KPMG

Film Financing and Television programming

A Taxation Guide

Now in its eighth edition, KPMG LLP's ("KPMG") Film Financing and Television Programming: A Taxation Guide (the "Guide") is a fundamental resource for film and television producers, attorneys, tax executives, 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.

Doing business across borders can pose major challenges and may lead to potentially significant tax implications, and a detailed understanding of the full range of potential tax implications can be as essential as the actual financing of a project. The Guide helps producers and other industry executives assess the many issues surrounding cross-border business conditions, financing structures, and issues associated with them, including film and television development costs and rules around foreign investment. Recognizing the role that tax credits, subsidies, and other government incentives play in the financing of film and television productions, the Guide includes a robust discussion of relevant tax incentive programs in each country.

The primary focus of the Guide 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 member firm media and entertainment Tax professionals.

Each chapter 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. 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 value-added (VAT) tax rates; normal nontreaty withholding tax rates; and tax year-end information for companies and individuals.

Financing Structures
Descriptions of commonly used financing structures in film and television production and distribution 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-efficient 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.

Digital Media
For the first time, we have included a discussion of digital media tax considerations recognizing its growing role in the distribution of film and television content.

KPMG and Member Firm Contacts
References to KPMG and other KPMG International member firms' contacts at the end of each chapter are provided as a resource for additional detailed information.

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 publication 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.

Production opportunities are not limited to the countries contained in this Guide. KPMG and the other KPMG International member firms are in the business 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.

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South Africa

Introduction

The South African film industry has grown significantly over the past few years. Foreign film makers are drawn by South Africa's unique and diverse locations, as well as lower production costs and a favorable exchange rate. Cape Town is one of the cheapest destinations for production, set, site, utilities and labour costs. Cape Town Film Studios was the first custom-built world class studio in Africa, and has continued to expand in recent years. Over the past decade, more than 450 films have been shot in South Africa, and this sector has grown into a billion-dollar industry.

With the aim of growing the industry, the South African government's Department of Trade and Industry (DTI) offers a variety of incentives to promote the production of films, as discussed below.

Key Tax Facts

Corporate income tax rate: SA companies	28%
Corporate income tax rate: SA branches of foreign companies	28%
Marginal personal income tax rate (sliding scale)	18% to 45%
VAT rate	15% [1]
Normal non-treaty withholding tax rates:	
Dividends	20% [2,3]
Interest	15%
Royalties	15% of the gross royalty
Capital gains tax: SA companies	22.4% (effective rate)
Capital gains tax: SA branches of foreign companies	22.4% (effective rate)

[1] The VAT rate increased from 14% to 15% with effect from 1 April 2018.

[2] Dividends tax is a tax on shareholders on dividends paid by a South African company. The company paying the dividend must withhold the tax and pay it over to the revenue authorities. The dividends tax rate may be reduced in terms of a double taxation agreement between South Africa and the shareholder's country of tax residence.

[3] The dividends tax rate increased from 15% to 20% for dividends paid on or after 22 February 2017.

Capital gains tax: Individuals	0% to 18% (effective rate)
Tax year-end: Companies	Accounting year-end
Tax year-end: Individuals	February 28

Film Financing

Financing Structures

Where the intention is to make use of the incentives offered by the DTI, it is a requirement that the applicant is a special purpose corporate vehicle incorporated in South Africa. The special purpose vehicle can be funded by way of loans or through the subscription of shares, as described in more detail below.

Co-Production

An unincorporated co-production joint venture will not qualify for the incentives offered by the DTI. Where a South African resident investor enters into an unincorporated co-production joint venture (a partnership) based in South Africa with a foreign investor, exploitation rights are usually apportioned between the parties. In such circumstances, the joint venture itself is not recognized as a tax entity and would not be liable in its own right for taxation in South Africa.

What is important from a taxation point of view is the particular tax position of each party to the transaction. South Africa operates on the residence basis for taxation, so South African income tax residents are taxed on their worldwide income. A company is tax resident in South Africa if it is incorporated in South Africa and/or if it is effectively managed in South Africa. Thus, a foreign company would be considered to be tax resident in South Africa if its place of effective management is in South Africa.

Non-residents are taxed on South African source or deemed source income, which is determined in accordance with normal source principles. A foreign investor may, therefore, fall to be taxed in South Africa to the extent that its income is sourced or deemed to be sourced in South Africa. The foreign investor could potentially be taxed on the same income in South Africa, as well as its home country. The existence of a Double Taxation Agreement (DTA) between South Africa and the relevant foreign jurisdiction may alleviate instances of double taxation.

In addition to the above, the South African Income Tax Act imposes a withholding tax on the payment of dividends, interest and royalties by residents to non-residents. This is a final tax. The existence of a DTA between South Africa and the relevant foreign jurisdiction, however, would generally reduce this withholding tax to a lower rate, should the beneficial owner of such dividends, interest or royalties be a resident of the foreign jurisdiction.

It is important to bear in mind, from an exchange control point of view, that income derived from investments in South Africa is generally freely transferable to foreign investors. Certain restrictions, however, are relevant in this context. Royalties are normally transferable provided prior exchange control approval from the Financial Surveillance Department of the South African Reserve Bank (FSD) has been obtained. Full disclosure must be made to the FSD in respect of the relevant transaction.

