



cutting through complexity

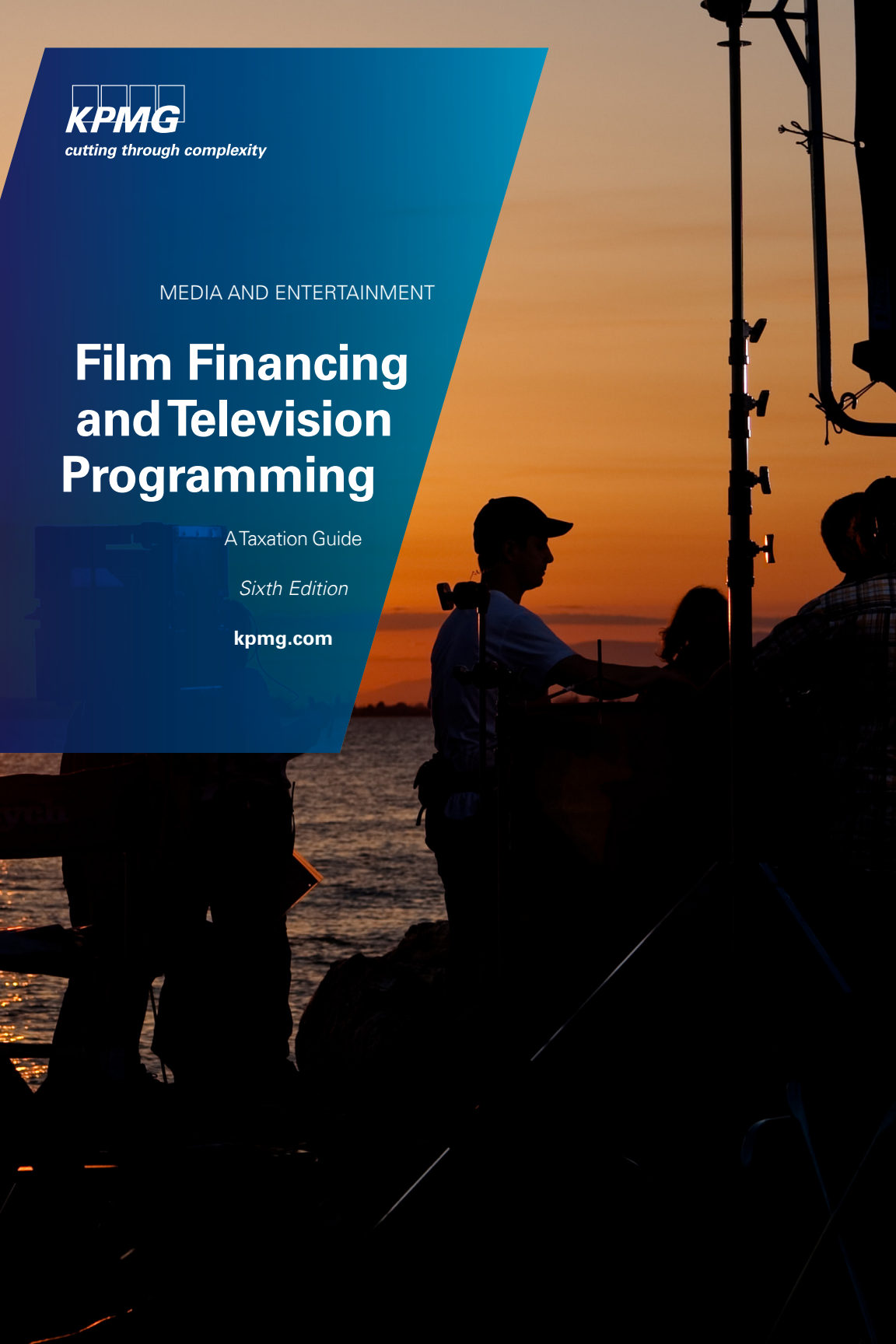
MEDIA AND ENTERTAINMENT

Film Financing and Television Programming

A Taxation Guide

Sixth Edition

kpmg.com



Contents

Preface		1
Chapter 01	Australia	3
Chapter 02	Austria	30
Chapter 03	Belgium	39
Chapter 04	Brazil	59
Chapter 05	Canada	76
Chapter 06	China and Hong Kong SAR China (124-135) Hong Kong SAR (136-144)	124
Chapter 07	Colombia	145
Chapter 08	Czech Republic	154
Chapter 09	Fiji	166
Chapter 10	France	183
Chapter 11	Germany	200
Chapter 12	Greece	219
Chapter 13	Hungary	254
Chapter 14	Iceland	268
Chapter 15	India	279
Chapter 16	Indonesia	303
Chapter 17	Ireland	309
Chapter 18	Italy	335
Chapter 19	Japan	352
Chapter 20	Luxembourg	362
Chapter 21	Malaysia	377
Chapter 22	Mexico	385

Chapter 23	The Netherlands	411
Chapter 24	New Zealand	436
Chapter 25	Norway	453
Chapter 26	Philippines	474
Chapter 27	Poland	489
Chapter 28	Romania	499
Chapter 29	Singapore	516
Chapter 30	South Africa	532
Chapter 31	South Korea	550
Chapter 32	Sweden	556
Chapter 33	Thailand	566
Chapter 34	United Kingdom	578
Chapter 35	United States	606
Appendix A		637
Table of Film and TV Royalty Withholding Tax Rates		
Appendix B		645
Table of Dividend Withholding Tax Rates		
Appendix C		659
Table of Interest Withholding Tax Rates		

ANY TAX ADVICE IN THIS COMMUNICATION IS NOT INTENDED OR WRITTEN BY KPMG LLPTO BE USED, AND CANNOT BE USED, BY A CLIENT OR ANY OTHER PERSON OR ENTITY FOR THE PURPOSE OF (i) AVOIDING PENALTIES THAT MAY BE IMPOSED ON ANY TAXPAYER OR (ii) PROMOTING, MARKETING OR RECOMMENDING TO ANOTHER PARTY ANY MATTERS ADDRESSED HEREIN.

Preface

KPMG LLP's (KPMG) *Film Financing and Television Programming: A Taxation Guide*, now in its sixth edition, is a fundamental resource for film and television producers, attorneys, tax, and finance executives involved with the commercial side of film and television production. The guide is recognized as a valued reference tool for motion picture and television industry professionals. Its primary focus is on the tax and business needs of the film and television industry with information drawn from the knowledge of KPMG International's global network of media and entertainment Tax professionals.

KPMG published the first guide more than 15 years ago as a resource for global coverage of incentives and tax updates as they apply to the film and television industry. Subsequent editions expanded into coverage of financing techniques, credits/incentives, and a thorough appendix of withholding tax rates—a valuable reference tool for all finance and tax professionals.

