



Taxation of Film Owners

Another helpful guide brought to you by the
South African Revenue Service

**TAXATION
OF
*FILM OWNERS***

FOREWORD

This document provides general guidelines regarding the taxation of film owners, as well as their liability in respect of some of the taxes, duties, levies and contributions administered by the South African Revenue Service (SARS). This document is not meant to delve into the precise technical and legal detail that is often associated with taxation. It should, therefore, not be used as a legal reference.

Should you require additional information regarding any taxes administered by SARS:

- Contact your local SARS branch;
- Visit SARS online at <http://www.sars.gov.za>; and/or
- Contact your own advisors.

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SOUTH AFRICAN REVENUE SERVICE

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OVERVIEW

Due to the rapid growth of the film industry in South Africa, the South African Revenue Service has identified a need to issue an information brochure that deals with the taxation of film owners. The main aim of the brochure is to explain the income tax consequences for film owners in South Africa. The first part of the brochure, therefore, deals with the determination of the taxable income of a film owner. Furthermore, it contains information about the responsibilities of film owners with regard to some of the other taxes, duties, levies and contributions administered by SARS. Finally it contains information about certain of the administrative provisions of the Income Tax Act, No. 58 of 1962, as amended (the Act). All the definitions in this brochure have been extracted from the Act, unless the context indicates otherwise. The words “taxpayer” and “film owner”, as well as “South Africa” and “the Republic” will be used interchangeably as they have the same meaning for the purposes of this brochure.

PART A: TAXATION OF FILM OWNERS

Resident film owners are liable for the payment of income tax in respect of their world-wide income and non-resident film-owners on their income from a South African source. Special deductions are allowed in the determination of taxable income derived from their trade as film owners. These special deductions are contained in section 24F of the Act. Film owners can conduct their business in their individual capacity or through other entities, such as companies or close corporations. There are instances where film owners may also be required to register for Employees' Tax (commonly known as PAYE), Skills Development Levies (SDL), Unemployment Fund Contributions (UIF) and Value Added Tax (VAT), etc.

A partnership is not regarded as a person for income tax purposes. Each film owner that is a partner, therefore, has to register as a separate taxpayer and will be assessed as such. The assessments of the partners will be based on the ratios in which the profits or losses of a partnership are to be shared. Deductions will also be taken into account according to the same ratios when determining their taxable income.

1 WHO IS A FILM OWNER?

A film and a film owner are defined in section 24F(1) as follows:

“film owner” means any person who owns, whether solely or jointly, a film.

“film” means a recording of moving visual images and sound by means of cinematographic film, video tape, video disc or otherwise, including any copy of the film and any right therein.

A person must acquire *bona fide* ownership of a film or film right in order to qualify as a “film owner” for purposes of section 24F. The determination of whether or not a person is a *bona fide* film owner rather than, for example, a mere licensee, must be made upon the basis of all the facts and circumstances, including the terms of all the agreements entered into by or amongst parties to an arrangement. A person is not considered to be a *bona fide* film owner, for example, where the net effect of such agreements is to grant that person no more than a limited right to income for a limited period of time, without transferring the risks and rewards incidental to the actual ownership of the film to such person.

A person that only renders a service to a film owner, e.g. a production company that produces a film on behalf of the owner of such a film, is not regarded as a film owner and cannot claim any deductions under section 24F. Distribution companies that merely hold distribution licenses to sell films through cinemas and videos are also not regarded as film owners.

2 HOW IS THE TAXABLE INCOME OF A FILM OWNER DETERMINED?

2.1 INTRODUCTION

A person who carries on a trade as a film owner may earn income from various sources as a result of the exploitation of the film, e.g. income from ticket sales, distribution fees, royalties, etc. All this income must be added together in order to arrive at the person's “gross income”. Exempt income must then be excluded from gross income in order to arrive at “income”. Once income has been determined a film owner may be entitled to certain deductions and allowances in order to determine the person's “taxable income” (provided the relevant requirements are met). As a final step to arrive at taxable income that is subject to normal tax, the net capital gain on capital assets disposed of must be added.

2.2 GROSS INCOME OF A FILM OWNER

The first step in the determination of the taxable income of a film owner is to determine what constitutes the film owner's gross income.

2.2.1 What constitutes gross income of a film owner?

Gross income in relation to any year of assessment means -

- for a resident, the total amount in cash or otherwise, received by or accrued to such person or in that person's favour that does not constitute receipts or accruals of a capital nature; or
- for a non-resident, the total amount in cash or otherwise, received by or accrued to such person or in that person's favour from a source within or deemed to be within the Republic that does not constitute receipts or accruals of a capital nature.

In addition to this main rule the definition also includes certain specific amounts (see par. 2.2.5 below).

Gross income of a film owner could, therefore, include income derived from the person's trade as a film owner, as well as income derived from other sources. It could, for example, include the following:

- Receipts or accruals from the exploitation of any kind of the film (e.g. box office sales, video sales and distribution fees);
- Any other receipts or accruals of a film owner in relation to the making of the film (e.g. fees from producing films for others);
- Royalties;
- Any other receipts or accruals of a film owner as a result of any transaction, agreement, scheme or arrangement that was entered into;
- Receipts or accruals from any other trade;
- Rental income;
- Investment income (e.g. interest and dividend income); and
- Deductions and allowances that are recovered or recouped.

2.2.2 When is a film owner regarded as a "resident"?

In determining the gross income of a film owner, it is necessary to determine whether such person is regarded as a resident for tax purposes.

Two tests apply in determining whether a film owner, who is a natural person, is regarded as a South African resident for income tax purposes:

- The ordinarily resident test (i.e. normally the place to which a person will naturally and as a matter of course return to from his/her travels); and
- The physical presence test in the Republic (i.e. based on the number of days during which a person was physically present in the Republic during a year of assessment and prior years of assessment).

A film owner that is a company, close corporation or a trust that is –

- incorporated, established or formed in the Republic; or
- has its place of effective management in the Republic

will be regarded as a South African resident for income tax purposes.

Further information regarding the residence basis of taxation for individuals can be found on the SARS website www.sars.gov.za and can also be obtained from SARS branches.

2.2.3 Royalties paid or payable to a film owner

Amounts received by or accrued to resident film owners in the form of royalties form part of their gross income and will be added to their other sources of income in the determination of their taxable income.

Amounts received by or accrued to non-residents in the form of royalties or similar payments for the right or the grant of permission to use in the Republic –

- certain patents, designs, trademarks, copyright, models, patterns, plans, formulas or processes or any property of a similar nature; or
- any motion picture film, or any film or video tape or disc for use in connection with television, or any sound recording or advertising matter used or intended to be used in connection with such picture, film or video tape or disc

are subject to a final withholding tax of 12 per cent and do not form part of their gross income.

The final withholding tax is, however, not applicable in respect of such amounts received by or accrued to any –

- non-resident company, if the amount is derived by the company from a trade carried on through a branch or agency in the Republic and the amount is subject to tax in the Republic; or
- any person (other than a person whose place of residence is in a neighbouring country) in respect of the use in any printed publication of any copyright as aforesaid, unless it is used for advertising purposes in connection with any motion picture or film or in connection with television. Such amounts will be regarded as gross income of a non-resident film owner and will be subject to the normal tax provisions.

Where a non-resident film owner has other sources of income from the Republic, e.g. rental income, only the rental income will be subject to income tax in South Africa. The royalty amount will be excluded from gross income as it is subject to the final withholding tax on royalties.

