

**INCOME TAX TREATMENT OF NEW ZEALAND
SCREEN PRODUCTION INDUSTRY UNDER THE
INCOME TAX ACT 2007**

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TABLE OF CONTENTS

PART I. BACKGROUND	5
CHAPTER 1 – INTRODUCTION	5
PART II. INCOME FROM FILMS AND GRANTS: SECTIONS CC 10, CX 47 AND CX 48C	6
CHAPTER 2 – INCOME FROM FILMS	6
CHAPTER 3 – INCOME FROM GRANTS	8
PART III. DEDUCTIONS AND TIMING RULES	9
CHAPTER 4 – INTRODUCTION	9
CHAPTER 5 – EXPENDITURE INCURRED IN ACQUIRING FILM RIGHTS: SECTION DS 1	10
CHAPTER 6 – FILM PRODUCTION EXPENDITURE: SECTION DS 2	15
CHAPTER 7 – CLAWBACK OF DEDUCTIONS UNDER FILM REIMBURSEMENT SCHEMES: SECTIONS DS 3 AND DS 4	21
PART IV. SPECIAL RULES DEFERRING DEDUCTIONS FOR EXPENDITURE IN RELATION TO FILMS	25
CHAPTER 8 – DEFERRED DEDUCTION RULE: SECTIONS GB 45 – GB 48	25
PART V. OTHER SPECIFIC ANTI-AVOIDANCE PROVISIONS DEALING WITH FILMS	30
CHAPTER 9 – INTRODUCTION	30
CHAPTER 10 – SPECIFIC ANTI-AVOIDANCE PROVISIONS: SECTIONS GB 17 – GB 19	31
PART VI. NEW ZEALAND FILM COMMISSION GRANTS	33
CHAPTER 11 – NEW ZEALAND FILM COMMISSION GRANTS	33
LIST OF REFERENCE MATERIAL	46

EXECUTIVE SUMMARY

The New Zealand screen production industry has been subject to a special tax regime since the early 1980s. This paper provides a comprehensive analysis of how income and expenditure within the industry is treated under the Income Tax Act 2007 (the “2007 Act”). Recent amendments to that treatment and to the associated persons rules as a result of the Taxation (International Taxation, Life Insurance and Remedial Matters) Act 2009 are also included. All statutory references in this paper are to the 2007 Act, unless otherwise stated.

Where a person has a “right or interest” (as defined in section CC 10(2)) in tangible assets relating to a film (i.e., the film, film prints, publicity material, etc), the amount received or receivable from the disposal, licensing, use, rental, or other exploitation of the film, is income of that person in the income year in which it is derived (section CC 10).

As of 1 October 2009, a grant from the New Zealand Film Commission (“NZFC”) is no longer exempt income with such payments receiving standard grant treatment in terms of the amount of allowable deductions being reduced by the amount of grant received (sections CX 47 and DF 1). These grants are now termed Government Screen Production payments (“GSP payments”) for the purposes of the 2007 Act. In addition to GSP payments, other Government funding is also treated as excluded income with the same reduction in the amount of deduction allowed (sections CX 48C and DF 5).

Expenditure incurred in acquiring a “film right” (as defined in section YA 1) is allowed as a deduction under section DS 1. Section EJ 4 provides for a write-off for feature films over a period of 24 months. Section EJ 5 deals with non-feature films, and allows a write-off over two income years.

Section DS 2 provides for an accelerated write-off for “film production expenditure” (as defined in section YA 1). Film production expenditure incurred in feature films and non feature films, which have a GSP payment can be spread over two years (sections EJ 4 and EJ 5). For New Zealand films without a GSP payment, film production expenditure incurred up to the completion of the film can be 100 per cent deducted in the year the film is completed (section EJ 7). Film production expenditure incurred up to the completion of films other than New Zealand Films, which do not have a GSP payment, can be spread over two income years (section EJ 8). Section DS 2, however, does not apply when a film right is acquired with the intention of disposal (section DS 2B).