Where a South African investor is entitled to a share of foreign exploitation rights, and no appropriate relief is available in terms of a DTA, such that the local investor is taxed in that foreign jurisdiction on dividends, interest or royalties received, the investor would be entitled to a rebate in respect of foreign taxes paid thereon, provided that the rebate does not exceed so much of normal tax as is attributable to the inclusion of the dividends, interest or royalties in the investor's taxable income.

Where a DTA exists and a foreign investor is actively involved with the production of a film in South Africa, there is a possibility that such a party would be taxed in South Africa on profits arising from such activity on the basis that this constitutes a permanent establishment of the foreign investor. The term "permanent establishment" is defined in all the DTAs that South Africa has entered into with foreign jurisdictions and includes, *inter alia*, a place of management, a branch, an office, a factory, a workshop, a mine, quarry or other place of extraction of natural resources, and a building site or construction or assembly project which exists for more than six to twelve months (depending on the provisions of the applicable DTA).

It could be argued that the establishment of a production office in South Africa may qualify for exemption under the appropriate DTA in that its activities would merely be of a preparatory or auxiliary character in relation to the enterprise. Alternatively, if the location site is not expected to be in existence beyond the period as defined in the DTA, or no business as such is being carried on, the relevant provisions contained in the particular DTA could be defeated on those grounds. If not, the appropriate relief from taxation in the foreign investor's home territory would be governed by the relevant DTA. Where no DTA exists, a non-resident would be taxed on South African sourced income as described above.

Where a South African investor is a party to a foreign-based co-production joint venture in respect of a film produced abroad such that tax is leviable by the foreign revenue authorities in respect of the income derived therefrom, a rebate equal to the sum of the taxes on income proved to be payable, without the right of recovery by the investor from the foreign revenue authorities, will reduce the normal tax payable by the investor. The rebate cannot exceed so much of the normal tax payable by the investor as is attributable to the inclusion of the relevant income in his taxable income. Most importantly, the rebate cannot be granted in addition to any relief afforded to the investor in terms of any DTA between South Africa and the other country. Relief by way of rebate would only be granted in substitution for the relief the investor would receive in terms of such an agreement.

Acquisition of Distribution Rights

Where an investor does not enter into a co-production joint venture, the provision of finance may take the form of an acquisition of film distribution rights in return for the provision of financial assistance. The relevant tax implications of such an investment are comparable to those of a co-production joint venture investor referred to above.

Partnership

In the past, partnerships were used extensively by investors who participated in "film schemes," which were eventually curtailed by the South African Revenue Service (SARS) in 1987. As a result, many investors found themselves in less than desirable positions, particularly from a taxation point of view. It appears that today there is still some reluctance on the part of some investors to utilize the partnership vehicle for fear that it might spark some unwelcome scrutiny from SARS in relation to the enterprise.

South African taxation law does not recognize partnerships as separate legal entities and they are not taxable as such, rather they are treated as "transparent" for tax purposes. In terms of the partnership agreement, the investor would share the actual income of the partnership. A South African partner that is tax resident in South Africa would be taxed on its worldwide income. Thus, it would be taxed on its share of the partnership's income, irrespective of the source of such income.

Should the partnership have a non-resident (for income tax purposes) as a partner, the question of source once again becomes important, as non-residents are taxed on a South African source or deemed source basis. Generally, a share in the profits of a partnership would arise either from the employment of capital or in respect of work undertaken or services rendered. This enquiry concerns the partner and not the partnership as a whole. Case law has inclined to the view that, where activities are undertaken by a partner in South Africa, the income from the partnership would be derived from a South African source despite the fact that the other partner resides and renders services to the partnership outside South Africa. It may thus be argued that the non-resident derives income from a source within South Africa and is subject to tax in South Africa on such income. Moreover, consideration must be had to the extent of the foreign investor's involvement in the project. If it only relates to the employment of capital with a consequent share in foreign territorial exploitation rights to the film, no South African tax implications would arise for the foreign partner. This is so because the foreign investor would not share in the overall revenues generated by the film but only in those arising from revenue generated abroad.

Where a DTA exists between the home country of the foreign investor and South Africa, and the foreign investor sets up a production office in South Africa, such facility may very well constitute a permanent establishment as defined and the investor would be taxed on the share of profits so derived from the overall revenues generated by the film. Again, the existence of a DTA would potentially alleviate the investor's position.

Other Tax-Effective Structures

South African Subsidiary

Where a foreign film production company wishes to produce a film or a series of films in South Africa, a South African subsidiary may be formed for this purpose. A South African incorporated special purpose vehicle is a requirement to qualify for the DTI incentives, discussed in more detail below. Investors would either subscribe for shares in the company or provide loan capital. The company would have a liability for corporate tax at 28%. In addition, dividends are subject to a withholding tax of 20% and interest is subject to a withholding tax of 15%. These tax rates may be reduced in terms of a DTA.

From an exchange control point of view, dividends can generally be freely remitted to foreign investors.

A general restriction regarding the granting of local financial assistance to affected persons and non-residents and security given by non-residents is contained in the Exchange Control Regulations of 1961.[4]

[4] Section 3(1)(e) and 3(1)(f).