Each chapter of the sixth edition focuses on a single country and provides a description of commonly used financing structures in film and television, as well as their potential commercial and tax implications for the parties involved. Additionally, the United States chapter focuses on both federal and state incentives, highlighting the states that offer the more popular and generous tax and financial incentives. Key sections in each chapter include:

Introduction

A thumbnail description of the country's film and television industry contacts, regulatory bodies, and financing developments and trends.

Key Tax Facts

At-a-glance tables of corporate, personal, and VAT tax rates; normal non-treaty withholding tax rates; and tax year-end information for companies and individuals.

Financing Structures

Descriptions of commonly used financing structures in film and television in the country and the potential commercial tax implications for the parties involved. The section covers rules surrounding co-productions, partnerships, equity tracking shares, sales and leaseback, subsidiaries, and other tax-effective structures.

Tax and Financial Incentives

Details regarding the tax and financial incentives available from central and local governments as they apply to investors, producers, distributors, and actors, as well as other types of incentives offered.

Corporate Tax

Explanations of the corporate tax in the country, including definitions, rates, and how they are applied.

Personal Tax

Personal tax rules from the perspective of investors, producers, distributors, artists, and employees.

Appendices

Additionally, withholding tax tables setting forth the non-treaty and treaty-based dividend, interest, and film royalty withholding tax rates for the countries surveyed are included as an appendix and can be used as a preliminary source for locating the applicable withholding rates between countries.

KPMG and Member Firm Contacts

References to KPMG and KPMG International member firm contacts at the end of each chapter are provided as a resource for additional detailed information.

The sixth edition of KPMG's Film and Television Tax Guide is available in an online PDF format at www.kpmg.com/filmtax and on CD. The guide is searchable by country.

Please note: While every effort has been made to provide up-to-date information, tax laws around the world are constantly changing. Accordingly, the material contained in this book should be viewed as a general guide only and should not be relied upon without consulting your KPMG or KPMG International member firm Tax advisor.

Finally, we would sincerely like to thank all of the KPMG International member firm Tax professionals from around the world who contributed their time and effort in compiling the information contained in this book and assisting with its publication. Production opportunities are not limited to the 35 countries contained in this guide. KPMG and the other KPMG International member firms are in the business of identifying early-stage emerging trends to assist clients in navigating new business opportunities. We encourage you to consult a KPMG or KPMG International member firm Tax professional to continue the conversation about potential approaches to critical tax and business issues facing the media and entertainment industry.

Thank you and we look forward to helping you with any questions you may have.

Tony Castellanos

+1 212.954.6840
acastellanos@kpmg.com

Benson Berro

+1 818.227.6954
bberro@kpmg.com

January 2012

Chapter 01

Australia

Introduction

Since 1999, the Australian government has undertaken a program of significant business tax reforms. The result is a changed Australian tax landscape that includes the broad based goods and services tax (GST), tax consolidation regime, specific tax rules to classify financial instruments as debt or equity, thin capitalization rules, simplified dividend imputation rules, comprehensive tax rules for recognizing and calculating foreign exchange gains and losses and new rules redefining the taxation of financial arrangements.

On the international front, double tax agreements with countries such as France, Norway, Japan and New Zealand have come into force in the last few years. As a result, changes are being made to the way overseas profits earned by Australian entities and their affiliates are taxed in Australia. Other significant changes on the international front include amendments to capital gains tax, which include, amongst other changes, the exemption from Australian capital gains tax for non-residents in certain circumstances and the exemption for capital gains and losses in relation to shares in a foreign company in certain circumstances.

Of more direct relevance for film projects has been the phasing out of the Division 10B and Division 10BA tax incentives and the introduction of new Australian Screen Production Incentives as a result of a review in 2006 to reform and strengthen the Australian screen media industry. The shift toward producer based incentives is a reaction to the limited effectiveness of the investor based incentives offered by Division 10BA and Division 10B and is designed to make Australia a more attractive location for overseas film investment by improving the accessibility of the tax offsets available.

The producer incentives are available in three streams; the Producer Offset, the Location Offset and the Post, Digital and Visual Effects Production (PDV) Offset. The offsets can only be claimed by a production company which is either an Australian resident or a foreign resident that has a permanent establishment in Australia and has an Australian Business Number (ABN). Only one of the three offsets may be claimed for a film production.

On 29 July 2011, draft legislation was released for public consultation outlining proposed changes to the film producer offset, location offset, and the PDV offset originally announced as part of the 2011 – 12 Federal Budget.

In 2008, a new authority named Screen Australia was established to bring together the functions of the Australian Film Commission, Film Finance Corporation Australia Limited and Film Australia Limited and carry out additional functions regarding the support and promotion of Australian film and the provision of tax incentives to film producers. The Screen Australia

webpage (<http://www.screenaustralia.gov.au>) and the Department of the Prime Minister and Cabinet – Office of the Arts webpage (<http://www.arts.gov.au/topics/film-television/australian-screen-production-incentive>) provide all the relevant information to taxpayers wishing to invest in the film industry.

Key Tax Facts

Corporate income tax rate	30% (proposed reduction to 29% from 2013-14, however, not yet legislated)
Highest personal income tax rate	46.5%
Goods and services tax rate	10%
Annual GST registration turnover threshold	A\$75,000
Normal non-treaty withholding tax rates: Unfranked dividends	30%
Franked dividends	0%
Interest	10%
Royalties	30%
Tax year-end: Companies	June 30
Tax year-end: Individuals	June 30

Film Financing

Financing Structures

Co-production

Australia has entered into a number of co-production agreements with other countries. Currently, Australia has full co-production treaties with the United Kingdom and Northern Ireland (currently being renegotiated), Canada, Italy, Israel, Ireland, Singapore, China, and Germany, and “less-than-treaty” memoranda of understanding (MOU) with New Zealand and France. Further, a co-production treaty with South Africa has been signed but is not yet in force. Australia is also negotiating co-production treaties with India, Denmark, Malaysia and the Republic of Korea. It is possible to apply for a one-off MOU on a particular project as an appropriate way to “trial” whether general MOU of a treaty with the country in question should be pursued.