It should be noted that expenditure on films that is allowed as a deduction under section DS 1 or DS 2 is accumulated until the film is completed (as defined in section YA 1).

Deductions allowed under section DS 1 or DS 2 can be clawed back by section DS 3 under film reimbursement schemes (as defined in section DS 4). Where section DS 3 applies, the Commissioner of Inland Revenue (“the Commissioner”) is entitled to assess taxpayers outside the time bar (section DS 3(6)).

Deductions otherwise available under sections DS 1 or DS 2 will be deferred under sections GB 45 – GB 48 (the deferred deduction rule) provided certain requirements are met. The deduction is deferred until the investors are personally at risk of incurring the film related expenditure.

Deductions otherwise allowed under sections DS 1 or DS 2 may be reduced by specific anti-avoidance provisions in relation to films, including sections GB 17, GB 18, and GB 19. These provisions target non-arm's length transactions and arrangements which are designed to manipulate sections DS 1 and DS 2.

PART I. BACKGROUND

CHAPTER 1 – INTRODUCTION

- 1.1. The New Zealand screen production industry is subject to special income tax rules under the 2007 Act. This is in line with the Government's efforts to encourage the development of the New Zealand screen production industry.
- 1.2. The 2007 Act came into force from 1 April 2008 and has been subsequently amended by the Taxation (International Taxation, Life Insurance and Remedial Matters) Act 2009.
- 1.3. This paper will provide an analysis of the income tax treatment of the screen production industry under the 2007 Act. This paper covers the following topics:
 - income from films: sections CC 10, CX 47 and CX 48C;
 - deductions and timing rules in relation to film industry expenditure: sections DS 1, DS 2 and EJ 4 - EJ 8;
 - deferred deductions relating to money not at risk: sections GB 45 – GB 48;
 - specific anti-avoidance provisions in relation to films: sections GB 17 – GB 19; and
 - an outline of relevant grants from the New Zealand Film Commission.
- 1.4. A diagram showing how these topics interact is included in Appendix A.

PART II. INCOME FROM FILMS AND GRANTS: SECTIONS CC 10, CX 47 AND CX 48C

CHAPTER 2 – INCOME FROM FILMS

- 2.1. Section CC 10 deals with income from films. Where a person has a “right or interest” (as described in section CC 10(2)) in, or to, certain tangible assets relating to a film (as set out in section CC 10(1)), the following amounts are income of the person under section CC 10(3):
- (a) an amount received or receivable by the person for—
 - (i) the use of, or the right to use the film or a right or interest in a right in the film;
 - (ii) the granting of a licence for a future right in the film;
 - (iii) the disposal of some or all of a right or interest in a right in the film;
 - (iv) the assignment of a right or an interest in a right;
 - (v) the assignment of a right to derive income from the use of a right or interest; and
 - (b) an amount derived by the person from the rental, sale, use, or other exploitation of the film.
- 2.2. Section CC 10 applies when a person has a “right or interest” in, or to, certain tangible assets relating to films, including (section CC 10(1)):
- (a) a film;
 - (b) a print of the film;
 - (c) publicity material for the film; or
 - (d) any other tangible asset relating to the film.
- 2.3. The “right or interest” is a right or interest, including a future or contingent right or interest, of any of the following kinds (section CC 10(2)):
- (a) copyright in the film;
 - (b) a licence relating to the copyright;
 - (c) an equitable right in the copyright;
 - (d) an equitable right in a licence relating to the copyright;
 - (e) any other right existing in or attaching to the film;
 - (f) a right to income, or a share of income, from the rental, sale, use, or other exploitation of the film.
- 2.4. Section CC 10 is, however, overridden by section CV 17 (Non-resident film renters) and section YD 7 (Apportionment of film rental income). Under section CV 17, only 10 per cent of the amounts derived from New Zealand by a non-resident from the following activities is income of the non-resident person:

