overage that is not met through Underages.

39. The Investor severally grants to the Production Company an exclusive licence to market the Product throughout the world. The Production Company's exclusive licence for marketing the Product commences on the date of the Agreement and continues until the Cut-Off Date.

40. The Production Company reserves the right to give the Product to schools free of charge if more than half the Budget is raised from Sponsorship.

41. The Production Company must pay the Proceeds into the Proceeds Account, where they will be held by the Production Company on its own behalf, within 30 days after the end of the month of receipt of the Proceeds. The Proceeds must be paid to Investors or to the Production Company within 30 days of Proceeds being deposited into the Proceeds Account, as follows:

- First: 100% to Deferrers pro rata and pari passu until all Deferrers have been paid in full; and then
- Second: pro rata and pari passu:
  - 70% to the Investors, each in proportion to the number of Units held relative to the total number of Units held by the Investors, until the Investors have recouped 200% of the Investment Amount; and
  - 30% to Production Company until the Production Company has recouped \$150,000;

- and upon either being so recouped, 100% to the other until so recouped; and then
- Third until the Cut-Off Date, pro rata and pari passu: that percentage of Proceeds as the Investors hold of Copyright to the Investors, each in proportion to the number of Units held relative to the total number of Units by the Investors; and the balance to Production Company (out of which the Production Company will pay NEIB Aboriginal Corporation one half); and
- Fourth: after the Cut-Off Date, 100% to the Production Company.

## Fee Deferral Agreement

42. Under this Agreement, Dr Machin has agreed to defer payment of a portion of his fees for services as director of the Product on the basis that he will receive those fees from proceeds under the terms of the Production and Investment Agreement.

## Sponsorship Agreement

43. The Sponsor agrees to pay to the Production Company the Sponsorship Fee in the manner and the times set out in Item 2 to the Agreement.

44. In consideration of the Sponsorship Fee the Production Company grants to the Sponsor the right to sponsor the Product, in conjunction with other sponsors, and have the Sponsor's Logo incorporated in the Product.

45. The Sponsor acknowledges that the Copyright shall remain the sole and exclusive property of the Production Company together with any goodwill.

46. The Production Company acknowledges that by entering into this Agreement it shall not acquire any rights to the Sponsor's Logo including any developments or variation of that Logo.

## Finance

47. There is no finance facility offered by the Production Company or any other party to the arrangement. Investors can fund their investment in the Product themselves, or borrow from an independent lender. Regardless of the source of loan funds, this Ruling will not apply to Investors if the Production Company accepts their investment subject to finance approval by a lending institution and the full amount payable is not paid to the Production Company on or before the time of acceptance of the Investor's Investment Application.

48. This Ruling does not apply if a finance arrangement entered into by an Investor to fund the Investor's investment in the arrangement 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 project;
- the funds borrowed, or any part of them, will not be available for the conduct of the project but will be transferred (by any mechanism, directly or indirectly) back to the lender or any associate of the lender;
- lenders do not have the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers; or
- entities associated with the project are involved or become involved, in the provision of finance to Investors for the project.

## **Ruling**

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### **Division 10B**

49. A deduction is available to an Investor in the project under Division 10B as follows:

- (a) 50% of the Investment Amount is allowable in the year of income in which the Product is first used to produce assessable income; and
- (b) the remaining 50% is allowable in the next succeeding year of income.

## **Partnership**

50. During the period that the Investors and the Production Company receive distributions from the Proceeds Account, the Investors and the Production Company will be in 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). The partners will receive income jointly from the commercial exploitation of the Copyright in the Product. Section 90 of ITAA 1936 provides that the net income of a partnership is calculated as if the partnership was a resident taxpayer, and is the assessable income less all allowable deductions. The partnership will be required to lodge a partnership return for each year of income, as required by section 91 of the ITAA 1936.

51. Each partner will be a partner in a partnership and, in accordance with section 92 of the ITAA 1936, where the partner is a resident, will be required to include his or her individual interest in the net income of the partnership in his or her assessable income. Where the Investor is a non-resident, he or she is required to include in his or her assessable income his or her individual interest in the net income of the partnership as is derived from sources in Australia.

## **Interest**

52. The deductibility or otherwise of interest arising from loan agreements entered into with financiers is outside the scope of this Ruling.