In order to prevent foreign-owned companies gearing their South African operations excessively, restrictions are in some instances placed on local borrowings. There is no restriction on the amount that could be borrowed locally in instances where an affected person[5] wishes to borrow locally to finance a foreign direct investment into South Africa or for domestic working capital requirements. Wholly non-resident owned subsidiaries may borrow locally up to 100% of the total shareholders' investment, in respect of the acquisition of residential property in South Africa and certain specific financial transactions. In this regard, the FSD prescribes a formula where the "local financial assistance ratio" or permitted percentage of effective capital[6] is to be calculated.

The formula for calculating the "local financial assistance ratio" or permitted percentage of effective capital is:

$$100\% + \frac{(\%\ \text{South African interest})}{(\%\ \text{Non-resident interest})} \times 100\%$$

It follows that requests for local financial assistance facilities in respect of financial transactions and/or the acquisition of residential property in South Africa, in excess of the maximum limit, as calculated per the local financial assistance formula, must be referred by the designated Authorised Dealer to the Financial Surveillance Department for prior approval. Should there be any doubt as to whether a new or additional facility can be granted, the matter must be referred to the Financial Surveillance Department by the designated Authorised Dealer.

Financial assistance includes the lending of currency, granting of credit, taking-up of securities, concluding of hire purchase or lease agreements, financing of sales or stocks, discounting of receivables, factoring of debtors, guaranteeing of acceptance credits, guaranteeing or acceptance of any obligations, any suretyships and buy-back or leaseback agreements.

In addition, where the foreign-held production company proposes to provide loan finance to the local company, approval is required from the FSD. To receive the approval, the loan must meet the specific criteria applicable to inward foreign loans. Further, such loans must be recorded via the Loan Reporting System by the Authorised Dealer concerned.

The following criteria, *inter alia*, apply to inward foreign loans:

— The loan must be for a minimum period of at least one month.

[5] "Affected person" is defined in section 1 of the Exchange Control Regulations as a body corporate, foundation, trust or partnership operating in South Africa, or an estate, in respect of which (i) 75% or more of the capital, assets or earnings thereof may be utilised for payment to, or to the benefit in any manner of, any person who is not resident in South Africa; or (ii) 75% or more of the voting securities, voting power, power of control, capital, assets or earnings thereof, are directly or indirectly vested in, or controlled by or on behalf of, any person who is not resident in South Africa.

[6] "Effective capital" is defined in section 1 of the Exchange Control Regulations to include issued share capital and premium, retained income, other earned reserves created out of profits, deferred tax, outstanding dividends, the permanent portion of an intercompany trading account with an overseas associate or holding company, and approved shareholders' loans which are in proportion to ownership.

- The interest rate in respect of third-party foreign denominated loans may not exceed the base lending rate plus 3 per cent or, in the case of shareholders' loans, the base lending rate as determined by commercial banks in the country of denomination.
- The interest rate in respect of Rand-denominated loans may not exceed the base rate (i.e., prime rate) plus 5 per cent on third-party loans or the base rate, in the case of shareholders' loans

No repatriation guarantees will be given by the FSD.

Whilst dividends are not income tax deductible, interest may be deductible. The deductibility of interest will be impacted by several factors:

- Where the production company qualifies for an income tax exemption from income (discussed below), the interest expense cannot be deducted;
- Where the funding is obtained from, facilitated or guaranteed by a connected person in relation to the production company, section 23M of the South African Income Tax Act may apply to limit the interest deduction to 40% of adjusted taxable income;
- The interest deduction may be influenced by transfer pricing, as described below.

The South African thin capitalisation and transfer pricing provisions would also find application to cross-border transactions with connected persons. These provisions are intended to address tax avoidance schemes involving the manipulation of prices for goods and services which encompasses the granting of financial assistance, including a loan, advance or debt and the provision of any security or guarantee under cross-border transactions between connected persons. In essence, the following two practices are covered by the provision:

- Transfer pricing provisions will be applied to adjust, for tax purposes, the prices of goods and services concluded between connected persons, to arrive at an arm's length price that would have applied had the transaction been concluded between unconnected parties. This is known as a primary adjustment.
- As a punitive measure, a secondary adjustment is made in that the primary adjustment is deemed to be a dividend *in specie*, which will attract dividends tax at a rate of 20%, and which may not be reduced through application of DTA relief.
- With effect from 1 April 2012 and applicable in respect of years of assessment commencing on or after that date, the 3:1 debt to equity ratio was abolished and replaced with an arm's length test that is based on OECD methodologies. A draft interpretation note was released by SARS providing some guidance on the principles behind the new section 31. The main aspect highlighted in this interpretation note relates to the fact that the arm's length evaluation will be based on the level of finance the borrower could have secured under the same terms and conditions had the borrower (the local company) and the lender (the foreign company) been independent parties dealing at arm's length, and whether as a result of the transaction, a tax benefit is derived by the parties to the transaction. However, such guidance was never made final by SARS, and as a result, no certainty exists as to how taxpayers should comply with the new section 31 of the Act.

- As an alternative to the registration of a South African subsidiary, a foreign production company could establish a place of business in South Africa in the form of a branch and as such have to be registered as an external company. The profits of a branch operation are subject to normal tax at the same corporate rate of 28%.