Screen Australia administers the official co-production program and is the “competent authority” for purposes of the program. Screen Australia administers the program within the terms of the “International Co-Production Program Guidelines” (version issued 27 April 2011) available on the Screen Australia webpage. If a production qualifies as an official co-production, it may be eligible for certain benefits such as investment by Screen Australia and tax benefits. To qualify, productions must meet certain tests which require an overall balance of all creative and financial elements to be maintained across co-productions over a period of time. Broadly, the following must be satisfied:

- There must be a producer from each co-production country;
- The Australian co-producer must retain a share of copyright in the co-production, i.e. in the finished film;
- The film must be made in the co-production countries. However, some co-production arrangements provide for the competent authorities to consider requests to undertake location filming outside the co-producing countries in exceptional circumstances;
- Participants in the making of the film must be national or permanent residents of Australia or the co-producing country/ies;
- A film may be based on an underlying work from any country;
- Australian minimum participation levels are set out in each co-production arrangement. The minimum is typically 20 or 30 percent;
- The proportion of the budget raised by the Australian co-producer must be reasonably similar to the proportion of the budget spent on Australian elements; and
- Each co-production is made in accordance with an agreement entered into by each of the co-producers.

Australian participation in a co-production is determined by a points system, Australian Qualifying Points (“AQP”). The AQP must reach at least the minimum contribution level prescribed by the relevant co-production arrangement as a percentage of the total creative points and must also be reasonably proportionally similar to the financial contribution that the Australian co-producer makes to the co-production. A 5 percent leeway is allowed.

Each test has a set number of roles that are always counted (top-line key creative roles). These roles attract ‘compulsory points’. In addition, the Australian co-producer may select roles in the discretionary point section to make up the level of points required for the film. However, Screen Australia reserves the right not to accept the allocated discretionary points.

For example, note the points values system for feature films and TV drama in the table below:

Australian Points System – Feature Films and TV Drama	Points
Compulsory points	
Writer	2
Director	2
Director of Philosophy	1
Editor/Picture Editor	1
Cast (4 principal roles)	4
Discretionary points (select 5 from below)	
Composer	1
Costume Designer	1
Production Designer	1
Script Editor	1
Sound Designer	1
Underlying work	1
VFX Supervisor	1
Other senior key role specific to the film such as choreographer, special make-up design etc.	1
Total:	15

Partnership

Limited partnerships are taxable as companies in Australia and accordingly are not commonly used in any investment structure.

Where an unlimited (i.e. general) partnership is formed in Australia to make a film in Australia, the Australian tax treatment will be straightforward. General partnerships are not tax paying entities; however, they are required to lodge tax returns in Australia disclosing the partnership profit sharing arrangements. All partners will be subject to full Australian tax on their share of the partnership profits as the carrying on of a business by the partnership will give each partner a permanent establishment in Australia. Relief from double taxation should be available.

In the event that a partner is resident in Australia but the partnership carries on business outside Australia under the control of a non-Australian resident, the non-Australian resident partner would clearly not be liable to Australian tax. The Australian resident partner would still be liable to Australian tax on its share of the partnership profits.

Equity Tracking Shares

The term “equity tracking shares” is not used in Australia. Internationally, the term refers to shares that provide for dividend returns dependent on the profitability of a film production company’s business. These shares have the same rights as the production company’s ordinary shares except that dividends are profit-linked and have preferential rights to assets on a liquidation of the company.

If the production company is resident in Australia, these tracking shares would be regarded as preference share capital. Normally, the dividends paid on the tracking shares would be treated in the same way as dividends paid on ordinary shares. Dividends paid on ordinary and preference shares in Australia are normally treated similarly provided that the equity tracking shares are considered to be an equity instrument under the debt/equity rules.

If the tracking shares are acquired by an Australian resident investor, but the production company is resident elsewhere, any dividends received on the tracking shares would be treated in the same way as dividends received on ordinary shares. Where the Australian resident company has a greater than 10 percent voting interest in the foreign production company, any dividends received on the tracking shares may qualify for an exemption from income tax in Australia, provided certain conditions are met. Any tax withheld in the foreign jurisdiction would be dealt with according to the dividend article of the appropriate double tax treaty.

Yield Adjusted Debt

A film production company may sometimes issue a “debt security” to investors. Its yield may be linked to revenues from specific films. The principal would be repaid on maturity and there may be a low (or even nil) rate of interest stated on the debt instrument. However, at each interest payment date, a supplementary (and perhaps increasing) interest payment may be paid where a predetermined target is reached or exceeded (such as revenues or net cash proceeds).

For Australian tax purposes, this “debt security” would probably be classified as debt under the debt/equity rules. Generally, if the parties are at arm’s-length the interest would be regarded as fully tax deductible to the payer and subject to a 10 percent withholding tax irrespective of the jurisdiction of the lender (unless the lender is a financial institution resident in, for example, the U.K., the U.S., New Zealand, Japan, Finland, or Norway, where Australia’s double tax agreements provide for no withholding).

Any repayment of the principal would not be subject to any form of withholding.

Sale and Leaseback

A purchase and leaseback of a film is not usually tax effective in Australia as the purchaser is regarded as having made a capital payment and would only be able to amortize the purchase price over the life of the film’s copyright. Any license payments received by the purchaser/lessor of the film would be fully assessable to tax.

Other Tax-effective Structures

Australian Subsidiary

An Australian subsidiary will provide foreign film makers with the greatest flexibility. To the extent that funds are required in Australia, the subsidiary could obtain a limited license from a foreign copyright holder and make the film in Australia under that license. The fee to the production company can be structured on a cost-plus basis.

Tax and Financial Incentives

Investors

Australian tax legislation has a general anti-avoidance provision whose broad impact is that any transaction that has the dominant purpose of avoiding tax can be attacked by the Australian revenue authorities.

Filmed Licensed Investment Companies

The filmed licensed investment companies (FLIC) pilot scheme ran in parallel with the Division 10BA and Division 10B film concession. The FLIC Scheme 2005 followed a pilot scheme that operated between the 1999 and 2002 financial years. Under the FLIC Scheme 2005, a company was granted a non-transferable license to raise concessional capital to be invested in qualifying Australian films.

No further FLIC licenses have been issued since the introduction of the Australian Screen Production Incentives.

Australian Screen Production Incentives

The Australian Screen Production Incentives comprise the Producer Offset, Location Offset and PDV Offset. The Producer Offset scheme is administered by Screen Australia and both the Location Offset and the PDV Offset are administered by the Department of the Prime Minister and Cabinet – Office of the Arts.

Producer Offset

The Producer Offset is a refundable tax offset of 40 percent of a film's Qualifying Australian Production Expenditure (QAPE) for Australian feature films and 20 percent where the Australian film is not a feature film. The Producer Offset is to be claimed in the income tax return for the income year in which the project is completed.

The Producer Offset is available to productions which incur eligible expenditure on or after 1 July 2007, in relation to certain types of eligible productions. In order to claim the Producer Offset, the production company must first obtain a certificate of eligibility from Screen Australia.

The types of films which are eligible for the Producer Offset include feature films, single episode programs, series, a season of a series, and other short form animated dramas. To be eligible, the film must have "significant Australian content" or be a film made in accordance with the requirements of a co-production agreement (in which case it is considered to meet the significant Australian content test).