## **Division 40 of the ITAA 1997**

53. Division 40 of the ITAA 1997 does not apply to the Investors interest in the Copyright.

## **Section 79D**

54. Section 79D does not apply to deny or defer the deductions otherwise available.

## **Section 82KL**

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

## **Part IVA**

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

**Assumptions**

57. This Ruling is made subject to the following assumptions in respect of the Product:

- (a) an Investor will incur capital expenditure on the purchase of Copyright (paragraph 124L(1)(b));
- (b) an Investor's interest in the Copyright amounts to ownership of the Copyright for the purposes of Division 10B (subsection 124K(1));
- (c) the Product will be completed and the Partnership will use the Copyright for the purpose of producing assessable income (section 124L(1));
- (d) a certificate, issued by the Department of Communication, Intellectual Technology and the Arts, will be in existence in relation to the Product (subsection 124K(1));
- (e) the Investors will not exercise the discretion contained in subsection 124UA(2);
- (f) the effective life of the Copyright in the Product is two years (subsection 124UA(1));
- (g) 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 acquiring copyright interests in the Product;
- (h) the dominant purpose of the Investors is to make a commercial return from their investment in the Product and the arrangements will be executed in the manner described in this Ruling; and
- (i) Copyright Interests are acquired at an arms length value from the Production Company.

**Explanation****Corporations Act 2001**

58. For this Ruling to apply, an offer for an interest in the project must:

- have been made to, and accepted by an Investor, who qualifies as a wholesale client as defined in section 761G of the *Corporations Act 2001*; or
- be an offer which qualifies as a small scale offering as defined in section 1012E of the *Corporations Act 2001*.

59. Small scale offers and offers to wholesale clients do not require a prospectus or product disclosure statement.

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

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

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

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

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

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

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

- the person is a financial services licensee;
- the person is a listed entity or related body corporate;
- the person is a bodies corporate carrying on the business of investing in financial products using funds subscribed from the public;
- the person is a body other than a superannuation fund which is regulated by APRA;
- the person is registered under the *Financial Corporations Act 1974*; or
- the person controls at least \$10 million for the purposes of investment in securities.

64. Alternatively, under section 1012E, an Investor may participate in the project by accepting a 'personal offer' for an interest in the project. Offers made under section 1012E cannot be accepted by more than 20 investors in any 12 month period and these investors, in aggregate, must not invest more than \$2 million dollars (subsection 1012E(2)).

65. An offer will be a 'personal offer' where it can only be accepted by the person to whom it is made, and it is made to a person who is likely to be interested in the offer because of previous contact, or professional or other connection with the person making the offer, or because they have indicated that they are interested in offers of that kind (subsection 1012E(5)).

### **Division 10B**

#### ***The Cost of a unit of industrial property***

66. The cost of an Australian film for the purposes of Division 10B is determined under section 124R.

67. In our view, based on the information provided, the Investors and the Production Company are dealing at arm's length. The Investors will pay the Investment Amount to the Distribution Company who will apply 100% of the Investment Amount towards the direct production costs of the Product. Sponsorship Fees will be used to fund non-deductible expenditure.

#### ***Used for the purpose of producing assessable income***

68. For Division 10B to apply, section 124L requires the owner of a unit of industrial property to have used it in the year of income concerned or in a previous year of income for the purpose of producing assessable income.

69. The Investors will licence their interest in the Copyright to the Production Company. The Production Company will market the Product worldwide. The Partnership is to receive income generated from the commercial exploitation of the Product in accordance with the Production and Investment Agreement. It is our view that the Product will be used for the purpose of producing assessable income. In the year of income that these events occur, a deduction will be first available to the Investors.

#### ***Entitlement to annual deductions***

70. The amount of the annual deduction allowable to the owner of a unit of industrial property to whom Division 10B applies is determined in accordance with section 124M.

71. The amount of the annual deduction is calculated by dividing the residual value of the unit at the end of the income year by the number of whole years in the effective life of the unit as at the beginning of the year. The residual value of a unit is determined in accordance with section 124S and the effective life of a unit, being a copyright subsisting in an Australian film, is determined in accordance with section 124UA.

### ***Residual value***

72. Residual value is determined under section 124S. Generally speaking, the residual value, as per subsection 124S(1), is the cost of the unit to the owner less the sum of:

- i. the deductions (if any) allowed or allowable to that person in respect of the unit in previous years; and
- ii. any consideration receivable by the owner in respect of any earlier part disposal of the unit.

### ***Effective life of a unit***

73. The effective life of a unit to which s 124UA applies, that is, a copyright subsisting in an Australian film, will commence at the commencement of the year of income during which it is first used by the owner for the purpose of producing assessable income and shall end at the conclusion of the next succeeding year of income, or, where the unit was acquired for a specified period, the end of the year of income in which that specified period ends, whichever first occurs. Effectively this means that the cost of the unit is written off over two years except in circumstances where the unit is acquired for a specified period which expires within the same year of income in which the unit was acquired, in which case the capital cost of the unit will be fully deductible in that year.

74. Subsection 124UA(2) gives an owner of a unit of industrial property that relates to a copyright in an Australian film the right to elect to have the effective life of the unit determined under section 124U. If the owner makes such an election, the deductions allowable in respect of the cost to the owner will be determined under the general basis provided for in Division 10B, i.e. by way of annual deductions over 25 years or any shorter effective life as determined in accordance with section 124U.