Other Financing Considerations

Department of Trade and Industry Film and Television Production Incentives

The South African government provides the Foreign Film and Television Production and Post-Production Incentive and the South African Film Production and Co-production Incentive. The Emerging Black Filmmakers Fund is dealt with separately below.

The Foreign Film and Television Production and Post-Production Incentive

The objective with the incentive, hereinafter referred to as the Foreign Film rebate, is to attract and encourage large budget films and television production work. Incentive was initially effective from 1 April 2012 to be administered until 31 March 2017 and has now been extended indefinitely. A successful applicant will be rebated a portion of the eligible film production and post-production costs incurred as follows:

- 20% for shooting on location in South Africa;
- An additional 2.5% (cumulative 22.5%) where post-production work of at least R1.5 million is conducted in South Africa;
- An additional 2.5% (cumulative 25%) where post-production work of at least R3 million is conducted in South Africa;
- 22.5% of the post-production cost, where post-production work of at least R1.5 million is conducted in South Africa; and
- 25% of the post-production cost, where post production work of at least R3 million is conducted in South Africa.

The criteria to qualify for the Foreign Film rebate are listed in (a) to (h) below.

The South African Film Production and Co-production Incentive

This incentive, hereinafter referred to as the South African Film rebate, allows for a rebate in respect of qualifying South African productions costs, including the cost of official treaty co-productions. The rebate is 35% of the first R6 million that the applicant has spent on an eligible film production and 25% of costs incurred above R6 million. The incentive was effective from 1 February 2008 until 2014. Productions eligible for the South African Film and Television Production Incentive can either be a Qualifying South African Production (QSAP) or an Official Treaty Co-production (OTC).

For a production to qualify as a QSAP, the following should apply:

- At least 75% of the total budget of the film must be defined as Qualifying South African Production Expenditure (QSAPE);
- The majority of the intellectual property must be owned by South African citizens;

— The director of the film should be a South African citizen, unless the production requires the participation of a particular individual, in which case approval may be given at the provisional approval stage;

— The top writer and producer credits should include South African writers, unless the production requires the participation of a particular individual, in which case approval may be given at the provisional approval stage (either exclusive or shared collaboration credits);

— The majority of the five highest paid performers should be South African citizens, unless the production requires participation of a particular individual, in which case approval may be given at the provisional certification stage; and

— The majority of the film's heads of departments and key personnel should be South African citizens.

In the event of an OTC, the production must be approved by the Minister of Arts and Culture as an Official Treaty Co-production. An advance ruling must be obtained and submitted at the application stage for provisional certification. (If these requirements are not met, the production may qualify as a foreign production.)

General requirements

To be eligible for the above Foreign Film rebate and South African Film rebate, a production must meet the following criteria:

(a) the minimum qualifying South African production expenditure (QSAPE) should be R12 million for a foreign production and a budgeted R2.5 million for South African productions. A rebate is also available in respect of qualifying South African post production expenditure (QSAPPE) for a foreign production where the QSAPPE is at least R1.5 million;

(b) at least 50% of the principal photography schedule, and a minimum of four weeks of filming, should be filmed in South Africa (a minimum of two weeks for a South African production). To qualify for a rebate in respect of post-production work in respect of a foreign production, a minimum of two weeks post production must be carried out in South Africa[7];

(d) the production must be in one of the following formats, (i) feature film, (ii) tele-movie, (iii) television drama series or mini-series, (iv) documentary, documentary series and documentary feature, or (v) animation. In respect of foreign production, the production can also be in the format of digital content and video gaming;

(e) the applicant may not bundle productions in order to qualify for the rebate, that is, only one film production, television drama or documentary series per entity is eligible for the incentive;

(f) the applicant must be a Special Purpose Corporate Vehicle (SPCV) incorporated in South Africa per production solely for the purpose of the production and post-production

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For productions with QSAPE of R100 million, the requirements in paragraph (b) may be waived.

work[8], and have access to full financial information for the whole production worldwide. In the case of the South African Film rebate, the SPCV must have at least one South African resident shareholder who should have an active role in the production and be credited in that role;

(g) the Department of Trade and Industry should be credited for its contribution in the end titles of the film or TV production; and

(h) the applicant must for purposes of the Foreign Film rebate comply with the obligations under the Legal Deposit Act 54 of 1997.

Any other South African rebates, training or internship funding specific to this project may be claimed but should be deducted from the gross QSAPE before calculation of the rebate. An exception is applicable for Services Sector Education and Training Authority (SETA) funds, which may be received after the final application or payment of the rebate. A project that receives funding from the Industrial Development Corporation, National Film and Video Foundation or private investors under section 12O of the Income Tax Act No 58 of 1962, as amended, will not be eligible for the rebate.

Emerging Black Filmmakers Fund

The Emerging Black Filmmakers Fund of R90 million was launched by the DTI in July 2014 in conjunction with the Industrial Development Corporation and the National Film and Video Foundation. For the next three years, the Fund will in each year fund six qualifying feature films with a budget of R5 million (R4.5 million for development and production and R500 000 for the marketing). It is a requirement that 51% of the film production must be black owned.