The determination of "significant Australian content" is a matter of judgment based on consideration of all the elements of a particular project. Where there are non-Australian elements in a particular aspect of the film, the applicant should provide justification for these elements and it is expected that there would be reliance on strong Australian elements in other aspects of the film. Screen Australia has provided the following guidance for matters it will consider in determining whether "significant Australian content" exists (refer to the "Producer Offset: Guidance on Significant Australian Content (SAC)" (September 2009) publication available on the Screen Australia webpage):

- **Subject matter of the film:** Whether or not the film looks and feels significantly Australian. This involves considering whether it is based on an Australian story, the extent to which it is about Australian characters and is set in Australia, whether the core origination of the project took place in Australia or under Australian control, the length and extent of association

that Australian citizens or residents have had in its development, and other relevant factors which are peculiar to an individual project. This is one of the more important matters in satisfying the significant Australian content test;

- **Place where the film was made:** Whether the film was to a significant extent produced in Australia. Screen Australia will take into account each phase of the production cycle separately (pre-production, production and post-production). Where a film is shot mostly overseas it will need strong claims in other matters to pass the significant Australian content test;
- **Nationalities and places of residence of the persons who took part in the making of the film:** Whether the nationality (citizen or permanent resident of Australia) and residence (if nationality not Australian) of filmmakers are Australian. That of the producer, writer and director is especially important, followed by that of the lead cast, Heads of Department, and other cast and crew. Foreign personnel in key roles would reduce a film's claim in this matter;
- **Details of the production expenditure incurred in respect of the film:** Extent to which the Australian film industry benefits from a film's production expenditure with respect to its maintenance and development. This includes the extent to which Australian citizens or residents receive the expenditure and the extent the expenditure is spent on Australian goods and services; and
- **Other matters that the film authority considers to be relevant:** Screen Australia may take into account anything else that it considers relevant, for example policy issues, copyright ownership, creative control, etc.

Screen Australia requires that any film with numerous non-Australian elements provide additional information to support it in a significant Australian content claim. This may include development timelines regarding the length of Australian association, photos demonstrating impact of Australian landscape on the film, etc.

Under the Producer Offset, sources of financing of copyright ownership are no longer specific factors to be considered in determining eligibility for the offset. The Producer Offset is only available to a production company if it is either an Australian resident or a foreign resident that has a permanent establishment in Australia and has an ABN.

A key criterion to access the Producer Offset is that the production must satisfy a minimum QAPE threshold depending on the type of project undertaken. For a feature film, the minimum level of QAPE to obtain the Producer Offset is \$1 million.

A film's production expenditure is the expenditure incurred or reasonably attributable to actually making the film and any other activities undertaken to bring the film up to the state where it could reasonably be regarded as ready to be distributed, broadcast or exhibited to the general public. This includes pre-production activities, shooting of the film and post-production activities.

QAPE defines those costs that are eligible for the tax offset to be the production expenditure for the film that is incurred or reasonably attributable to:

- Goods and services provided in Australia
- The use of land located in Australia
- The use of goods located in Australia at the time they are used in making the film

There are specific inclusions and exclusions to this definition.

Generally, the following costs are excluded from production expenditure and QAPE in order to focus the tax offset on the expenditure that occurs in the activity of making the film:

- Financing expenditure (including forms of insurance which constitute financing)
- Foreign development expenditure – expenditure on development work undertaken outside of Australia
- Foreign-held copyright acquisition – acquiring copyright from a non-Australian resident (this applies to the purchase and licensing in pre-existing works)
- Foreign business overheads – expenditure incurred to meet the business overheads of the company
- Publicity and promotion expenditure – except those incurred in producing Australian copyrighted promotional material and producing additional content
- Deferments and profit participation – payments which are deferred until the production provides financial returns
- Residuals paid out after the film is completed – amounts payable in satisfaction of the residual rights of a person who is a member of the cast
- Advances – amounts paid by way of advance on a payment
- Costs incurred in the acquisition of depreciating assets

A production company is not entitled to the Producer Offset if it or any other person in relation to the underlying copyright of the film has:

- Claimed a tax deduction for the project under Division 10B; or
- Been issued with a final certificate under Division 10BA; or
- Been issued with a final certificate for the Location Offset or PDV Offset; or
- Been issued with a final certificate for the Refundable Film Tax Offset (RFTO); or
- Received investment support under the FLIC scheme; or
- Received production funding from the FFC, AFC, Australian Film, Television and Radio School or Film Australia prior to 1 July 2007

The Producer Offset can be applied for in two parts. A producer can make an application for a Provisional Certificate, which will provide guidance on whether a production is likely to qualify for the Producer Offset, or for a Final Certificate, a mandatory application which provides the base for the calculations for the payment of the Producer Offset by the Australian Taxation Office (ATO). While a Provisional Certificate application can be made once financing and distribution arrangements have been completed, a Final Certificate application can only be submitted when the film is completed, all expenditure has ceased and the project has evidence of distribution.

As of 31 March 2011, 519 projects have been issued with provisional certificates in relation to the Producer Offset, comprising 173 feature films, 239 non-feature documentaries and 107 other projects. Also, as of 31 March 2011, 296 projects have been issued with final certificates in relation to the Producer Offset, comprising 62 feature films, 163 non-feature documentaries and 71 other projects.

Location Offset

As a financial incentive for the producers of large budget films to locate in Australia, in 2001, the government introduced a refundable tax offset scheme. The tax offset was intended to complement the diversity of Australia's locations, the skills and flexibility of Australian crews and creative teams, and the internationally recognized standards of Australia's technical facilities and post-production services. The refundable film tax offset scheme was reviewed in 2006, and the Location Offset introduced as part of the new producer incentives.

The new Location Offset is effectively an enhancement of the previous refundable film tax offset scheme aimed to encourage large scale film productions to locate in Australia. The Location Offset provides a 15 percent refund (an increase from 12.5 percent) on the total of the production company's QAPE on the film. The general test for QAPE for the Location Offset is the same as that for the Producer Offset, including specific inclusions and exclusions and rules related to expenditure generally. However, there are a few additional rules which apply to the Location Offset and the PDV Offset.

Consistent with the other Australian Screen Production Incentive offsets, the Location Offset is to be claimed in the income tax return for the income year in which the film is completed, and can only be claimed by an eligible film production company that is either an Australian resident company or a foreign corporation with an Australian Business Number (ABN) that is operating with a permanent establishment in Australia.

The Location Offset will apply to film and television projects which commence principal photography or production of the animated image on or after 8 May 2007. A film will be eligible for the Location Offset if it is a feature film or a film of a like nature, a telemovie, a miniseries, or certain television series.