- (a) renting, exhibiting, or issuing a film, or making other arrangements for its exhibition;
 - (b) selling or hiring film containers, cinematographic or photographic materials, or equipment or accessories relating to a film;
 - (c) selling or hiring advertising materials relating to a film.
- 2.5. The rest of the amounts derived from such activities are exempt income of the non-resident person (section CV 17(2)).
- 2.6. Under section YD 7(4), the non-resident person is denied a deduction in relation to an amount to which section CV 17 applies.
- 2.7. Section CV 17 does not apply to a non-resident person if the amounts derived by them from the above activities are an insignificant proportion of the total amounts derived by them from any business carried on in New Zealand or elsewhere (section CV 17(3)).

CHAPTER 3 – INCOME FROM GRANTS

- 3.1. The NZFC administers the following three grants:
 - the Large Budget Screen Production grant (“LBSP”);
 - the Post, Digital and Visual Effects grant (“PDV”); and
 - the Screen Production Incentive Fund grant (“SPIF”).
- 3.2. These three grants (collectively “the NZFC grants”) are discussed in more detail in Chapter 11 but for income tax purposes, all three grants are recognised as GSP payments under the 2007 Act.
- 3.3. Prior to 1 October 2009, a grant received from the NZFC was exempt income under section CW 37. However this section has been repealed with effect from 1 October 2009. The grant will no longer be exempt income if:
 - (a) the final application for a NZFC grant is made on or after 1 October 2009; and
 - (b) the company does not incur before 1 July 2008 an amount of \$3,000,000 or more in expenditure on the project to which the grant relates.
- 3.4. Also with effect from 1 October 2009, a GSP payment is now excluded income following the removal of the exclusion in section CX 47(3) (Government Grants to Businesses). This is the case where:
 - (a) the final application for a NZFC grant is made on or after 1 October 2009; and
 - (b) the company does not incur before 1 July 2008 an amount of \$3,000,000 or more in expenditure on the project to which the grant relates.
- 3.5. In line with the standard treatment of grants, section DF 1 has been amended so that the amount of deductions allowed for screen production expenditure will be reduced by the amount of any GSP payment received.
- 3.6. A new section CX 48C has also been inserted into the 2007 Act That section applies when a film receives government funding other than a GSP payment and:
 - (a) the payment is not in the nature of a grant or subsidy; and
 - (b) the payment is not a grant-related suspensory loan; and
 - (c) the person receives a GSP payment for the project in addition to the payment.
- 3.7. If these criteria are met, that further funding will be excluded income. It should be noted that this section will apply to the SPIF grant only as applicants seeking the LBSP and PDV grants are unable to apply for other government incentives under NZFC criteria.

PART III. DEDUCTIONS AND TIMING RULES

CHAPTER 4 – INTRODUCTION

- 4.1. Film industry expenditure is subject to a special deduction regime contained in Subpart DS:
- section DS 1: expenditure incurred in **acquiring film rights** (see Chapter 5); and
 - section DS 2: **film production expenditure** (see Chapter 6).
- 4.2. Depending on the nature of the film and the receipt of a GSP payment, different timing rules apply. The relevant sections are:
- section EJ 4 for expenditure incurred in acquiring film rights in **feature films** where the film has a GSP payment;
 - section EJ 5 for expenditure incurred in acquiring film rights in **films other than feature films** where the film has a GSP payment;
 - section EJ 7 for film production expenditure for **New Zealand films** having no GSP payment (certification of New Zealand films is provided for in section EJ 6); and
 - section EJ 8 for film production expenditure for **films other than New Zealand films** having no GSP payment.
- 4.3. It is important to note that deductions allowed under section DS 1 or DS 2 will only be available when the film is **completed** (as defined in section YA 1), regardless of whether it is a feature film, a non-feature film, a New Zealand film or a non-New Zealand film.
- 4.4. Under section DS 2B, where a film or film right is acquired with the intention of disposal, a deduction will not be allowed under either section DS 1 or DS 2 but will be allowed under section EA 2.
- 4.5. Deductions available under section DS 1 or DS 2 will be clawed back under section DS 3 where property is disposed of under a film reimbursement scheme (as defined in section DS 4). Section DS 3(6) allows the Commissioner to reassess a taxpayer outside the normal four-year time bar set out in section 108 of the Tax Administration Act 1994. (See Chapter 7 for further details of sections DS 3 and DS 4.)
- 4.6. The deferred deduction rule (contained in sections GB 45 – GB 48) will apply to defer the surplus deductions otherwise allowable under section DS 1 or DS 2 if certain requirements (set out in section GB 45) are met. The effect of the deferred deduction rule is that deductions are deferred until the investors are personally at risk of the expenditure incurred relating to films. (See Chapter 8 for details of the deferred deduction rule.)