Security Transfer Tax (STT)

STT is levied at the rate of 0.25% of the greater of the consideration paid or the market value of any security transferred.

Exchange Controls and Regulatory Rules

Exchange Control has no application to non-residents and, as such, income derived from investments in South Africa is generally freely remittable abroad to foreign investors, subject to the following restrictions:

— Interest

Interest is freely remittable abroad, provided the loan facility has been approved by the FSD and the interest rate is related to the market rate of the currency in which the loan is raised (generally the FSD will also approve the interest rate upfront).

— Management Fees

Payment of a management fee by a South African company to an offshore company or beneficiary is subject to approval by the FSD. The amount paid must be reasonable in relation to the services provided.

[8] Both the applicant SPCV and holding company(ies) must comply with the requirements for Broad-Based Black Economic Empowerment in terms of the Codes of Good Practice for Broad-Based Black Economic Empowerment, as issued in Government Gazette February 9, 2007.

— Royalties and License Agreements

Agreements for the payment of royalties and similar payments for the use of technical know-how, patents and copyrights require prior approval from the FSD.

— Dividends

Dividends can be freely remitted as long as the company is within its local borrowing limit (see above). Applications to transfer dividends abroad must be accompanied by a representation letter, an auditor's clearance certificate and either the audited financial statements or, in the case of interim dividends, interim financial statements.

Corporate Taxation

Recognition of Income

Film/Television Program Production Company – Production Fee Income

South African Resident Company

Where a South African subsidiary company is established to produce a film or video in South Africa without acquiring any exploitation rights to the completed product, it would be important to ensure that the consideration payable by the foreign investor in respect of the production services rendered in South Africa reflects an arm's length price. Failure to do so would result in SARS adjusting the consideration to reflect such a price.

Where a branch is established to attend to the production of a film in South Africa, any taxable income attributable to the South African branch must be calculated as if it was a separate and distinct entity from its head office.

Non-South African Resident Company

Where a DTA exists and a non-resident company sets up a production office in South Africa to administer filming here, the main issue for consideration is whether such activity would constitute a permanent establishment of the foreign enterprise. One would have to consider the various exemptions provided for in the DTA in order to determine the company's tax liability, if any, in South Africa. If no such agreement exists, the normal source principles referred to above would apply.

If the foreign company merely undertakes filming in South Africa and does not establish a production office here, it is unlikely that such activity would constitute a permanent establishment of the foreign enterprise.

Should SARS seek to tax the company on the basis that its activities constitute a permanent establishment, this would be done by reference to the profits attributable to that permanent establishment. In this regard, the profits would be determined on the basis of what an independent enterprise engaged in similar or the same activities would be expected to derive.

Exemption from normal tax

For productions where principal photography commences on or after 1 January 2012 and before 1 January 2022, section 12O of the Income Tax Act provides that the receipts and accruals in respect of income derived from the exploitation of the rights of a film are exempt from normal tax. In addition, any amount received by an SPCV from the Department of

Trade and Industry in respect of the incentives described above will be exempt from normal tax (provided that any recoupments or recoveries must be subjected to tax).

The change in legislation stems from the fact that, in previous years, the focus of the legislation was on costs. Therefore, the greater the amount of expenditure incurred, the higher the amount of the allowance received. This incentivised tax advisors and other financial facilitators to create tax schemes to maximise deductions without regard for the underlying film. The exemption is aimed at covering all receipts and accruals (including sales and licensing rights) derived from the exploitation rights of a film, for a period of ten years commencing on the date that the film production is completed. In order to receive the exemption, the following criteria must be satisfied:

- The exploitation rights must be in respect of a feature film, animation, documentary or documentary series;
- The film must be approved by the National Film and Video Foundation as a local production or co-production (where by a film is co-produced in terms of an international co-production agreement between South Africa and the government of another country);
- The income must be derived by the initial investors, namely:
    i. a person which acquired the exploitation rights prior to the date that principal photography commenced, or
    ii. a person who acquired the exploitation rights after commencement of the principal photography but before the completion date where consideration for those exploitation rights were not directly or indirectly paid to a person in (i);
- The income must be derived in respect of exploitation rights, being the use of, the right of use of, or the granting of permission to use a film, to the extent that the receipts and accruals are wholly dependent on profits and losses in respect of the film; and
- The income must be received or must accrue within 10 years from completion.

The SPCV (an entity that qualifies for a DTI incentive, as discussed above) or an approved collection account manager that manages the exploitation rights under a collection account management agreement must report information to the Minister of Finance in a prescribed manner in form.

A broadcaster or a person connected to a broadcaster cannot qualify for this exemption.

Non-Exempt Income and the Sale of Distribution Rights
Where a production company accrues production fee income or sale proceeds from the sale of distribution rights in a film, and the income does not qualify for exemption in terms of section 12O, the receipts and accruals would normally be treated as income arising from the conducting of a trade.

Where a foreign company sells distribution rights in a film and such rights will be exercised by the purchaser in South Africa, the income derived from the sale of such rights could be deemed to have accrued to the seller from a South African source. If a DTA exists, however, this may provide relief from South African taxation.