The Location Offset is administered by the Department of the Prime Minister and Cabinet – Office of the Arts. Applicants must first apply to the Office for a certificate of eligibility, which is issued by the Minister for the Arts in order to guarantee receipt of the Location Offset (refer to the "Guidelines to the Australian Screen Production Incentive: Location and PDV Offsets – Incentives for large-budget screen production in Australia (July 2011)" publication available at <http://www.arts.gov.au/>).

The key criterion to access the Location Offset is a minimum level of QAPE of \$15 million on the production of the film. Once this criterion is satisfied, the film will qualify for the tax offset irrespective of the percentage of the film's total production expenditure that is spent on film production activity in Australia.

To be eligible for the location offset, a company must have either carried out, or made the arrangements for the carrying out of, all the activities in Australia that were necessary for the making of the film. It is not necessary for the company to be responsible for the entire production.

An eligible production company can apply for the Location Offset in the income year in which the QAPE ceased being incurred.

PDV Offset

The Post, Digital and Visual Effects (PDV) Offset is designed to attract post-production, digital and visual effects production to Australia as part of large budget productions, no matter where the film is shot. Consistent with the other Australian Screen Production Incentive offsets, the PDV Offset is to be claimed through the production company's income tax return for the income year in which the qualifying PDV expenditure ceased being incurred.

The PDV offset offers a 15 percent refund on all "qualifying PDV expenditure" for an eligible film or television program. The offset will be available for PDV production work that commences on or after 1 July 2007. The date which production commences on the film for which the PDV work is being undertaken has no effect on whether the PDV offset can be accessed. The formats eligible for the PDV Offset are feature films and films of a like nature (including direct-to-DVD), mini-series, telemovies and television series.

The PDV Offset is administered by the Department of the Prime Minister and Cabinet – Office of the Arts. Applicants must first apply to the Office for a certificate of eligibility, which is issued by the Minister for the Arts in order to obtain the PDV Offset (refer to the "Guidelines to the Australian Screen Production Incentive: Location and PDV Offsets – Incentives for large-budget screen production in Australia (July 2011)" publication available at <http://www.arts.gov.au/>).

The key criterion to access the PDV Offset is a minimum threshold of \$500,000 on QAPE expenditure to the extent that the QAPE related to the PDV production of a film. Qualifying PDV expenditure is broadly expenditure incurred in relation to PDV production work in Australia. "PDV production" is defined as:

- The creation of audio or visual elements (other than principal photography, pick ups or the creation of physical elements such as sets, props or costumes) for the film
- The manipulation of audio or visual elements (other than pick ups or physical elements such as sets, props or costumes) for the film
- Activities that are necessarily related to the above activities mentioned

PDV production includes post-production, all digital production and all visual effects production on the film, but does not include principal photography, whether the footage is shot on film or digitally. Expenditure on any PDV work that does not take place in Australia is not PDV expenditure.

Before granting a certificate of eligibility, in addition to being satisfied that the application meets the expenditure threshold, the Minister for the Arts must also be satisfied that the applicant company is the sole company that is responsible for all the activities that were necessary for PDV production in Australia. Depending on the production, this could be for example:

- An Australian company set up to manage or commission one or more Australian companies to provide PDV work for the production
- The “lead” Australian PDV company which either undertakes all the PDV work in Australia and/or subcontracts Australian PDV work to other companies
- An Australian production company or production services company
- An applicant company is not entitled to the PDV Offset where:
 - A deduction has been previously claimed under Division 10B; or
 - The film has been issued with a final certificate under Division 10BA; or
 - The film has been granted a final certificate for either the Producer Offset or the Location Offset

An eligible production company can apply for the PDV Offset in relation to a project once QAPE in relation to PDV expenditure has ceased being incurred.

Product Rulings

Under the product rulings system administered by ATO, it is possible to obtain a ruling which is legally binding on the Commissioner of Taxation and which confirms the tax consequences to a class of investors contemplating an investment in a film.

As the Australian Screen Production Incentives are producer, rather than investor, related incentives, the role of product rulings has lessened.

No film product rulings in relation to the new Australian Screen Production Incentives have been issued since their introduction.

Businesses

Interest payable on loans and other forms of business indebtedness can generally be deducted for tax purposes. However, the loan principal can never be deducted in calculating taxable profits.

Other general tax incentives for investment include certain beneficial rates of tax depreciation (known as “capital allowances”) for plant and buildings and certain qualifying investments. Capital allowances have generally become less generous in recent years following the removal of accelerated depreciation and the Australian tax authorities’ determination of longer effective lives. However, the Australian Government has introduced further concessions, including an increase from 150 to 200 percent in the diminishing value depreciation rate and the broadening of the scope for business related deductions.

Government Funding Schemes

Screen Australia

Screen Australia is the Australian Government’s key direct funding body for the Australian screen production industry, replacing the Australian Film Commission (AFC), Film Australia Limited (FAL) and the Film Finance Corporation Australia Limited (FFC). Screen Australia commenced operation on 1 July 2008, bringing together the functions of the FFC, FAL and most of the functions of the AFC. Previously, the FFC was the Australian Government’s principal agency for funding the production of film and television in Australia and had invested in over 1,000 features, television dramas and documentaries.

Through Australian Government appropriations and revenues earned from investments in previous years and with the collaboration of private investors and marketplace participants in individual projects, the FFC was able to support a diverse volume of Australian product. From 2008/09, the former FFC’s functions will be funded through Screen Australia.

The underlying principle for Screen Australia’s co-investment with the Producer Offset will be similar to that of its predecessor agency, the FFC. Namely, where a project meets the general eligibility requirements outlined in Screen Australia’s Terms of Trade, Screen Australia may provide production funding for certain productions.

Screen Australia may provide finance for feature films, television drama, low budget drama, documentaries, children’s television drama, Indigenous films and documentaries, projects produced under the All Media Program and some other types of productions.

The amount Screen Australia will invest in a production depends on the available funding for the particular program, the number of applicants satisfying the program requirements, the quality of the projects, and a cap based on the production type (refer to the “Screen Australia – Terms of Trade” publication available at <http://www.screenaustralia.gov.au>).

In return for its production investment, Screen Australia requires a copyright interest in the production, equity in the production, recoupment of its investment and credit for its investment, commensurate to its investment in the production.

State Government Schemes

All of Australia's State governments have established specific offices/bodies designed to promote, support, and facilitate film and television activities in their State. Most of these provide funding for development and production support as well as a range of other forms of assistance including small equity investment, free locations, presentations, and surveys for green-lit productions and other incentives to shoot in their State such as payroll tax exemption.