2.2.4 A film owner could be subject to taxation in more than one country

Films owned by residents may earn income from foreign sources as a result of their distribution, usage etc. in foreign countries, usage in other countries, etc. Under such circumstances the income from foreign sources may be subject to both South African income tax and tax in the foreign countries, creating a potential for so-called “double taxation”. For example, if a film owner who is a South African resident earns income from the distribution of films in Canada, such income could be taxable in both countries. It will be taxable in the Republic, because the film owner is a resident in South Africa and could also be taxable in Canada under that country’s sourcing rules.

Countries have entered into Double Taxation Agreements (DTAs) to eliminate or reduce the potential for such double taxation. Relief is generally provided in a DTA by either exempting the income in one country or by allowing a credit for the tax payable in the country which has been granted the first right of taxation in terms of the relevant DTA.

South Africa has entered into DTAs with various countries for the avoidance of double taxation. The existing DTAs between South Africa and other countries are available on the SARS website www.sars.gov.za under Legislation/International Treaties/Double Tax Agreements.

2.2.5 Other amounts to be included in the gross income of a film owner

Certain other amounts are to be included in the income of a film owner in terms of the provisions of the Act. Such amounts also constitute gross income of a film owner.

Examples of amounts that are to be included in the income of a film owner are amounts of expenditure in respect of which deductions or allowances have been allowed during a year of assessment that are recovered or recouped during such a year of assessment. The payment of a short-term insurance claim in respect of stock lost in a fire or a profit made on the sale of an capital asset to the extent that depreciation has been allowed as a deduction are examples of such amounts. In the case of a film owner, an amount that has been allowed as a deduction in terms of the provisions of section 24F of the Act that is recovered or recouped, must be included in the gross income of that film owner.

2.3 EXEMPT INCOME OF A FILM OWNER

The next step to determine the taxable income of a film owner is to exclude all receipts and accruals that are exempt from income tax from the gross income of a film owner. Such net amount constitutes “income” as defined in the Act.

The following receipts and accruals are examples of exempt amounts:

- An amount paid or payable to a film owner in terms of the Film and Television Production Rebate program administered by the Department of Trade and Industry;
- An amount received by or accrued to a non-resident film owner that has been subject to withholding tax on royalties; and
- An amount received by or accrued to a film owner by a way of a subsidy payable by the State as provided in section 10(1)(zG) of the Act.

2.4 SPECIAL DEDUCTIONS THAT CAN BE CLAIMED BY A FILM OWNER

2.4.1 Overview of Section 24F

Section 24F provides for three special deductions for film owners –

- a deduction in respect of production and post-production cost incurred in respect of a film (the film allowance);
- a deduction in respect of marketing expenditure incurred in respect of a South African Export Film (the SAEF marketing deduction); and
- a deduction in respect of the print costs incurred in making copies of a film (print cost deduction).

All of these special deductions are subject to the “at risk” limitation. The “at risk” limitation is discussed separately in paragraph 2.4.5 below. Certain abusive film schemes or partnerships are discussed in paragraph 2.4.6 below.

A taxpayer may not qualify for the special deductions under section 24F for a variety of reasons. For example, the taxpayer may be a mere licensee rather than a *bona fide* owner. Similarly, a particular film may fail to qualify as a South African Export Film for purposes of the SAEF marketing deduction. In these situations, any expenditure will be deductible, if at all, only to the extent allowable under the normal rules governing the deductibility of expenditure under the Act (or, if applicable, the deductibility of capital losses under the Eighth Schedule).

2.4.2 The Film Allowance

a) General Rule

Under section 24F, a film owner is allowed a deduction, known as the “film allowance”, in respect of the production and post-production cost incurred by the film owner in respect of any film –

- used by the film owner in the production of income, or
- from which any income is received by or accrues to the film owner.

b) Defined terms

For purposes of the film allowance, unless the context otherwise indicates –

“**completion date**”, in relation to a film, means the date on which the cut master negative and conforming sound track of the film are married in an answer print or, where such film is not a cinematographic film, the date on which the film is completed to an equivalent production stage.

“**production cost**”, in relation to a film, means the total expenditure incurred by the film owner in respect of the acquisition or production of such film, excluding expenditure incurred in the erection, construction or acquisition of any buildings or other structures or works of a permanent nature, but including, without in any way limiting the scope of this definition -

- a) any remuneration, salary, legal, accounting or other fee, commission or other amount paid or payable to any person for the purpose of or in connection with the production of the film;
- b) the costs of acquiring the story rights, script, screenplay, copyright or other rights in relation to the film;
- c) insurance premiums in respect of insurance against injury to or death of persons, or loss of or damage to property employed or used, as the case may be, in the production of the film;
- d) premiums or commission payable in order to secure a guarantee that the cost of the film will not exceed a specified amount;
- e) interest, finance charges and raising fees incurred for the purpose of or in connection with the production of a film;
- f) the cost of acquiring or creating music, sound and other effects which will form part of the film;
- g) any allowance which but for the provisions of this section would be allowed under section 11(e) or (o) or 12C in respect of any machinery, implements, utensils or articles used in the production of a film: Provided that –
 - (i) any such allowance shall be deemed to be an amount of expenditure incurred;
 - (ii) an amount equal to the total amount of any such allowance which may be granted in respect of any year of assessment divided by the number of days in that year shall be deemed to have been incurred on each day of that year;
 - (iii) such expenditure shall be deemed to have been incurred in the country in which the asset in respect of which the allowance may be granted was acquired; and
 - (iv) no deduction or allowance shall be granted in respect of the cost of acquisition of any such machinery, implements, utensils or articles otherwise than as provided in this paragraph or paragraph (h); and
- h) expenditure incurred in respect of –
 - (i) the purchase, hire or construction of sets; and
 - (ii) the hire of any machinery, implements, utensils or articles used in the production of the film,but excluding any such expenditure incurred after the completion date and any expenditure incurred in the marketing or promotion of, or soliciting of orders for, the film.

“post-production cost” in relation to a film means any expenditure of the nature referred to in the definition of “production cost” which is incurred after the completion date, but excluding any print cost in relation to such film.

For purposes of the following discussion, **production cost** and **post-production cost** are referred to collectively as **“eligible costs”**.

c) Basic requirements and limitations

The film allowance is subject to a number of basic requirements and limitations –

- the film must be one that is used by the film owner in the production of income or from which the film owner receives or accrues income (income requirement);
- the film must be completed before the film allowance may be claimed (completion date requirement);
- expenditure for eligible costs may be deducted only once and may not exceed, under any circumstances, the aggregate eligible costs actually incurred by the film owner in respect of the film (actual cost limitation); and
- if some or all of the expenditure has been paid or financed through loans or credit, the film allowance may only be claimed if and to the extent that the film owner is “at risk” for the amount of any such loan or credit still owed on the last day of the year of assessment (“at risk” limitation).

The “at risk” limitation is discussed in paragraph 2.4.5 below.

(i) The income requirement

A film owner may only claim the film allowance in respect of eligible costs that are incurred in respect of a film which is used by the film owner in the production of income or from which the film owner receives or accrues income.

EXAMPLE 1

Facts:

Taxpayer A, an individual, buys a video cassette recorder and begins to make home movies as a hobby.

Solution:

Taxpayer A may not claim a deduction for the film allowance in respect of any costs that are incurred in making these home movies.

(ii) The completion date requirement

The film allowance in respect of any film may not be claimed by the film owner prior to the year of assessment in which the completion date for the film falls. This rule applies even if the film owner owns other films and earns income from them during the year of assessment. The amount of the film allowance that is not allowed under this rule may be carried forward to subsequent years of assessment and may be claimed in the year of assessment in which the film is completed, subject to the other requirements and limitations of section 24F.