CHAPTER 5 – EXPENDITURE INCURRED IN ACQUIRING FILM RIGHTS: SECTION DS 1

- 5.1. Section DS 1(1) allows a deduction for expenditure incurred in acquiring a “film right” (as defined in section YA 1) **if the film is completed** (whether it is completed before, at the time, or after the film right is acquired).
- 5.2. Under section YA 1, a “*film right*” means a right or interest, including a future or contingent right or interest, of any of the following kinds:
- (a) copyright in a film;
 - (b) a licence relating to the copyright in a film;
 - (c) an equitable right in the copyright in a film;
 - (d) an equitable right in a licence relating to the copyright in a film;
 - (e) any other right existing in or attaching to a film; or
 - (f) a right to income, or a share of income, from the rental, sale, use, or other exploitation of a film.
- 5.3. The word “*completed*”, for a film, is defined in section YA 1, to mean the completion of a film to –
- (a) the stage of production at which the film has been completely edited, shot by shot, to its final length; or
 - (b) a production stage equivalent to that described in paragraph (a).

Timing of deduction

- 5.4. Different timing rules will apply depending on whether the film is a feature film (refer to section EJ 4) or a non-feature film (refer to section EJ 5).
- 5.5. A “*feature film*” is defined in section YA 1 and means a film that –
- (a) is produced mainly for exhibition in a cinema; and
 - (b) is exhibited in 35mm gauge; and
 - (c) has a continuous running time of no less than 75 minutes.

Exclusion - section DS 1(2)

- 5.6. Section DS 1 does not apply to expenditure that a person incurs in acquiring a film right, if -
- (a) the person operates a television station, a television network, or a cable television system, and the film right is acquired mainly to enable the film to be broadcast in New Zealand;
 - (b) the film is intended to be shown as an advertisement;

- (c) the expenditure is film production expenditure; or
- (d) section DS 2B applies to the expenditure (Expenditure when film or film right intended for disposal).

No other deduction – section DS 1(4)

- 5.7. No other deduction in respect of expenditure incurred in acquiring a film right is allowed under any other provision of the 2007 Act except section DS 2B (Expenditure when film or film right intended for disposal).

Deduction for a feature film – section EJ 4

- 5.8. Section EJ 4 allocates a deduction in respect of feature films for expenditure incurred in acquiring film rights or in producing a film for which a GSP payment is made. Under section EJ 4(2), if a person has a film right at the end of an income year, that person is allowed a deduction in that income year of an amount that is **the lesser of:**

- (a) the greater of an “apportioned amount” of the deduction (which is calculated under section EJ 4(3); and the amount of film income derived in the income year (see Chapter 2 above for income from films); **and**
- (b) the “remaining deduction” (as defined in section EJ 4(6)).

- 5.9. The “apportioned amount” is calculated using the formula as follows (section EJ 4(3)):

$$\frac{\text{completed months}}{\text{non-completed months}} \times \text{deduction.}$$

where –

completed months is the number of months in the income year, including a part of a month, for which the film is completed

non-completed months is 24, reduced by the number of complete months in the period that -

- (i) starts on the first day of the month in which the film is completed; and
- (ii) ends on the last day of the income year before the income year referred to in section EJ 4(2)

deduction is the “**remaining deduction**”.