Where distribution rights are transferred in a cross-border transaction between connected parties, the consideration for tax purposes would, if necessary, be adjusted to reflect an arm's length price which would be payable between unrelated third parties.

In addition, the necessary Exchange Control formalities would have to be complied with.

Transfer of Film Rights between Related Parties

As discussed above, the cross-border transfer of film rights between connected (related) parties would fall within the ambit of the South African transfer pricing legislation and, as such, if the consideration payable for the exploitation of those rights does not reflect a price that would be payable between independent third parties, it would, for tax purposes, be adjusted to reflect an arm's length price.

It is not possible to speculate on what the arm's length consideration would be which SARS might wish to apply. As long as the consideration can be justified on an open-market, third-party basis, no transfer pricing adjustment should be necessary. Determining an arm's length amount, however, may prove to be difficult in view of the relative absence of activity in the South African film industry.

South African taxpayers are required to make full disclosure of any cross-border connected party transactions when submitting their income tax returns. Taxpayers must also, if requested by SARS, submit a transfer pricing policy and copies (if available) of any agreements relating to such cross-border transactions with connected parties.

The Television Broadcaster

Television broadcasters in South Africa are divided into two groups, the first comprising the South African Broadcasting Corporation (SABC), which is the public broadcasting entity, and e-TV, a private broadcasting entity, and the second comprising broadcasters, such as MultiChoice, which provide satellite television services. The SABC and, to a lesser extent, MultiChoice, have generally been involved in the production of films and/or series which have, in some instances, been released internationally. As such, these bodies have provided the necessary impetus in the local industry for the production of films. Indeed, the broadcasting legislation specifically empowers the SABC to "make, compile, print, manufacture, buy, hire or acquire by any other means sound, visual, or audiovisual recordings, fixations and material of whatever nature or description and may sell, lease, deal in or in any other manner dispose of such recordings, fixations and material, irrespective of whether it was broadcast by the corporation or not." In this context, they provide a vital resource in the financing of such projects.

Much of the SABC's income is derived from a statutory licensing fee payable by the user of a television set. In addition, a large proportion of its income is derived from the screening of advertisements. Income is also generated by the sale of programming to third parties abroad. MultiChoice, the satellite television operator, earns a combination of subscriber and advertising income.

Expenditure

The deduction of expenditure is governed by the general deduction provisions of the ITA. To the extent that income received or accrued qualifies for exemption in terms of section 12O of the Income Tax Act (as described above), the expenditure will not be deductible for income tax purposes. No income tax allowances can be claimed in respect of pre- and post-production expenditure.

Foreign Tax Relief

There are currently withholding taxes on dividends at a rate of 20%, on interest paid to non-residents at a rate of 15%, and in respect of royalties received by or accrued to non-residents at a rate of 15%. All the aforementioned withholding taxes may be reduced if provided for in a DTA between South Africa and the country in which the beneficial owner or recipient is tax resident.

Indirect Taxation

Value Added Tax (VAT)

VAT is an indirect tax, which is largely directed at the domestic consumption of goods and services and at goods imported into South Africa. The tax is designed to be borne mainly by the ultimate consumer or purchaser in South Africa. It is levied at two rates, namely a standard rate (currently 15%) or a zero rate (0%). Supplies which are charged with tax at a zero rate are primarily supplies of goods or services which are exported from South Africa. Standard-rated and zero-rated supplies are known as taxable supplies. Other supplies are known as exempt and non-supplies.

Unless a person registers as a vendor, he cannot charge VAT and, moreover, cannot claim any input tax (i.e., VAT credits). Registration as a vendor is compulsory where a person carries on an enterprise in South Africa or partly in South Africa, continuously or regularly (whether for profit or not) and his turnover in respect of taxable supplies exceeds or is expected to exceed R1 million per annum. From 1 April 2014, only businesses that have exceeded the R1 million threshold value of taxable supplies over a continuous period of 12 months or have a contractual obligation to do so in the next 12-month period will be obliged to register for VAT. However, a business can also register on a voluntarily basis for VAT if its turnover is in excess of R50,000 or it is reasonably expected to meet the R50 000 threshold after a period of 12 months. These cases will only be allowed where certain conditions are met.

Currently, non-resident suppliers of certain electronic services to South African residents or where payment originates from a South African bank account are required to register and account for VAT in South Africa if the total value of taxable supplies has exceeded R50,000. Following the Minister of Finance’s budget speech on 21 February 2018, it is clear that the VAT base in respect of the supply of electronic services (including broadcasting services) by non-residents and consumed in South Africa will be broadened. The intention is to level the playing field for resident VAT vendors. New regulations in this regard are expected to come into effect on 1 October 2018.

The supply of any set of moving visual images or other visible signals (and any right to view the visual images or visible signals), whether with or without accompanying sounds, where the visual images are such that sequences of them are seen as moving pictures, will be regarded as electronic services where such services are supplied by means of any electronic agent, electronic communication or the Internet for any fee.

The effect of the above is that non-residents that supply the above services will be required to levy VAT on supplies (if its turnover exceeds R50,000), and the supplies concerned will no longer be regarded as imported services.