75. The Production Company will assign 50% of the Copyright in the Product to the Investors. The residual value for an Investor will be the capital expenditure incurred by that Investor to acquire their Copyright interest in the Product.

76. Given that no election in terms of subsection 124UA(2) has been made, the effective life of the series is two years. Consequently, the deduction available to an Investor in the year in which the Copyright is first used by the Partnership to produce assessable income is 50% of the capital expenditure incurred by that Investor to acquire his or her interest in the Copyright.

77. The deduction available in the following year will be the residual value of the Product at that time, being the cost of the unit to the owner less the deductions allowed in previous years (assuming that no consideration was received by the Partnership or the Investors when the Partnership enters into the Production and Investment Agreement). The deduction available is therefore the remaining 50% being, the capital expenditure incurred (cost of unit) less the 50% deduction allowed in the previous year.

#### **Partnership for income tax purposes**

78. The Investors and the Production Company will comprise 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). Division 5 of Part III applies so that the assessable income of a partner includes so much of the individual interest of the partner in the net income of the partnership. It should be noted that the partnership is not a common law partnership and consists only of the persons who receive income jointly from the exploitation of the Copyright in the Product.

79. The partners will receive passive income from the exploitation of the Copyright in the Product.

80. As the Investors and the Production Company between them hold 100% of the Copyright in the Product, the Investors and the Production Company are entitled to share in the distributions from the Proceeds Account.

81. A partnership return will be required to be furnished for each year of income as required by section 91. The Investors will be required to disclose their share of the partnership net income or loss in their returns of income as required by section 92.

#### **Interest deductibility**

82. The deductibility of interest incurred by Investors who finance their participation in the project through a loan facility with a bank or other financier is outside the scope of this Ruling. Product Rulings only deal with arrangements where all details and documentation have been provided to, and examined by, the Tax Office.

## **Division 40 of the ITAA 1997**

83. Division 40 of the ITAA 1997 does not apply to the Program Copyright as it is excluded by the operation of subsection 40-45(5) of the ITAA 1997 where the relevant depreciating asset is a copyright in an Australian film and the Investor is entitled to a deduction under Division 10B.

## **Section 79D**

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

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

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

86. The operation of section 82KL depends, among other things, on the identification of a certain quantum of 'additional benefits'. Insufficient 'additional benefits' will be provided in respect of this project, to trigger the application of section 82KL. It will not apply to deny the deductions otherwise allowable under section 124M.

## **Part IVA**

87. For Part IVA to apply, there must be a 'scheme' (section 177A); a 'tax benefit' (section 177C); and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D). The arrangement subject to this ruling will be a 'scheme'. The Investors will obtain, for example, a 'tax benefit' from entering into the scheme, in the form of a deduction allowable under the provisions in Division 10B, that would not have been obtained but for the scheme. However, it is not possible to conclude, from the arrangement outlined in this ruling, that the scheme will be entered into or carried out with the dominant purpose of obtaining a tax benefit.

88. An Investor to whom this ruling applies intends to stay in the scheme for its full term and derive assessable income from the exploitation of the Copyright of the Product. Further, there are no features of the project, as described in the said arrangement, that suggest that the project is so 'tax driven' and 'so designed to produce a tax deduction of a certain magnitude', that the operation of Part IVA is attracted.

## Detailed contents list

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**Commissioner of Taxation**

20 July 2005

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| <i>Previous draft:</i>                 | - ITAA 1936 124M                   |
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|  | - ITAA 1936 124S                   |
| <i>Related Rulings/Determinations:</i> | - ITAA 1936 124S(1)                |
| PR 1999/95; TR 92/1; TR 92/20;         | - ITAA 1936 124U                   |
| TR 97/16; TR 98/22; TD 93/34,          | - ITAA 1936 124UA                  |
|  | - ITAA 1936 124UA(1)               |
| <i>Subject references:</i>             | - ITAA 1936 124UA(2)               |
| - Australian films                     | - ITAA 1936 160AFD(9)              |
| - film income                          | - ITAA 1936 Pt IVA                 |
| - film industry                        | - ITAA 1936 177A                   |
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| - tax avoidance                        | - ITAA 1997 Div 40                 |
| - tax administration                   | - ITAA 1997 40-45(5)               |
|  | - ITAA 1997 995-1                  |
| <i>Legislative references:</i>         | - Copyright Act 1968               |
| - ITAA 1936 79D                        | - TAA 1953 Pt IVAAA                |
| - ITAA 1936 82KL                       | - ANTS(GST)A 1999                  |
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| - ITAA 1936 90                         | - Corporations Act 2001            |
| - ITAA 1936 91                         | - Corporations Act 2001 761G       |
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