The relevant State offices/bodies are as follows:

State/Territory	Office/Body	Web site
New South Wales	Screen NSW	www.screen.nsw.gov.au
Victoria	Film Victoria	www.film.vic.gov.au
South Australia	South Australian Film Corporation	www.safilm.com.au
Queensland	Screen Queensland	www.screenqueensland.com.au
Western Australia	ScreenWest	www.screenwest.com.au
Tasmania	Screen Tasmania	www.screen.tas.gov.au
Northern Territory	NT Film Office	www.filmoffice.nt.gov.au

Other Financing Considerations

Tax Costs of Share or Bond Issues

No tax or capital duty is imposed in Australia on any issue of new ordinary or preference shares.

Stamp Duties

All States and Territories of Australia impose stamp duty on certain types of transactions. The provisions imposing stamp duty and the rates of duty differ between jurisdictions.

The transfer of shares in an unlisted company registered for incorporation in New South Wales and South Australia is subject to duty at the rate of 60 cents for every \$100 (or part thereof) of the greater of the consideration paid and the unencumbered value of the shares. Duty on the transfer of shares in unlisted companies will be abolished in New South Wales and South Australia on July 1, 2012.

In addition, if the company has interests in land, it is necessary to consider whether the land-rich or landholder provisions of the stamp duties legislation have any application. If the land-rich or the landholder provisions apply, duty at rates as high as 6.75 percent of the unencumbered value of the land holdings (land holdings and goods in New South Wales, Western Australia and South Australia) will be imposed.

New South Wales imposes duty on mortgages or charges securing property located wholly or partly in this State at rates up to 0.4 percent of the amount secured. Mortgage duty will be abolished in New South Wales on July 1, 2012.

Exchange Controls and Regulatory Rules

There are no specific exchange controls or other regulatory rules in Australia. Therefore, there is nothing to prevent a foreign investor or artist repatriating income arising in Australia back to their home territory. However, under the financial transactions reporting legislation it is necessary to file a currency transfer report to transfer more than \$10,000 (or foreign currency equivalent) in or out of Australia.

No changes to reintroduce such controls are expected in the foreseeable future.

Corporate Taxation

Recognition of Income

Film Production Company – Production Fee Income

Australian-Resident Company

If a special purpose company is set up in Australia to produce a film without acquiring any rights in that film, i.e., a “camera-for-hire” company, the tax authorities often query the level of income attributed to Australia if they believe that there is flexibility in the level of production fee income that may be attributed such that it is below a proper arm’s-length amount. It is difficult to be specific about the percentage of the total production budget that would be an acceptable level of income attributed to Australia but in our experience an acceptable level could lie between one and five percent of the production budget. The lower the percentage, the more likely an enquiry.

It is seldom possible to negotiate with the Australian tax authorities in advance about an acceptable level as there are formal ruling processes that are designed for taxpayers to seek binding rulings from the tax authorities. Australia's tax authority no longer gives advice binding them to a position other than via the formal ruling processes.

Non-Australian Resident Company

If a company is not resident in Australia but has a production office to administer location shooting in Australia, it is possible that the tax authorities may try to argue that it is chargeable to tax here by being regarded as having a permanent establishment, subject to specific exemptions under an applicable double tax treaty. The Australian authorities would determine whether or not a "permanent establishment" exists by applying the appropriate article in an applicable double tax treaty (i.e., presences such as a branch, office, factory, workshop or similar site). If no treaty existed, they could still be expected to apply a similar set of criteria.

If a company is not resident in Australia and does not have a production office here, but undertakes location shooting here, it is unlikely that it would have an Australian tax liability since it would not be regarded as having a permanent establishment.

If the Australian tax authorities attempt to tax the company on a proportion of its profits on the basis that it has a permanent establishment, they would first seek to attribute the appropriate level of profits that the enterprise would be expected to make if it were a distinct and separate enterprise engaged in that activity. Clearly, however, a proper measurement of such profits would be difficult. It is likely that the Australian tax authorities would measure the profit enjoyed by the company in its own resident territory and seek to attribute a specific proportion of this, perhaps by comparing the different levels of expenditure incurred in each location or the periods of operation in each territory. The level of tax liability would ultimately be a matter for negotiation.

The foreign investor would have to rely on an applicable treaty and/or its home country rules to obtain relief from double taxation.

Examples of the relief provided for under Australia's treaties are as follows:

U.S.	Australian tax on business profits creditable against U.S. tax (Article 22)
U.K.	Australian tax on business profits creditable against U.K. tax (Article 22)
Netherlands	Business profits can be taxed in the Netherlands and a deduction against that tax may be allowed where the income has already been taxed in Australia (Article 23)
Japan	Australian tax on business profits creditable against Japanese tax (Article 25)
Singapore	Australian tax on business profits creditable against Singapore tax (Article 18)
Malaysia	Australian tax on business profits creditable against Malaysian tax (Article 23)
Thailand	Australian tax on business profits creditable against Thai tax (Article 24)

Film Production Company – Sale of Distribution Rights

If an Australian-resident production company sells distribution rights (i.e., licenses rather than assigns the copyright) in a film to an unconnected distribution company in consideration for a lump-sum payment in advance and subsequent periodic payments based on gross revenues, the sale proceeds would normally be treated as income arising in the trade of film rights exploitation. The same rules would apply to whatever type of entity is making the sale.

If intangible assets such as distribution rights are transferred from Australia to a connected party in a foreign territory, it is preferable to help ensure that such a transfer is carried out as part of a commercially defensible transaction, as the tax authorities may well seek to attribute an arm's-length price.

Film Distribution Company

If an Australian resident distribution company acquires rights by way of a lump-sum payment for distribution rights from an unconnected production company, the payment for the acquisition of the rights is normally treated as an expense in earning profits. The expense is not regarded as the purchase of an intangible asset but as a royalty payment. Revenue rulings establish that these payments are fully deductible in the year that the obligation to

pay arises. This would be the case whether the company exploits the rights in Australia or worldwide, and whether or not the production company is resident in a country that has a double tax treaty with Australia.

Where the recipient of the payments is non-resident and not subject to tax in Australia, payments for distribution rights may be subject to Australian withholding tax.

The Australian tax regime does not discriminate between royalty payments for films or other intellectual property. In the absence of a treaty all royalties are subject to a withholding of 30 percent.

Examples of the relevant treaty royalty withholding rates are as follows:

U.S.	5%
U.K.	5%
Netherlands	10%
Japan	5%
Singapore	10%
Malaysia	15%
Thailand	15%

The income arising from exploiting such rights is normally recognized as trading income. The distribution company would be taxed on the income derived from the exploitation of any of its acquired films, wherever and however these are sublicensed, provided that the parties are not connected. If they were connected, the tax authorities might question the level of income returned. For Australian taxation purposes, income in this case is normally recognized when the right to be paid has been irrevocably determined.