Supply of a Completed Film

Where a South African resident supplies a completed film to another local resident, a taxable supply will have been effected and, accordingly, VAT will be payable at the standard rate on this supply. There are provisions in the VAT legislation which deal specifically with situations where the deduction of input tax will be denied. One of those circumstances relate to the situation where a vendor acquires goods and services for the purposes of entertainment. The definition of what constitutes entertainment is very wide and includes the provision of any food, beverages, accommodation, entertainment, amusement, recreation or hospitality of any kind by a vendor to anyone in connection with an enterprise carried on by him. The provision will not apply where the goods or services are acquired wholly or mainly for making taxable supplies in the ordinary course of an enterprise which continuously or regularly supplies entertainment for consideration. There is a proviso, however, to the effect that the consideration charged must be sufficient to cover the cost of the entertainment supplied by the vendor to the recipient.

Where a local company exports a completed film to a non-resident, the taxable supply may be zero-rated and therefore no VAT will be payable.

Pre-Sale of Distribution Rights

Such a sale by a local resident to another local resident would attract VAT at the standard rate. A sale of such rights by a South African resident to a non-VAT vendor may be zero rated. To determine whether the zero rate will apply is dependent upon the specific circumstance.

Royalties

The same principles referred to above in relation to the presale of distribution rights would be applicable in this context.

Agent versus Principal Deals

Generally, where an agent acts on behalf of a principal, supplies by and to the agent will be deemed to be supplies by and to the principal for purposes of VAT. Where the principal is a non-resident, certain supplies may be zero rated. However, each supply must be considered to determine the applicable rate of VAT.

Peripheral and Promotional Goods or Services and Merchandising

All such items would constitute taxable supplies at the standard rate. However, regard must be had to the deemed value of the supply, as some of it may be deemed to have a nil value.

Film Crews and Artists

If a film production company (being VAT registered) films an advertisement, television programme or film, the question arises as to whether input tax may be claimed on expenses incurred in respect of catering provided for crew members, clients and production staff during the production of the advertisement, television programme or film.

In terms of the general disallowance rule, a vendor is not entitled to claim an input tax deduction in respect of goods or services acquired for the purpose of entertainment. However, this rule does not apply where the goods or services are acquired for making taxable supplies in the ordinary course of an enterprise which continuously or regularly supplies entertainment for a consideration which covers both the direct and indirect cost of the entertainment or the open market value thereof.

However, a vendor is entitled to claim an input tax deduction where the goods or services are acquired in respect of the personal subsistence of employees or office holders, who, by reason of their duties, are obliged to spend at least one night away from their usual place of residence and usual working-place. Foreign crew members will only be regarded as employees or office holders if an employment contract has been entered into between the parties concerned. The film production company is entitled to claim an input tax deduction in respect of personal subsistence incurred by local crew members who are away from their usual place of residence and their usual working-place while involved in the production of a film or making of an advertisement on location.

Imports of Goods and Customs Duties

Any entity wishing to import goods into South Africa is required to be registered as an importer with SARS. Different registration requirements exist for entities registered in South Africa and foreign registered entities. Foreign entities not located in South Africa may apply to be registered as an importer but will be required to appoint a local registered agent with a fixed physical address in South Africa. The importation of goods into South Africa by a local or a foreign company may attract customs duties as well as VAT. Customs duty are generally not refundable, whereas the VAT may well be.

Customs duty rates vary depending on the imported product and its allocated tariff heading. As an example, cinematographic cameras are classified under tariff heading 90.07 and are free of customs duty. It is advisable to obtain clarity on the customs duty liability prior to shipping any goods to South Africa.

Certain goods may be temporarily imported into South Africa, subject to certain conditions and a six-month time restriction restrictions, in particular, time restrictions for the period which temporarily imported goods may be stored or utilized in South Africa. The customs duty may be rebated under rebate item 480.00/490.00 upon importing such goods temporarily. With any temporary import a provisional payment for customs duties may be required in order to secure the duties and VAT applicable. The provisional payment will be refunded upon providing the required proof that the goods were duly re-exported from South Africa.

Goods may also be imported temporarily under an ATA Carnet, which replaces the ordinary customs declarations for import and export. The ATA Carnet is a temporary export document that eliminates the need for customs declaration at border points and the deposit of a guarantee or bond in the country of temporary importation. ATA Carnets can be obtained from an international guaranteeing organisation against payment of a security deposit (usually in an amount less than the total import duties payable). The South African Chamber of Commerce and Industry (SACCI) undertakes to settle outstanding duties due to the non-exportation or misuse of the ATA Carnet. An ATA Carnet is generally valid for 12 months and therefore provides a longer time frame than the six months' time limit on goods temporarily admitted under rebate item 480.00/490.00.

In order to import second-hand goods into South Africa, an import permit is generally required, except where goods are imported temporarily. Import permits must be produced for clearance of the goods into South Africa and must be obtained prior to importation from the International Trade Administration Commission (ITAC).

Personal Taxation

Non-resident Artists

Income Tax Implications

Based on the normal South African source principles, a non-resident artist would be taxed in South Africa in respect of any income received arising from a performance in South Africa. Indeed, all the DTAs provide that income derived by public entertainers, such as theatre, motion picture, radio or television artists and by athletes from their personal activities, may be taxed in the contracting state in which they exercise their activities.