EXAMPLE 2

Facts:

In June 2003, Taxpayer B, an individual, purchases the rights to a screenplay for a feature film. In November 2003, Taxpayer B begins filming. In December 2003, due to cost overruns and “creative differences”, Taxpayer B suspends work on the project indefinitely. As of 28 February 2004, the film has still not been completed.

Solution:

Taxpayer B may not claim any film allowance for any of the eligible costs incurred in respect of this film for the 2004 year of assessment.

EXAMPLE 3

Facts:

In June 2003, Taxpayer C, an individual, purchases the rights to a screenplay for a feature film. Taxpayer C begins filming in November 2003 and finishes filming in February 2004. The answer print is completed in April 2004.

Solution:

In this instance, the completion date for the film occurred in the 2005 year of assessment. Therefore, Taxpayer C may not claim the film allowance for any portion of the expenditure for eligible costs incurred during the 2004 year of assessment. These costs may be carried forward and deducted by Taxpayer C in the 2005 year of assessment, subject to the other requirements and limitations under section 24F.

EXAMPLE 4

Facts:

Company D is engaged in the production of feature films for commercial distribution and exhibition. During its 2004 year of assessment, Company D was engaged in three film projects. It completed the first two projects during that year and began their theatrical release. The third project began filming prior to the end of the year and will not be completed until sometime in 2006.

Solution:

Company D may claim the film allowance for its expenditure for eligible costs in respect of the first two films during its 2004 year of assessment. It may not claim the film allowance in respect of any eligible costs it incurred during that year in respect of the third film. Those costs must be carried forward and may only be deducted by Company D in the year of assessment in which the completion date for that film falls, subject to the other requirements and limitations of section 24F.

(iii) The actual cost limitation

The film allowance in respect of a film may not, in the aggregate, exceed the total production and post-production cost actually incurred by the film owner in respect of that film. The film allowance, moreover, is granted in lieu of any deduction or allowance in respect of expenditure for eligible costs which may otherwise be allowable in terms of the provisions of the Act.

EXAMPLE 5

Facts:

Company E pays R100 000 for film equipment for use in producing a feature film during its 2004 year of assessment. It begins filming immediately but does not complete the film until the following year.

Solution:

Company E may not claim the film allowance in respect of its expenditure for the film equipment during its 2004 year of assessment. It must carry the entire amount forward to its 2005 year of assessment. Company E, moreover, may not claim any allowance for wear and tear in respect of the equipment under section 11(e) of the Act, nor may it claim any other deduction or allowance that might otherwise be allowable for expenditure for such equipment in terms of any provision of the Act. See also Example 6 below illustrating the interaction of the “actual cost” limitation and the “at risk” limitation.

(d) Potential benefits

Assuming that the requirements and conditions of section 24F are met, the film allowance may offer several advantages to film owners in respect of the income tax treatment of eligible costs. Notably, the film allowance generally permits the deduction of expenditure for eligible costs regardless of whether the expenditure is of a revenue or capital nature. In addition, expenditure for assets such as machinery and equipment, which normally must be taken as an allowance over a number of years, may generally be deducted in full during the year of assessment in which the completion date falls. Finally, to the extent that the film allowance exceeds the film owner's income from the film itself, the deductions may be allowed against the film owner's income from other sources.

2.4.3 The SAEF Marketing Deduction

a) General rule

Under section 24F, a film owner is also allowed a deduction for any **marketing expenditure** incurred in respect of a **South African Export Film** (SAEF marketing deduction).

b) Defined terms

For purposes of the SAEF marketing deduction, unless the context otherwise indicates –

“export country” means any country other than the Republic or a neighbouring country.

“marketing expenditure” means so much of the expenditure incurred by the film owner during the year of assessment to market a South African export film and allowed to be deducted from his or her income under section 11 as is proved to the satisfaction of the Commissioner to have been incurred directly –

- a) in research into or obtaining information (including the remuneration of consultants, agents or representatives) in regard to the marketing of that film in any export country;
- b) in advertising or otherwise securing publicity for that film in an export country (excluding expenditure incurred in sponsoring or promoting any sporting or any other event in a country other than the export country) or in soliciting orders for that film in, or participating in trade fairs in, export countries;
- c) in providing without charge samples or technical information in respect of that film to prospective customers in any export country;
- d) in bringing prospective customers from any export country to the Republic;
- e) in connection with the preparation or submission of tenders or quotations in respect of that film to be exported to any export country;
- f) in respect of commissions or other remuneration for orders for that film exported to any export country or the clearing or forwarding of that film in that country;
- g) by way of certification fees charged by the South African Certification Authority in respect of that film which has been exported;
- h) by way of expenditure (including search and application fees) incurred in obtaining in any export country the registration of any copyright or patent or the restoration of any copyright or patent or the registration of any design or trade mark or the extension of the term or registration period of, or renewal of the registration of, any copyright, patent, design or trademark;
- i) in connection with the design of any special label or packaging of that film, if the Commissioner is satisfied that the requirements as to the labeling or packaging of that film differ materially from, or are additional to, the requirements of the South African market; and
- j) by way of membership fees of any institution or body which-
 - (i) is effectively engaged in export promotion of films;
 - (ii) does not receive financial support from the State; and
 - (iii) is approved by the Director-General of Trade and Industry.

“South African export film” (SAEF) means a film in respect of which –

a) at least 75 per cent of –

- (i) the total amount of production cost and post-production cost (excluding amounts paid or payable to persons nominated under subparagraph (ii) is incurred and is paid or payable in the Republic; and
- (ii) the total amount paid or payable, whether by a film owner or any other person, in respect of services rendered by persons employed directly in connection with the production of the film (other than a maximum of four such persons nominated by the film owner for the purposes of this definition) is paid or payable to persons ordinarily resident in the Republic: Provided that where any person so nominated is replaced by another person who assumes responsibility for such first-mentioned person’s duties, the amounts paid or payable to both such persons shall be deemed to have been paid or to be payable to one person; and

b) at least 50 per cent of –

- (i) the production cost and post-production cost; and
- (ii) any expenditure similar to production which is incurred in connection with the film by any person other than the film owner, is incurred and is paid or payable in the Republic.

c) Basic requirements and limitations

The SAEF marketing deduction is subject to several basic requirements and limitations –

- it may only be taken in respect of marketing expenditure, as defined, incurred in respect of a SAEF (SAEF requirement);
- the expenditure must be incurred in the production of income (income requirement);
- any expenditure may be deducted only once and may not exceed, under any circumstances, the SAEF marketing expenditure actually incurred by the film owner (actual cost limitation); and
- if some or all of the SAEF marketing expenditure has been paid or financed through loans or credit, the SAEF marketing deduction may only be claimed if and to the extent that the film owner is “at risk” for the amount of any such loan or credit still owed on the last day of the year of assessment (at risk limitation).

This deduction is also explicitly subject to the provisions of section 11 of the Act, including the so-called general deduction formula in section 11(a). The provisions of section 11 are beyond the scope of this brochure.

(i) SAEF requirement

The SAEF marketing deduction may only be allowed in respect of marketing expenditure incurred in respect of a SAEF. Marketing expenditure incurred in respect of a film that is not a SAEF may be deducted by a film owner, if at all, only under the normal rules governing the deductibility of expenditure under the Act (or, where applicable, the allowance of capital losses under the Eighth Schedule).

(ii) Income requirement

The film owner may only claim the SAEF marketing deduction in respect of marketing expenditure incurred in the production of income. Unlike the film allowance, however, the SAEF marketing deduction is not subject to the “completion date requirement”. Thus, to the extent that a film owner incurs marketing expenditure in respect of a SAEF prior to the year of assessment in which the completion date falls, the film owner may nonetheless claim the SAEF marketing deduction for those amounts, subject to the other requirements and limitations of sections 11 and 24F.