Transfer of Film Rights Between Related Parties

Where a worldwide group of companies holds rights to films and videos, and grants sublicenses for exploitation of those rights to an Australian-resident company, care needs to be taken to help ensure that the level of profit earned by the Australian company can be justified. Any transactions within a worldwide group of companies are liable to be challenged by the Australian tax authorities since they would seek to apply an open-market third-party value to such transactions. Indeed, if an Australian resident company remits

income to a low tax territory via a sublicensing distribution agreement, the Australian tax authorities can be expected to query the level of such income.

There is no specific level that the Australian tax authorities seek to apply. They always have regard to comparative deals that other unconnected parties may make. It is always wise to obtain evidence at the time a deal is struck to verify that the price agreed can be substantiated at a later date.

It is possible to obtain formal clearance in advance from the Australian tax authorities by way of an Advance Pricing Arrangement.

Amortization of Expenditure

Production Expenditure

Where a production company owns a copyright in a film, the expenditure will be included in the effective life depreciation regime, and taxpayers can either self-assess the effective life of the film copyright or use the 'safe harbour' effective life specified by the Commissioner of Taxation. In the case of film copyright, the Commissioner has specified a 'safe harbour' effective life of 5 years.

At times a distributor may acquire the copyright in a film. Generally, this is done by way of an assignment of the copyright by the producer. The distributor will obtain a deduction for the purchase price of the copyright over the period of the purchase. For example, where a distributor purchased the Australian rights for a film for five years, the distributor would be entitled to amortize the purchase price over five years. Any payments that are exclusively referable to an assignment of copyright would not be subject to any withholding.

The tax treatment of the assignment of copyright as a true purchase of property consisting of the copyright, rather than a payment for the use of, or the right to use, the property (and therefore a royalty) will depend on all relevant facts and circumstances. The Commissioner of Taxation has indicated in a published ruling (2008) that an assignment of copyright amounts to an outright sale if:

- It is for the full remaining life of the copyright; and
- It extends geographically over an entire country or several countries; and
- It is not limited as to the class of acts that the copyright assignee has the exclusive right to do; and
- The amount and timing of the payment or payments for the assignment are not dependant on the extent of exploitation of the copyright by the assignee

Other Expenditure

Neither a film distribution company nor a film production company has any special status under Australian tax law. Consequently, they are subject to the usual rules to which other companies are subject. For example, in calculating taxable trading profits, they may deduct most normal day-to-day business expenditure such as the cost of film rights (as detailed above), salaries, rents, advertising, travel expenses, and legal and professional costs normally relating to the business.

Certain other expenditure cannot be deducted, for example any expenditure on capital account, such as the purchase of land and buildings, goodwill and investments. Nor can the acquisition of plant and machinery be deducted, although capital allowances can be deducted at specific rates and in some circumstances these rates can be generous. Additionally, certain day-to-day expenditure (e.g., business entertainment) and any expenditure that is too remote from any business purpose are not allowable.

Losses

To the extent to which a production company has any carried forward losses, the continuity of ownership test (COT) or (if the COT is not satisfied), the same business test (SBT) must be satisfied in order to utilise those losses in the current year.

The COT considers whether the same persons beneficially owned the same shares in the company from the beginning of the loss year to the end of the income year. The COT is satisfied where the same persons beneficially own between them shares that carry the rights to greater than 50% of voting power, dividend and capital distributions in the company.

The SBT considers whether the company is carrying on the same business as it carried on immediately before the change in ownership by reference to the business carried on and transactions entered into.

Foreign Tax Relief

Producers and Distributors

There are no special rules for producers and distributors when it comes to foreign tax relief. They are treated as ordinary taxpayers.

If an Australian resident film distributor/producer receives income from unconnected, non-resident companies, but suffers overseas withholding tax, it is normally able to rely on Australia's wide range of double tax treaties to obtain relief for the tax suffered. If no such treaty exists between the territories concerned, it would expect to receive credit for the tax suffered on a "unilateral" basis.

Further, if income is considered as receipt from the exploitation of a film overseas, it will be considered as foreign income.

Indirect Taxation

Goods and Services Tax

Goods and Services Tax (GST) of 10 percent is payable by an entity on the *taxable supplies* that it makes. An entity makes a taxable supply if the supply is made for consideration, in the course or furtherance of an enterprise that an entity carries on, the supply is connected with Australia and the entity is registered for GST or required to be so registered. A supply will not be a taxable supply if it is *GST-free* or *input taxed*.

An entity is entitled to input tax credits for the GST component of its *creditable acquisitions*, that is, for the acquisitions incurred in carrying on its enterprise except to the extent that the acquisition relates to making supplies that are input taxed or the acquisition is of a private or domestic nature.

If a supply is “input taxed,” no GST is payable on it but the supplier cannot claim input tax credits for the GST payable on its acquisitions that relate to that supply or it is entitled to reduced input tax credits only (75 percent) on a limited class of acquisitions. Input taxed supplies include supplies of residential accommodation and certain supplies of financial services (e.g., loans, mortgages, guarantees). A supplier may be entitled to input tax credits for its acquisitions relating to financial supplies (even though financial supplies are input taxed) if the supplier does not exceed the “financial acquisitions threshold” which is a *de minimis* test for taxpayers who make very few input taxed financial supplies. In addition, a supplier will be entitled to full input tax credits for borrowing expenses if the borrowing relates to the supplier making supplies that are not input-taxed.

If a supply is GST-free this means that no GST is payable on it but that the supplier is entitled to claim credits for the GST payable on its acquisitions that relate to that supply (i.e., equivalent to zero-rated in other GST/VAT environments). GST-free supplies include exports and other supplies that are for consumption outside Australia.

There is no GST on exported release positive prints or negatives provided that the goods are exported by the exporter within the earlier of 60 days of the date of invoice or the date on which the supplier receives any consideration. However, release positive prints or negatives imported into Australia are subject to GST calculated on the sum of the customs value of the goods, cost of overseas freight, and insurance and any customs duty.

Customs Duties

Blank videotapes, recorded tapes, video masters, and cinematographic film, exposed and developed, are free of customs duty.

Customs duty on publicity, advertising, and promotional materials will depend upon the particular type of good, i.e., some advertising material is free of customs duty while other material is subject to a customs duty rate of five percent of the customs value. GST of 10 percent will apply to any imported publicity, advertising, and promotional materials. The value the GST is calculated on at the time of importation is the customs value, plus overseas freight and insurance, plus the customs duty (if any) times 10 percent.

In any case, consignments with a customs value less than a \$1000 may be afforded duty and GST free entry, subject to certain conditions.

Costumes and theatrical properties meeting prescribed requirements may also receive a concessional customs duty rate of free.