Any non-resident person, who performs any personal activity as a theatre, motion picture, radio or television artist or musician or takes part in any other activity, which is usually regarded as of an entertainment character, for reward, in South Africa, is subject to a final withholding tax of 15%.

The withholding tax does not, however, apply to any person who is an employee of a South African resident employer *and* is physically present in South Africa for periods exceeding 183 days, in aggregate, in any 12-month period, commencing or ending in the year of assessment.

Persons so exempted from the withholding tax will be subject to normal tax (also referred to as income tax) in South Africa. Further, where non-resident entertainers are subject to the withholding tax, such receipts are exempt from normal tax.

VAT Implications

Central to the imposition of VAT on any supply of goods and services is that such supply is made in the course or furtherance of any enterprise. An enterprise is defined, *inter alia*, as constituting an activity which is carried on continuously or regularly by a person in South Africa, or partly in South Africa. Services, which are rendered by an employee to her employer in the course of her employment or holding of any office, are excluded. Since, in most cases, a non-resident artist will render services on a one-off basis, the question of VAT should not be relevant in this context.

Resident Artists

Income Tax Implications

Resident artists will be taxed on any income derived from their participation in a performance rendered in South Africa. In addition, such artists will be taxed in South Africa on any income derived by them where they render their services outside South Africa, whether the payment for the service, work or labor is made or is to be made by a person resident in or out of South Africa and wherever payment is to be made. The term "trade" includes every profession, trade, business, employment, calling, occupation or venture.

Since, in terms of most DTAs, income earned by artists would be subject to taxation in the country where they exercise their activities, the provisions contained in such agreements, which allow for an exemption or credit in respect of such income which is subject to tax in their home country, would provide the necessary relief against double taxation.

VAT Implications

Where an artist's income exceeds R1,000,000 per annum, he or she will be required to register for VAT. As such, the artist will be required to charge VAT at the standard rate. On the issue relating to the claiming of input tax, regard should be had to the comments made in relation to the provision of "entertainment" above.

Employees

Employees' Tax

South African resident employers who pay remuneration, or non-resident employers who have a representative employer who pays or has authority to pay remuneration in South Africa are required to withhold employees' tax (PAYE) from the employee on a monthly basis and pay over the amount withheld to SARS. Remuneration is widely defined in section 1 of the ITA, and includes, *inter alia*, salaries, wages or emoluments, etc.

It is important to note that there does not have to be a contract of formal employment for a South African employer (or a resident representative employer) to have an obligation to withhold PAYE. Therefore, it is not sufficient to not withhold on the basis that the individual in question is not employed by the film owner under a contract of employment.

Amounts are not regarded as remuneration if paid or payable to common law independent contractors who are not subject to control or supervision of any person as to the manner in which their duties are performed or as to the hours of work and to whom the amounts paid or payable are not payable at regular daily, weekly, monthly or other intervals. Film owners commonly hire so-called "independent contractors" and do not perform the tests to determine whether they are genuine common law independent contractors. It is recommended that advice be sought in this area, as this often is an area where film owners do not apply the correct tests, and as a result are subject to penalties and interest for not withholding PAYE.

It often happens in the film industry that artists, models and crew members are introduced to filmmakers by agents. Employment contracts are entered into between the artists, models or crew members and the film owner, and an introduction fee is payable to the agent. The fees due to the artists, models or crew members are sometimes paid over to the agents who are requested to deduct their fees and PAYE before the net amounts are paid over to the artists, models or crew members. It is important to note that despite such an agreement with an agent, the film owner that employs the artists, models or crew members is still obliged to ensure that PAYE is paid over to SARS in respect of such amounts paid and that the relevant employees' tax certificates are issued.

Where the agent can provide an IRP30 exemption certificate, the employer is not required to withhold PAYE from payments to the agent, but the agent may very well have a withholding obligation in respect of payments to be made to their employees.

Skills Development Levies

As an employer, a film owner is obliged to pay a Skills Development Levy (SDL) amounting to 1% of any remuneration payable to an employee, unless the employer is exempt, for example, where total remuneration to all employees during a determined 12-month period does not exceed R500,000.

Unemployment Insurance Contributions

As an employer, a film owner is also obliged to make contributions to the Unemployment Insurance Fund (UIF) in respect of the remuneration paid or payable to any employee and to pay over such contributions deducted or withheld from the employee for purposes of UIF.

The employer must pay over a total contribution of 2% of the total remuneration paid or payable to the employees, of which 1% must be deducted from the employees' remuneration.

Payments of employees' tax, skills development and unemployment insurance contributions

Where an employer is registered at SARS for PAYE, SDL and UIF, the amounts must be paid over to SARS no later than seven days after the end of the month in respect of which the contributions should be made.

Contributions for Occupational Injuries and Diseases

An employer is required to make contributions to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.

Contributions are payable in respect of an employee's earnings, as defined, up to a maximum threshold, which is subject to change from time to time. Earnings include all payment made regularly, before any deductions, whether in money or in kind, to employees but exclude certain types of payments. The rates applied in determining the contributions are generally low and differ from industry to industry.

The contributions are payable annually upon assessment by the Commissioner of a return submitted by the employer on 31 March. The date of payment is printed on the notice of assessment and is usually within 30 days of the date of the assessment.

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