- 5.10. For the purposes of section EJ 4, “*remaining deduction*” means, for an income year, the amount of the deduction for expenditure incurred before the end of the income year that has not been allocated to an earlier income year (section EJ 4(6)).

5.11. It should be noted that under sections DS 1 and EJ 4, no deduction may be allowed until the year in which the film is completed (provided no film income is derived in the relevant income year). Costs incurred up to the completion of the film are accumulated and the total spread over a 24-month period commencing with the month in which the film was completed.

5.12. An example illustrating how section EJ 4 works is set out below:

Example 1:

Assume a film commences production in the 2005-2006 tax year and the film will be completed on 15 January 2008. A person (“X”) acquires a film right on 20 July 2006 at the cost of \$1,000,000. The film is a feature film. Assume there is no film income. The deduction for such acquisition cost is as follows (assuming a 31 March balance date):

Year ending 31 March 2007

Acquisition costs	\$1,000,000
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No deduction allowed because the “apportioned amount” is a nil figure as the film is not yet completed.

Year ending 31 March 2008

Assume that the film will be completed on 15 January 2008. The total acquisition cost is	\$1,000,000
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Therefore, the allowable deduction is

$3 / (24 - 0) \times 1,000,000$	\$125,000
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Year ending 31 March 2009

Remaining deduction	\$875,000
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Therefore, the allowable deduction is:

$12 / (24 - 3) \times 875,000$	\$500,000
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Year ending 31 March 2010

Remaining deduction	375,000
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Allowable deduction:

$12 / (24 - (12+3)) \times 375,000$ or remaining deduction of \$375,000 (whichever is the lesser)	\$500,000
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Therefore the deduction allowed will be	\$375,000
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Deduction for films other than feature films – section EJ 5

5.13. A deduction is allocated under section EJ 5, in respect of non-feature films, for expenditure incurred in acquiring a film right or for expenditure incurred in producing a film for which a GSP payment is made. If the person has the film

right at the end of an income year, the deduction is allocated in two proportions as follows (section EJ 5(2)):

in the income year in which the film right is acquired or the film is completed, whichever is the later:

- 50% of the deduction; **or**
- if the film income derived in the income year is more than 50% of the deduction, the lesser of the amount of film income and the total amount of the deduction (see Chapters 2 and 3 above for income from films); and

in the next income year: the remaining deduction.

5.14. “*Remaining deduction*”, for the purposes of section EJ 5, means for an income year the amount of the deduction that has not been allocated to an earlier income year (section EJ 5(4)).

5.15. It should be noted that no deductions under sections DS 1 and EJ 5 may be allowed until the year in which the film is completed. Costs incurred up to that date are accumulated and the total allowed over a two-year period, 50 per cent (or more) in the later of the income year in which the film is completed or the film right is acquired, and the remaining deduction in the following year.

Example 2:

Assume a film commences production in the 2005-2006 tax year and the film will be completed on 15 January 2008. A person (“X”) acquires a film right on 20 July 2006 at the cost of \$1,000,000. The film is not a feature film. Assume there is no film income. The deduction for such acquisition cost is as follows:

Year ending 31 March 2007 (Assume a standard balance date)

Acquisition costs \$1,000,000

No deduction allowed until the film is completed.

Year ending 31 March 2008

Assume that the film will be completed on 15 January 2008.

The total acquisition cost is \$1,000,000

Therefore, the allowable deduction is

50% of \$1,000,000 **\$500,000**

Year ending 31 March 2009

Remaining deduction \$500,000

Example 3:

The facts are the same as Example 2 above, with the exception that there is film income of \$600,000 in the 2007-2008 tax year. The deduction for such acquisition cost is as follows:

Year ending 31 March 2007 (Assume a standard balance date)

Acquisition costs \$1,000,000

No deduction allowed until the film is completed.

Year ending 31 March 2008

Assume that the film will be completed on 15 January 2008.