Customs duty for most goods is levied on an ad valorem basis. The valuation system is based on the WTO valuation agreement with some variations. Generally, the customs value is determined by reference to the price of the goods at the place of export (the location where the goods were placed into a container, posted or placed on board a ship or aircraft). The following additions are made to the price to determine the customs value:

- Commissions other than buying commissions
- Foreign inland freight and insurance (to the extent these are not already included)
- Packing costs
- Cost of materials and services required for production of imported goods, supplied by the purchaser free of charge at reduced costs
- All or part of proceeds for resale, use, etc. that accrue to the vendor
- Certain royalties

The legislation in this area is quite complex and each import must be examined individually to determine the correct customs value.

The Australian Customs & Border Protection Service (Customs) administers a system of strict liability/administrative penalties. Where customs duty is underpaid, the maximum judicial penalty that can be imposed is 100 percent of the short paid duty, and the maximum administrative penalty that may be

imposed is 20 percent of the short paid duty. Penalties can also apply where incorrect information is supplied to Customs even if there is no duty short payment. The maximum judicial penalty for non-revenue errors is \$5500 per statement, while the maximum administrative penalty is the lower of \$55 per error or \$1100 per statement.

Personal Taxation

Non-Resident Artists (self-employed)

Income Tax Implications

Subject to its double tax treaties Australia taxes the income arising to a non-resident artist from a performance in Australia and any other activities carried on in Australia. The authorities would also seek to tax income received outside Australia in connection with an Australian performance but not if it relates to services carried on outside Australia.

If a non-resident artist receives any payment arising from or in consequence of an Australian activity, the Australian payer is obliged to deduct “pay as you go” (PAYG) tax and remit this tax to the authorities. An entity carrying on an enterprise in Australia, whether an Australian entity or a foreign entity, must withhold an amount from payments made to another entity or individual, subject to certain exemptions discussed below.

To strengthen the collection of Australian taxes, a specific withholding regime applies for payments made to non-resident entertainers (including a performing artist). The rates of withholding for payments to entertainers that are individuals are the marginal rates applicable to non-residents, unless no ABN is provided. If no ABN is provided to the payer, withholding is required at 46.5 percent. The rate of withholding for payments made to non-resident entities is the company tax rate of 30 percent (46.5 percent if no ABN is provided).

The specific withholding regime also addresses payments made to related support staff (e.g., choreographer, costume designer, director, director of photography, film editor, musical director, producer, production designer, set designer) that are not engaged as employees. Non-resident support staff are not required to provide a Tax File Number (TFN) or ABN if they are tax resident of a country with which Australia has a double tax agreement and they are present in Australia for not more than 183 days during the financial year. If they do not meet the above criteria, withholding is required at non-resident rates or at 46.5 percent if no ABN is provided.

Australia's double tax agreements provide the following rules:

U.S.	U.S. artists (or an entity that provides the services of an artist) are taxable in Australia to the extent to which they carry out activities in Australia except where the payment does not exceed U.S. \$10,000 (Article 17)
U.K.	U.K. resident artists (or an entity that provides the services of an artist) are taxable in Australia to the extent to which they perform services in Australia (Article 16)
Netherlands	Dutch resident artists are taxable in Australia to the extent to which they perform services in Australia (Article 17)
Japan	Japanese resident artists are taxable in Australia to the extent to which they perform services in Australia (Article 16)
Singapore	Singapore resident artists are taxable in Australia to the extent to which they perform services in Australia (Article 12)
Malaysia	Malaysian resident artists are taxable in Australia to the extent to which they perform services in Australia (except where the visit is supported by government funds) (Article 16)
Thailand	Thai resident artists are taxable in Australia to the extent to which they perform services in Australia (except where the visit is supported by government funds) (Article 17)

It will be noted that non-resident artists are taxable only on the remuneration received in respect of the services they perform in Australia. Provided that genuine services are performed outside Australia and an arm's-length fee is payable for those services by the production company no tax would be levied in Australia on those payments.

It is common practice for an artist's representative to negotiate with the Australian revenue authorities on the deductions that can be claimed against the Australian source income.

Employers are liable for superannuation contributions equivalent to nine percent of the Australian fee paid to the artist. For the 2011/12 year the earnings cap that applies for superannuation contribution purposes is \$175,280 (i.e., total remuneration of approximately \$191,000 including the superannuation component). No further superannuation contribution is required on fees that exceed that amount. Superannuation contributions may be refunded to the artist after negotiation.

Payroll tax (which is a State/Territory tax) is levied at differing rates throughout Australia and may be as high as 6.85 percent of the salary cost.

Fringe benefits tax (FBT) is levied at 46.5 percent on the employer in respect of benefits such as employer-provided cars, free or low interest loans, free or subsidized residential accommodation or board, goods and services sold at a discount or provided free by an employer, and expenses paid on behalf of an employee. However, contributions to superannuation funds, employee share acquisition schemes, the use of certain commercial vehicles where private use is restricted to travel between home and work, residential accommodation provided to an employee living away from home, and a number of other minor items are exempt from FBT.

The taxable value of a fringe benefit is calculated as follows:

Type 1 – Where GST applied to cost of benefit	cost to employer x 2.0647
Type 2 – Where GST did not apply to cost of benefit	cost to employer x 1.8692

The employer is entitled to an income tax deduction for FBT paid by the employer.

Resident Artists (self-employed)

Resident artists are taxed similarly to employees, although they may not require PAYG withholding by the payer if they perform services through a company. However, please note the tax authorities may challenge the arrangement and, accordingly, most resident artists are taxable as individuals.

Employees

Income Tax Implications

Employers of employees working in Australia are obliged to make regular, periodic payments to the Australian tax authorities in respect of employees' personal tax liabilities arising from salaries or wages paid to them. Deductions are made under the "pay as you go" (PAYG) system. Employers deduct PAYG based on tax tables supplied by the tax authorities. The tables are designed to approximate the tax liability on annual salaries.

Employers are also generally obliged to deduct the employees' Medicare levy liability at the rate of one point five percent of PAYG salary or wages.

Social Security Implications

Employers are liable for superannuation contributions in respect of payments of salaries or wages. Currently the minimum superannuation contribution is nine percent with a single annual concessional contribution limit of \$25,000 (or \$50,000 for those aged 50 and above during a transitional period to 30 June, 2012), and post-tax contributions will be limited to \$150,000 per annum (subject to averaging over three years).

KPMG Contacts

KPMG's Media and Entertainment tax network members:

Steven Economides

KPMG
10 Shelley Street
Sydney NSW 2000
Australia

Phone: +61 2 9335 8876

Fax: +61 2 9299 7077

Rebecca Gosby

KPMG
10 Shelley Street
Sydney NSW 2000
Australia

Phone: +61 2 9335 7245

Fax: +61 2 9299 7077