(iii) Actual cost requirement

The SAEF marketing deduction may not, in the aggregate, exceed the total marketing expenditure actually incurred by the film owner in respect of that SAEF.

The “at risk” limitation is discussed in paragraph 2.4.5 below.

2.4.4 The Print Cost Deduction

a) General rule

Under section 24F, a film owner is also allowed a deduction for print cost incurred in respect of a film.

b) Defined terms

For purposes of the print cost deduction, unless the context otherwise indicates –

“print cost” in relation to a film, means any expenditure incurred by the film owner in the making of copies of the film.

c) Basic requirements and limitations

The print cost deduction is subject to several basic requirement and limitations –

- the expenditure must be incurred in the production of income (income requirement);
- any expenditure may be deducted once and only once and may not exceed, under any circumstances, the actual print cost expenditure actually incurred by the film owner (actual cost limitation); and
- if some or all of the print cost expenditure has been paid or financed through loans or credit, the print cost deduction may only be claimed if and to the extent that the film owner is “at risk” for the amount of any such loan or credit still owed on the last day of the year of assessment (“at risk” limitation).

(i) Income requirement

The film owner may only claim the print cost deduction in respect of print costs incurred in the production of income.

(ii) Actual cost limitation

The print cost deduction may not, in the aggregate, exceed the total print costs actually incurred by the film owner.

The “at risk” limitation is discussed in paragraph 2.4.5 below.

2.4.5 The “at risk” limitation

a) Basic concepts

The special deductions under section 24F are all subject to the “at risk” limitation. This limitation is intended to counter “abusive” schemes that manipulate tax relief to create claims for losses in excess of the capital, if any, actually invested by a taxpayer in a film.

If a film owner uses a loan or credit to finance expenditure, and that loan or credit is still outstanding, in whole or in part, on the last day of the year of assessment the film owner must reduce the amount of any film allowance, SAEF marketing deduction or print cost deduction by any portion of that outstanding balance for which the film owner is deemed not to be “at risk”. Due to the proliferation of abusive tax schemes, the “at risk” limitation often involves complex technical issues. Some of these issues are discussed in more detail in section 2.4.6 below.

In respect of the basic “at risk” concept, it may be useful to keep in mind the difference between recourse and non-recourse financing. In recourse financing, the lender is typically entitled to repayment from the borrower even if the income from the financed project and/or the value of the assets acquired are insufficient to service the loan. By contrast, in non-recourse financing, the lender is only entitled to repayment from the profits of the financed project and/or the value of the assets acquired - the lender has no “recourse” against the borrower or the borrower’s other assets.

EXAMPLE 6

Facts:

Company E purchases film equipment of R100 000 for use in producing a feature film during its 2004 year of assessment. It finances the purchase of the film equipment in its 2004 year of assessment in part with a recourse loan from Bank Y for R80 000. The loan is unconditionally payable in full in 2006 and Company D is liable for repaying it, regardless of the performance of the film or the value of the equipment.

Solution:

Under the circumstances, Company E is deemed to be “at risk” in respect of the outstanding balance of R80 000 and may claim a deduction for the film allowance in the amount of R100 000 in the 2004 year of assessment. Company E may not claim any further deduction for the film allowance when it actually repays the loan. It is assumed for purposes of this example that Company E has not entered into any other transaction, agreement, arrangement, understanding or scheme either before or after incurring the expenditure in question.

EXAMPLE 7

Facts:

Company E purchases film equipment of R100 000 for use in producing a feature film during its 2004 year of assessment. It finances the purchase of the film equipment in its 2004 year of assessment with a non-recourse loan from Bank Z for R80 000, payable in 2006. In particular, Bank Z is only entitled to repayment from the profits, if any, from the film and/or the value of the film equipment, which has been pledged as security for the loan.

Solution:

Under the circumstances, Company E is not “at risk” in respect of the outstanding balance of R80 000 on the last day of the 2004 year of assessment. Consequently, the amount of the film allowance Company E may claim for that year is limited to R20 000. The remaining expenditure of R80 000 may be carried forward to future years of assessment and deducted only if and when the “at risk” limitation is met.

b) Carry forward of disallowed amounts

In general, the amount of the special deduction that has not been allowed during a year of assessment may be carried forward to subsequent years of assessment.

c) When a film owner is deemed to be “at risk”

A film owner is deemed to be “at risk” only to the extent that the payment of expenditure incurred, or the repayment of a loan or credit used to finance expenditure, would result in an economic loss to the film owner were no income to be received by or accrue to the film owner in future years from the exploitation of the film.

The determination of whether, or to what extent, a film owner is “at risk” must be made having regard to any transaction, agreement, arrangement, understanding or scheme entered into before or after any expenditure has been incurred.

EXAMPLE 8

Facts:

Taxpayer F, an individual, enters into an arrangement with Producer P and Bank Z. As part of this arrangement, Taxpayer F enters into a recourse loan with Bank Z in order to finance the acquisition of a film from Producer P. The loan is repayable, in full, at the end of ten years. As part of the same arrangement, Taxpayer F and Producer P also enter into a side agreement, either directly or through one or more accommodating parties, pursuant to which Producer P (or an accommodating party) agrees to repurchase the film in ten years for an amount that is equal to or greater than the amount of the loan, without regard to the actual performance of the film or to its actual market value.

Solution:

In this situation, while the recourse nature of the loan might, in isolation, give rise to an impression that Taxpayer F would suffer an economic loss were no income to be derived from the exploitation of the film (since the repayment of the loan would then have to be financed out of the investor's own resources), the repurchase agreement ensures that the investor will immediately, at a minimum, be made whole for any amount due under the loan. It should be noted that the repurchase of the film involves a transaction of a capital nature and therefore does not result in income from the exploitation of the film.

d) When a film owner is not deemed to be "at risk"

There are situations where a film owner will not be deemed to be "at risk". A simple example would be a situation in which the film owner finances the acquisition of certain equipment with a non-recourse loan. Another example would be a situation in which a taxpayer invests in the film through *en commandite* partnership. In such a partnership, the undisclosed partner's liability is limited to the amount invested and such partner cannot be called upon to make any further contributions to the partnership should further debts be incurred by the partnership, thus the partner will only be "at risk" to the extent of the contribution.

Other examples of situations in which a film owner would be deemed not to be "at risk" include the following -

- the film owner's liabilities would be waived or expunged if certain minimum sales targets are not reached;
- the film owner is reimbursed for part or all of the losses as a result of a binding contract or stop-loss agreement between the film owner and any other person (the film owner is only "at risk" for the portion of capital for which he is not entitled to reimbursement); or
- the payment of costs is guaranteed in whole or in part by a third party.

2.4.6 Abusive Film Schemes/Film Partnerships

Unfortunately, South Africa has experienced some instances in which taxpayers have attempted to abuse the deductions under section 24F. Similar attempts have also arisen in other countries that had tried to assist their local film industries through similar allowances, including Australia, New Zealand and the United Kingdom. Not surprisingly, these abuses prompted a crack down by the local revenue authorities and in some cases forced those countries to withdraw or restrict the allowances in question.

These abusive schemes can take a number of different forms, but typically involve the formation of a partnership comprised of high net worth South African residents. A common example involves a purported sale and leaseback of so-called "film rights" between a film's producers and such a partnership.