The total acquisition cost is \$1,000,000

Therefore, the allowable deduction is

\$600,000 (film income) or \$1,000,000 (the total amount of deduction), whichever is lesser

\$600,000

Year ending 31 March 2009

Remaining deduction **\$400,000**

Deduction on disposal of film rights – sections EJ 4(5) and EJ 5(3)

- 5.16. Where in any income year a person disposes of a film right, whether in a feature film or a non-feature film, and the person does not have a film right in the film at the end of the income year, the remaining deduction is allocated to the income year.
- 5.17. Sections EJ 4(5) and EJ 5(3) work to the effect that in any year where ownership of any film right is relinquished, all remaining deductions are brought forward and are allowed to be deducted as a lump sum in that income year.
- 5.18. The person must dispose of **all** his/her film rights before the deduction becomes available.

Inter-relationship with other provisions

- 5.19. It should be noted that deductions allowed under section DS 1 for the cost of acquiring film rights can be clawed back under section DS 3 where the person disposes of property under a film reimbursement scheme (as defined in section DS 4).
- 5.20. Deductions otherwise available under section DS 1 may also be reduced by the deferred deduction rule contained in sections GB 45 – GB 48 if certain requirements are met. (See Chapters 7 and 8 for details of the clawback provision and the deferred deduction rule.)
- 5.21. The application of section DS 1 is also subject to specific anti-avoidance provisions dealing with films, including sections GB 17 and GB 18. (See Chapter 10 for details of those sections.)

CHAPTER 6 – FILM PRODUCTION EXPENDITURE: SECTION DS 2

- 6.1. Section DS 2(1) provides a deduction for film production expenditure if:
- (a) the film is completed; and
 - (b) the person has a film right in it (whether before, at the time, or after, the film is completed).

- 6.2. “*Film production expenditure*” is defined in section YA 1 as follows:

film production expenditure-

- (a) means—
 - (i) an expenditure or loss incurred in producing a film:
 - (ii) an amount of depreciation loss on property used in producing the film:
 - (iii) an amount of depreciation loss from disposing of depreciable property used in producing the film allowed under section EE 48 (Effect of disposal or event); and
- (b) does not include an expenditure incurred—
 - (i) in acquiring an asset for which a deduction for an amount of depreciation loss is allowed:
 - (ii) in acquiring a film right after the film is completed:
 - (iii) directly in marketing or selling a film

Inclusions – section DS 2(2)

- 6.3. For the purposes of section DS 2(1), the reimbursement of film production expenditure by one person to another, prior to the completion of the film, is treated as film production expenditure on the part of the first person. The reimbursement of interest expenses, by one person to another, can also qualify as film production expenditure. The following examples are set out in section DS 2(2) as follows:
- If a person (person A) reimburses another person (person B) for film production expenditure that person B incurs, and does it before the film is completed, the reimbursement is treated as film production expenditure incurred by person A (section DS 2(2)(a));
 - If a person (person A) reimburses another person (person B) for expenditure on interest incurred by person B in producing the film, person A **may** treat the reimbursement as film production expenditure incurred by person A (section DS 2(2)(b)). (For a detailed explanation, see Tax Information Bulletin, Vol. 15, No. 5 (May 2003), page 75.)

Exclusion – section DS 2(3)

- 6.4. A deduction cannot be claimed under section DS 2 if the film -
- (a) is produced mainly for broadcast in New Zealand by a person who operates a television station, a television network, or a cable television system;
 - (b) is intended to be shown as an advertisement;
- or if –
- (c) at the time of incurring the film production expenditure, the person intended to dispose of the film or film right (refer to section DS 2B).

No other deduction – section DS 2(5)

- 6.5. No other deduction for film production expenditure is allowed under any other provision of the 2007 Act except section DS 2B (Expenditure when film or film right intended for disposal).