These abusive schemes generally have a number of common features, including one or more of the following:

- The payment of an inflated or non-arm's length price for the acquisition of so-called "film rights";
- A high level of gearing or leverage by the partnership;
- A circular flow of funds (in which the proceeds from the loan used to gear or leverage the partnership's "investment" in the so-called "film rights" flow back to the lender itself, or a connected person to that lender or the film's producer, or to an accommodating party) and are used to fund or "guarantee" the payments due under the purported "lease" or "license back" arrangement;
- The absence of commercial film risk for the partnership and/or partners; or
- A pre-tax return to the partnership that is only a fraction of the after-tax return to the partners, after taking the anticipated film allowance, SAEF marketing deduction and/or print cost deduction into account.

Schemes/transactions that have the effect of avoiding or postponing the liability for tax will be closely scrutinized by the Commissioner of SARS. Taxpayers that participate in abusive film schemes may also be subject to applicable additional tax, interest and penalties.

EXAMPLE 9

Facts:

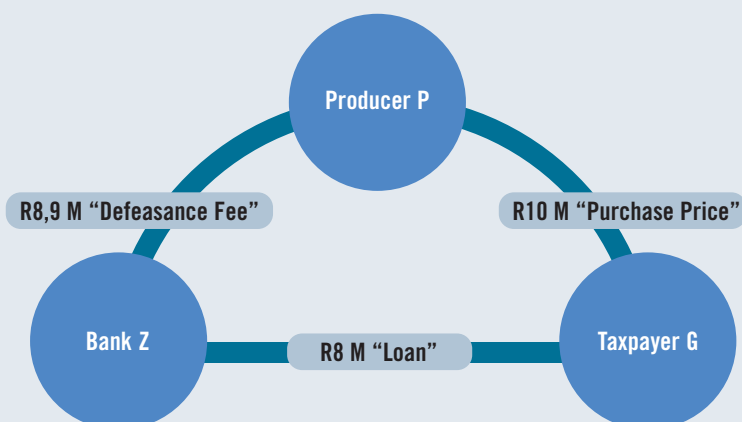
Taxpayer G, a high net worth South African resident, enters into a complex arrangement with Producer P and Bank Z. Pursuant to this arrangement, Producer P purports to "sell" certain "film exploitation rights" to Taxpayer G. These "film rights" are in fact subordinate to primary exploitation rights for the film that have already been sold to *bona fide* distributors in all the major potential markets for the film. Despite the limited value of these subordinated rights, the purchase price is arbitrarily set at R10 million, the total amount of the production and post-production costs for the film.

As part of the same arrangement, Taxpayer G also enters into what purports to be an R8 million loan with Bank Z in order to "finance" the "acquisition" of the subordinated "film rights" in question. The full principal amount of this loan is repayable at the end of ten years.

Also as part of the same arrangement, Producer P also enters into an agreement with Taxpayer G pursuant to which Producer P agrees, either directly or through one or more accommodating parties, to immediately license back the subordinated "film rights" in exchange for a license fee approximately equal to the carrying charges on Taxpayer G's loan with Bank Z. Producer P also enters into a second agreement with Taxpayer G pursuant to which Taxpayer G agrees to sell, and Producer agrees, either directly or through one or more accommodating parties, to repurchase, the subordinated "film rights" for R8,9 million at the end of ten years, without regard to the actual performance of the film or the actual market value of the subordinated "film rights".

Finally, as part of the same arrangement, Producer P enters into agreement with Bank Z pursuant to which Producer P purports to "pay" R8,9 million to Bank Z in exchange for Bank Z's assumption of Producer P's obligations to Taxpayer G under the "license back" and "repurchase" agreements (in addition, Producer P also may pay Bank Z a fee for structuring the transaction).

Diagram: Circular Cash Flow in an Abusive Film Scheme



Solution:

The transaction in question contains all of the features common to abuse film schemes discussed above:

- Taxpayer G paid an inflated, non-arm's length price for the subordinated film rights;
- Taxpayer G's investment is highly leveraged, with a 4 to 1 debt/equity ratio;
- There is a circular flow of funds among the parties to the transaction, with the loan proceeds moving from Bank Z through Taxpayer G and Producer P and back to Bank Z all on the same day;
- Taxpayer G bears no commercial risk in connection with the film itself; and
- The pre-tax return to Taxpayer G is only a fraction of Taxpayer G's after-tax return, after taking into account the anticipated film allowance. In particular, the pre-tax return to Taxpayer G consists of the minimal difference between the "license" fee payable by Producer P and the carrying charges on the purported loan with Bank Z. More important, Taxpayer G has actually locked itself into a pre-tax capital loss of R1,1 million in connection with the subordinated "film rights", being the difference between the R10 million purchase price and the R8,9 million price under the "repurchase" agreement. By contrast, the after-tax return to Taxpayer G would take into account the anticipated film allowance of R4 million (R10 million x 40%), an amount equal to twice Taxpayer G's purported "equity" investment in the "film rights".

The Commissioner will disallow the entire film allowance claimed by Taxpayer G. Taxpayer G will also be subject, *inter alia*, to the 200 per cent additional tax under section 76 of the Act.

2.5 CAPITAL GAINS TAX (CGT)

As a final step in the determination of the taxable income of a film owner, the net capital gain on the disposal of capital assets must be taken into account. The amount of capital gains or losses that are to be taken into account in determining this net capital gain is calculated in terms of the provisions of the Eighth Schedule to the Act. As CGT only came into operation on 1 October 2001, only the portion of a capital gain/loss attributable to the period subsequent to 1 October 2001 will be taken into account in the determination of film owner's liability for CGT purposes.

A capital gain must be included in the taxable income of a film owner and must be declared in such person's return of income for the year of assessment in which the asset was disposed of. A capital loss will only be deducted from any capital gains made on the disposal of capital assets during a year of assessment. To the extent that no capital gains were made during such a year of assessment, the balance of the loss will be carried forward to succeeding years to be set off against future capital gains.

A capital gain arises when the proceeds upon the disposal of a capital asset exceed the base cost of that asset and a capital loss arises when a capital asset is disposed of and the base cost exceeds the proceeds on disposal. Assets such as land and buildings, plant and machinery, listed and unlisted shares as well as rights of any kind, for example intellectual property rights and copy rights are regarded as capital assets.

Where a film owner is an individual, 25 per cent of the net capital gain will be included in the person's taxable income and where the film owner is a company or a trust, 50 per cent of the net capital gain will be included in the person's taxable income.

Individuals and special trusts (as defined in the Eighth Schedule to the Act) are entitled to an annual exclusion of R10 000 before capital gains/losses are taken into account. This exclusion does, however, not apply to companies, close corporations and trusts.

Further information regarding CGT is available on the SARS website www.sars.gov.za and can also be obtained from SARS branches.

PART B: OTHER TAXES/DUTIES/LEVIES/CONTRIBUTIONS

Film owners are also liable for other taxes, duties, levies and contributions administered by SARS.

3 EMPLOYMENT INCOME RELATED TAXES/LEVIES/CONTRIBUTIONS (PAYE, SDL AND UIF)

A film owner, who is an employer as defined below, will be obliged to withhold employees' tax in the circumstances where such film owner pays remuneration to an employee. Such film owner is also obliged to pay a Skills Development Levy (SDL) and to make contributions to the Unemployment Insurance Fund (UIF) in respect of such remuneration paid or payable to any employee. Details about the payment of such amounts are set out below.

3.1 EMPLOYEES' TAX (PAYE)

3.1.1 Employers are liable to withhold employees' tax

Any film owner is required to withhold employees' tax from an amount payable to another person if the following three elements are present: employer, employee and remuneration. The employment contract that is entered into by the person rendering a service and the one making a payment will determine whether these three elements are present.

A film owner that is obliged to withhold and pay over employees' tax must register as an employer for these purposes at SARS. The amount to be withheld should be determined in accordance with the tax deduction tables that can be found in the "Guidelines for Employers" (more commonly known as the EMP 10) which is available on the SARS website www.sars.gov.za and can also be obtained from SARS branches.

An employer, employee and remuneration are defined in paragraph 1 of the Fourth Schedule as:

"employer" means any person (excluding any person not acting as a principal, but including any person acting in a fiduciary capacity or in his capacity as a trustee in an insolvent estate, an executor or an administrator of a benefit fund, pension fund, provident fund, retirement annuity fund or any other fund) who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any other person under the provisions of any law or out of public funds (including the funds of any provincial council or any administration or undertaking of the State) or out of funds voted by Parliament or a provincial council.

“employee” means –

- (a) any person (other than a company) who receives remuneration or to whom remuneration accrues;
- (b) any person who receives any remuneration or to whom any remuneration accrues by reason of any services rendered by such person to or on behalf of a labour broker;
- (c) any labour broker;
- (d) any person or class or category of person whom the Minister of Finance by notice in the Gazette declares to be an employee for the purposes of this definition;
- (e) any personal service company;
- (f) any personal service trust; and
- (g) any director of a private company who is not otherwise included in terms of paragraph (a).

“remuneration” means any amount of income which is paid or payable to any person by way of salary, leave pay, wage, overtime pay, bonus, gratuity, commission, fee, emolument, pension, superannuation allowance, retiring allowance or stipend, whether in cash or otherwise and whether or not in respect of services rendered.....

The following amounts paid or payable to an employee are, for example, regarded as remuneration:

- Salary, overtime fee, bonus, wage, leave gratuity;
- 50 per cent of a travelling allowance;
- Pension, annuity, lump sum payment and voluntary awards;
- Commission; and
- Restraint of trade compensation

The following amounts are, for example, not regarded as remuneration:

- Amounts paid or payable to an employee for reimbursement of business expenses incurred i.e. expenses incurred on behalf of the employer on an agency basis in the course of his or her employment; and
- Amounts paid or payable to common law independent contractors, but excluding amounts paid or payable to independent contractors who are 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 or to whom the amounts paid payable to them are payable at regular daily, weekly, monthly or other intervals.

Any film owner that, as an employer or a representative employer pays remuneration to an employee is obliged to withhold employees' tax from such amount and pay it over to SARS within 7 days after the end of the month during which the amount was deducted or withheld. Failure to make such payments within the prescribed periods, will be regarded as an offence and will result in the payment of penalties and interest at the prescribed rate of interest.

Further information regarding the employer/employee relationship and deduction of PAYE in the case of independent contractors can be obtained in Interpretation Note No. 17 that is available on the SARS website www.sars.gov.za under “Interpretation Notes” and can also be obtained from SARS branches.

3.1.2 Employees' tax to be withheld from visiting artists and crew members

In determining whether the amount paid or payable to a visiting artist, crew member, etc. is subject to the deduction of employees' tax, it is necessary to determine whether an employer-employee relationship exists between the person that pays an amount to the visiting artist and the visiting artist. This can be determined from any contract that is entered into between these two parties and any further agreements entered into by the person that pays an amount to the visiting artist and any third party.

An amount of employees' tax should be withheld from any remuneration paid or payable to a person that is not a South African resident in respect of services rendered by such a person in South Africa. The provisions of any DTA concluded between South Africa and the country in which the visiting artist is regarded as a resident should, however, be taken into account in the determination of the amount that will be subject to employees' tax in South Africa.

If an amount paid or payable to a visiting artist is not regarded as remuneration (as defined in the Act), such visiting artist will have to submit a return of income in respect of such receipt or accrual and make provisional tax payments in respect of his or her liability for normal tax. The provisions of any DTA that may exist between South Africa and the country of residence of such artist should be taken into account in the determination of such person's liability for normal tax in South Africa.

3.1.3 Labour brokers

A labour broker either makes available the employees of such labour broker to perform work for a client, or obtains workers for a client for reward. All payments made to a labour broker are subject to employees' tax since they are "employees" as defined. Only in the event that the labour broker has an exemption certificate (IRP 30) will the client of the labour broker not have to deduct employees' tax.

All persons working for a labour broker are employees as defined and the labour broker will be obliged to withhold employees' tax from all payments made to them. A labour broker not in possession of an exemption certificate will also be denied any deductions for income tax purposes except for salaries paid to their employees.

Many agencies also act as labour brokers. It is important to examine the employment contract or other contracts to determine the relationship between the artist, the production company and in certain instances, the agent.

3.2 SKILLS DEVELOPMENT LEVIES (SDL)

As an employer, a film owner is also obliged to pay skills development levies amounting to one per cent of any remuneration paid or payable to an employee. Skills development levies are, however, not payable in respect of, for example, remuneration payable by way of pension, lump sum payments from annuity or pension funds and amounts payable to learners in terms of registered learnership agreements. The remuneration in respect of employees earning below the threshold is also taken into consideration for the purposes of calculating the skills development levies.

The levies must be paid to SARS not later than 7 days after the end of the month in respect of which the levies are payable. Failure to make such payments within the prescribed periods will be regarded as an offence and will result in the payment of penalties and interest at the prescribed rate of interest. Further information regarding skills development levies is available on the SARS website www.sars.gov.za and can also be obtained from SARS branches.

3.3 UNEMPLOYMENT INSURANCE FUND CONTRIBUTIONS (UIF)

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

Unemployment insurance contributions are, however, not payable in respect of remuneration paid or payable by way of any pension, superannuation, annuity, compensation for restraint of trade, termination or loss of employment, lump sum from pension, provident or retirement annuity fund, or commission.

The unemployment insurance contributions are calculated based on the gross remuneration before the deduction of pension fund and retirement annuity fund contributions and, where the employee is over the age of 65 years, medical aid contributions.

The employer must pay over a total contribution of two per cent of the total remuneration paid or payable to the employees, of which one per cent must be deducted from the employees' remuneration.

Where an employer is registered at SARS for employees' tax or skills development levies purposes, the amounts must be paid over to SARS not later than 7 days after the end of the month in respect of which the contributions should be made. Where an employer is, however, not registered at SARS for employees' tax or skills development levies purposes, the amounts must be paid over to the Unemployment Insurance Commissioner not later than 7 days after the end of the month in respect of which the contributions should be made. Failure to make such payments within the prescribed period will be regarded as an offence and will result in the payment of penalties and interest at the prescribed rate of interest.

4 VALUE-ADDED TAX (VAT)

A film owner will in certain circumstances, as a supplier of goods and/or services, be required to register as a vendor for VAT purposes and to pay the balance of output tax to the SARS after deducting as a credit, the amount of input tax incurred of supplies received for the tax period concerned.

4.1 WHEN MUST A FILM OWNER REGISTER FOR VAT?

The VAT Act requires any film owner who carries on an enterprise to register as a vendor if the turnover of taxable supplies of that film owner exceeds R300 000 within any consecutive twelve month period or where there are reasonable grounds to believe that turnover in the next twelve months will exceed R300 000. A person can also register voluntarily if turnover in a twelve month period has exceeded or is likely to exceed R20 000.

An enterprise is defined in the VAT Act as follows:

“enterprise” means in the case of a vendor other than a local authority, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club.....

Royalties or other income of film owners as a result of, or in connection with, the rights from a film (or any other taxable supplies) will fall into the scope of “consideration”. If the consideration is earned in the course of the conducting of an enterprise, that film owner may be liable to register for VAT. Similarly, any supplier whose total taxable supplies in a 12 month consecutive period exceed the R300 000 registration threshold should charge VAT on supplies made to a film owner.

It should be noted that a partnership or joint venture is regarded as a “person” for VAT purposes. An enterprise which is carried on in the form of a partnership or joint venture may, therefore, also be liable to register and account for VAT.

4.2 VAT RATES AND TYPES OF SUPPLIES

VAT is calculated at two rates, namely a standard rate of 14 per cent and a zero rate (0 per cent rate), depending on the nature of the supply.

Examples of consideration received in respect of taxable supplies that are subject to VAT at 14 per cent, are the following:

- Income which relates to the exploitation of the rights pertaining to the film of any kind and activities taking place in the Republic, for example box office sales, royalties, video sales, distribution fees and sale of screening rights or copyrights;
- Rental income from assets leased to other person in the Republic; and
- Sale or disposal of assets acquired to make a film after the film has been completed, for example sale of the lightning and sounding equipment.

Examples of consideration received in respect of taxable supplies that are subject to VAT at 0 per cent, are the following:

- Consideration received in respect of the supply of the intellectual property rights, where and to the extent that it is for the use of those rights outside the Republic;
- Fees for services physically performed outside the Republic;
- The physical exportation of the film or other goods from the Republic;
- Consideration received for filming, producing and other services performed in South Africa for a person who is not a resident in the Republic, not a registered vendor or not in the Republic at the time when the services are rendered; and
- Grants or subsidies received from the public or local authority for the making of a film (except for the making of a film for the use of such authority).

Both these rates are levied on supplies known as “taxable supplies”.

A “taxable supply” is defined in the VAT Act as follows:

“taxable supply” means any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a), including tax chargeable at the rate of zero per cent under section 11.

There is also a limited range of goods which is exempt from VAT, for example the supply of financial services and the letting of land outside South Africa. These are commonly known as exempt supplies. The main difference between zero and exempt supplies is that registered vendors are not allowed to claim input tax on goods and services acquired to make exempt supplies. On the other hand, input tax may be claimed on goods and services acquired to make zero rated supplies. If a person only makes exempt supplies he cannot be registered as a vendor.

4.3 TAX PERIODS AND PAYMENT OF VAT TO SARS

Film owners that are vendors are required to pay over the tax that they charge on taxable supplies (known as output tax) to SARS at the end of each tax period. They are entitled to claim back the tax charged on them (known as input tax) for the purchasing of goods or services to produce taxable supplies. Most vendors pay VAT over every month or two months, depending on the taxable turnover and the requirements of that vendor.

Failure to make such payments within the prescribed periods will be regarded as an offence and will result in the payment of a penalty of 10 per cent and interest at the prescribed rate. On the other hand, where any amount is refundable to the vendor, interest at the prescribed rate will be payable by the Commissioner.

4.4 ON WHICH AMOUNTS MAY FILM OWNERS CLAIM VAT (INPUT TAX)?

Input tax may be claimed by a film owner on any expenses (except for a few exclusions) that include VAT at the standard rate which have been incurred for the purposes of making taxable supplies, for example, the production of a film.

The following are examples of VAT inclusive expenses on which input tax may be claimed:

- Marketing and advertising expenses;
- Capital expenses such as cameras, sound and lighting equipment;
- Service fees and commission for agents, designers and promoters who are registered for VAT;
- Film, stage props, clothing and other consumables;
- Royalties paid for the use or outright purchase of copyrights from other VAT registered film owners in South Africa for use in the country; and
- Transport cost such as airfare for the production staff and movement of production equipment between shooting locations.

The following are examples of expenses on which input tax may not be claimed:

- Petrol, diesel and other supplies where VAT has not been included in the consideration at the standard rate;
- Expenses which are incurred for private (non-enterprise) purposes or for the purpose of making exempt supplies;
- Salaries and wages of employees who earn remuneration;
- The acquisition of a motor car (including acquisition by means of rental, hire, installment sale and financial lease);
- Club subscriptions of a recreational nature, for example country club membership fees; and
- Expenses relating to entertainment, unless the vendor is in the business of continuously or regularly supplying entertainment in the ordinary course of that enterprise at a charge which covers all the direct and indirect costs (or open market value) of making the supply.

Further information regarding the registration and payment of VAT is available on the SARS website www.sars.gov.za and can also be obtained from SARS branches.

5 CUSTOMS DUTIES

A film owner could be liable for the payment of customs duties when goods are imported. Such a person may enter the Republic at any appointed place of entry. All the goods in the film owner's possession must be declared to a customs official at the port of entry. When dutiable goods are in the possession of the film owner, the relevant duties and VAT must be paid thereon. Customs duties are usually calculated on the value of the goods, but certain goods attract specific rated duties where the duty is based on the quantity of goods imported.

Non-resident film-owners and film-producers have two options of importing their film-making equipment into the Republic free from customs duties and Value-Added Tax (VAT), which are briefly discussed below.

5.1 CUSTOMS DECLARATION - NON RESIDENTS

5.1.1 Customs rebate for goods temporarily admitted for specific purposes

Schedule 4 to the Customs and Excise Act, 1964 contains provisions for a full customs rebate in respect of goods temporarily admitted for specific purposes. The rebate in respect of the temporal admission of film-making equipment is contained under the provisions of Rebate Item 480.15. This rebate item provides for a full rebate of customs duty in respect of professional equipment (including ancillary apparatus and accessories) owned by non-residents and which would otherwise be dutiable in terms of Schedule 1, Part 1 or 2, of the Customs and Excise Act. This equipment must be used solely by or under the supervision of the non-resident.

The equipment would have to be clearly identifiable and would go through the normal Customs clearing route. It would have to be re-exported through the same procedure within six months from the date of entering the Republic. The Commissioner may require security to be lodged in order to cover the duty applicable to such equipment, and this is refunded after the goods have been re-exported.

5.1.2 Agreement on Temporary Admission Carnet (ATA Carnet)

The ATA Carnet is an international Customs document that is accepted as a Customs declaration for a specified period. This document is approved by member countries who are signatories to the Convention on Temporary Admission-The Istanbul Convention (26 June 1990) as well as the Customs Convention on the ATA Carnet for Temporary Admission of Goods-The ATA Convention (18 December 1975).

The ATA Carnet serves as an internationally valid cover for import duties and taxes on specified goods. The owner of the film equipment has to register the goods to be imported into the Republic with a Chamber of Commerce in his resident country in order to obtain an ATA Carnet in respect of the equipment. The ATA Carnet simplifies the temporal importation of goods into the Republic and there is no additional security required. The equipment can, therefore, remain in the Republic for the validity period of the ATA Carnet (the validity may not exceed one year).

5.2 CUSTOMS DECLARATION - RESIDENTS

There is no special Customs rebate available for goods temporarily admitted for specific purposes for residents and they cannot make use of an ATA Carnet either. However, the Commissioner may grant permission for temporal admission of goods duty-free, provided that the goods would be re-exported in the same state. These provisions are contained in Rebate item 490.90 for goods not specified elsewhere in other Rebate items relating to the temporary admission of goods. Therefore, residents wishing to temporarily import film making equipment without payment of customs duty may apply to the Commissioner for permission to admit such equipment in terms of the above-mentioned Rebate item. Failure to do so will lead to full payment of customs duty and VAT on the admitted goods.

Further information on Customs duties is available on the SARS website www.sars.gov.za and can also be obtained from SARS branches.

6 EXCISE DUTIES

A film owner could be liable for the payment of excise duties.

Excise duty (based on the specific quantity or volume of the product) is levied on certain locally manufactured products and a counter-veiling duty equal to the specific excise duty, is levied on their imported counterparts. This duty is levied as a specific duty on certain items such as tobacco products, liquor products, petroleum products and hydro-carbons. The excise duty is included in the purchase price of the goods.

Ad Valorem Excise Duty (based on the value of the product) is levied on various goods such as cosmetics, television receptors and audio equipment. For example an excise duty of 5 per cent is payable in respect of photocopying equipment and TV sets and 7 per cent on video recording machines, video tape duplicators, still image video cameras and digital cameras. The current rate of ad valorem duty in respect of these goods is 7 per cent.

As liability for excise duty is based on consumption within the local country borders relief from excise duty, in the form of full rebates, is granted where excisable products are exported.

7 DONATIONS TAX

A resident film owner could be liable for the payment of donations tax. Unlike other taxes, donations tax is not imposed on income, but on the transfer of assets or wealth. The purpose of donations tax is to discourage the avoidance of tax and estate duty by the distribution of assets to other persons.

A donation and property are defined in section 55 as follows:

“donation” means any gratuitous disposal of property or any gratuitous waiver or renunciation of a right.

“property” means any right in or to property whether movable or immovable, corporeal or incorporeal (tangible or intangible), wheresoever situated.

Donations tax is payable by the donor on the value of any property disposed of under a donation at a rate of 20 per cent. Where property is disposed of by a film owner for an inadequate amount, a “deemed donation” is regarded to have taken place.

Donations made by a film owner that is a natural person are exempt up to an amount of R30 000 per year of assessment and in respect of a film owner that is not a natural person (e.g. a trust or company) up to an amount of R10 000 per year of assessment.

Donations tax must be paid within three months, or such longer period as the Commissioner of SARS may allow, from the date upon which the donation has taken effect. A donor and the donee are jointly and severally liable for the tax. Failure to pay the donations tax within the prescribed period will be regarded as an offence and will result in the payment of interest.

8 WITHHOLDING TAX ON ROYALTIES

A resident film owner will be responsible to withhold and pay over a final withholding tax of 12 per cent in respect of royalties or similar payments made to non-resident film owners for the right of, or the grant of permission to use in the Republic –

- certain patents, designs, trademarks, copyright, models, patterns, plans, formulas or processes or any property of a similar nature; or
- any motion picture film, or any film or video tape or disc for use in connection with television, or any sound recording or advertising matter used or intended to be used in connection with such picture, film or video tape or disc. Such tax must be paid over to SARS within 14 days after the end of the month during which the liability to pay the royalty was incurred.

No final withholding tax should, however, be withheld from any amount of royalty that is received by or accrues to any –

- company which is not a resident, if the amount is derived by the company from a trade carried on through a branch or agency in the Republic and the amount is subject to tax in the Republic; or
- person (other than a person whose place of residence is in a neighbouring country) in respect of the use in any printed publication of any copyright as aforesaid, unless it is used for advertising purposes in connection with any motion picture or film or in connection with television.

Failure to withhold and pay over such tax within the prescribed period will be regarded as an offence and will result in the payment of interest.

9 TRANSFER DUTY

A film owner will be liable for the payment of transfer duty on acquisition of any property (land, buildings and certain real rights). All transactions relating to a taxable supply of goods and subject to VAT are, however, exempt from transfer duty.

Transfer duty is calculated as follows:

ENTITY	FAIR VALUE*	RATE
Natural person	On the first R150 000 of purchase consideration	0%
	On the amount that exceeds R150 000 but not R320 000	5%
	On the amount that exceeds R320 000	8%
Person other than a natural person	On purchase consideration	10%

*Fair value is usually the purchase price

Failure to pay transfer duty within the prescribed period will be regarded as an offence and will result in the payment of interest and penalties.

Further information regarding the payment of transfer duty is available on the SARS website www.sars.gov.za and can also be obtained from SARS branches.

PART C: GENERAL (INCOME TAX)

The following general administrative provisions of the Act are also applicable to film owners:

10 REGISTRATION AS A TAXPAYER

Any resident that carries on a trade as a film owner in the Republic or in a foreign country, or non-resident that carries on a trade as a film owner in the Republic, is obliged to register as a taxpayer at SARS.

11 SUBMISSION OF INCOME TAX RETURNS

A film owner like any other registered taxpayer is, within a prescribed period, required to submit an income tax return at the end of each year of assessment. Late submission or failure to do so is an offence punishable by the imposition of fines, penalties and additional taxes.

12 YEAR OF ASSESSMENT

The year of assessment of a film owner that is a natural person or a trust will commence on 1 March of a year and end on 28 or 29 February of the following year.

The year of assessment of a film owner that is a company or close corporation will for tax purposes be the same as its financial year for accounting purposes. Should the year of assessment of a company or close corporation change for accounting purposes, the Commissioner of SARS needs to approve a change in the financial year of the company for tax purposes.

13 FILM OWNERS ARE PROVISIONAL TAXPAYERS

Film owners must register as provisional taxpayers, as they derive income from a trade (in the case of a company this will be done automatically on its registration). Income from carrying on a trade does not constitute "remuneration" and is, therefore, not subject to employees' tax.

Provisional tax is not a separate tax, but simply a provision for the final tax liability of a person for a particular year of assessment. All provisional tax payments made during a year of assessment will be allowed as a credit when a person's normal tax liability is determined in respect of that year of assessment. Failure to pay provisional tax may lead to the imposition of interest and penalties.

Two provisional tax payments must be made by a film owner during a year of assessment as follows:

- Where a film owner is a natural person or trust, at the end of August and February; and
- Where a film owner is a company or close corporation, the first payment must be made six months before its year end and the second payment by the end of its year of assessment.

A third voluntary payment can be made by a film owner six months after the end of the year of assessment. If the year of assessment ends at the last day of February, the third payment must be made within seven months after the end of the year of assessment.

Further information regarding the payment of provisional tax can be obtained on the SARS website www.sars.gov.za in the "Guide for Provisional Taxpayers" which is available under Guidelines for Employers: 2004 Tax Year and can also be obtained from SARS branches.

14 OBJECTIONS AND APPEALS

Where a film owner is not satisfied with an assessment issued or any modification made by the Commissioner to the declared income of such film owner and/or any deductions or allowances claimed in the return of income of such film owner, the film owner has the right to object to such an assessment.

Such an objection must state the grounds on which the objection is lodged and must reach the Commissioner within a period of 30 business days after the date of assessment, viz the due date of the assessment.

The Commissioner will either –

- allow the objection;
- disallow the objection; or
- allow the objection in part and disallow the other part.

Where an objection is disallowed in full or in part, a film owner has the right to appeal to the disallowance of the objection. The appeal must be delivered to the Commissioner within a period of 30 business days from the date of the disallowance of the objection.

Further information regarding the objection and appeal procedures is available on the SARS website www.sars.gov.za under "Dispute Resolution" and can also be obtained from SARS branches.

15 RETENTION OF RECORDS

Any film owner who has submitted a income tax return is required to retain all records relevant to that return for a period of five years from the date upon which the return relevant to the last entry in those records was received by the Commissioner.

In addition to this requirement, any film owner that has lodged an objection or appeal to an assessment, is required to retain the records relevant to the objection or appeal until the date the objection or appeal has been finalised.

CONCLUSION

The SARS has identified a need to issue this information brochure. It is trusted that it will contribute to greater certainty to film owners with regard to the determination of their tax liability.

Further information regarding the topics discussed in this brochure and any information about SARS is available on the SARS website www.sars.gov.za or can be obtained from SARS branches.

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