Timing of deduction

- 6.6. Different timing rules will apply depending on whether or not the film produced is a New Zealand film (refer to section EJ 6 for the certification of New Zealand films) and whether the film has a GSP payment:
- sections EJ 4 and EJ 5 apply to expenditure incurred in acquiring film rights for both feature films and non-feature films which have a GSP payment;
 - section EJ 7 applies to film production expenditure for New Zealand films which do not have a GSP payment;
 - section EJ 8 applies to film production expenditure for films other than New Zealand films which do not have a GSP payment.

Expenditure incurred in respect of films for which a GSP payment has been made – sections EJ 4 & EJ 5

- 6.7. Sections EJ 4 and EJ 5 set out the timing rules for deductions claimed under sections DS 1 and DS 2 where a film has a GSP payment. The timing rules in relation to these sections were detailed in Chapter 5. (Refer to paragraphs 5.8 – 5.15).

Film production expenditure for films without a GSP payment – section EJ 7

- 6.8. Section EJ 7 provides for an accelerated write-off for film production expenditure if a film has a **final** certificate as a New Zealand film under section EJ 6 (section EJ 7(1)) and does not have a GSP payment. In that case:

- film production expenditure incurred **in or before** the income year in which the film is completed can be 100 per cent deducted in the income year in which the film is completed (section EJ 7(2)).
- film production expenditure incurred **after** the film is completed is deductible in the income year in which the expenditure is incurred (section EJ 7(3)).

Certification of New Zealand Films – section EJ 6

6.9. The NZFC may certify that a film is a New Zealand film if the Commission is satisfied that the film has, or will on completion have, a significant New Zealand content as determined under section 18 of the New Zealand Film Commission Act 1978 (the “NZFC Act”).

New Zealand content

6.10. Section 18(2) of the NZFC Act lists the factors that the NZFC will consider in determining whether or not a film has, or is to have, a significant New Zealand content:

- (a) the subject of the film
- (b) the locations at which the film was or is to be made
- (c) the nationalities and places of residence of -
 - (i) the authors, scriptwriters, composers, producers, directors, actors, technicians, editors, and other persons who took part or are to take part in the making of the film; and
 - (ii) the persons who own or are to own the shares or capital of any company, partnership, or joint venture that is concerned with the making of the film; and
 - (iii) the persons who have or are to have the copyright in the film
- (d) the sources from which the money that was used or is to be used to make the film was or is to be derived
- (e) the ownership and whereabouts of the equipment and technical facilities that were or are to be used to make the film
- (f) any other matters that in the opinion of the Commission are relevant to the purposes of this Act.

6.11. Under section 18(2A) of the NZFC Act, a film will be deemed to have significant New Zealand content if it is made pursuant to an agreement or arrangement entered into in respect of the film between the New Zealand Government or the NZFC on the one hand and the Government of another country or relevant public authority of another country on the other.

Final and provisional certificates

6.12. Under section EJ 6(2), the certificate issued by the NZFC must be –

- (a) a provisional certificate, if the film is not completed; or
- (b) a final certificate, if the film is completed.

- 6.13. Applications to the NZFC for certification of New Zealand films must be made in writing and must provide information that the NZFC requires (section EJ 6(3)). Further information about “New Zealand Certification” and application forms for both provisional and final certificates are available at the NZFC’s website: <http://www.nzfilm.co.nz/RegulatoryApprovals/NZCertification.aspxc>.
- 6.14. It should be noted that the deduction allowable under section EJ 7 requires a film to be a New Zealand film, by means of a final certificate issued by the NZFC. A provisional certificate does not allow any deductions under section EJ 7 for film production expenditure.
- 6.15. However, obtaining a provisional certificate amounts to interim approval of the film as a New Zealand film by the NZFC. Once a provisional certificate is issued, it is likely that the taxpayer will be able to obtain a final certificate if the film is produced as provisionally approved.

Notice of certificate to the Commissioner

- 6.16. The NZFC **must** send a copy of the provisional certificate or the final certificate to the Commissioner immediately after issuing it (section EJ 6(4)).

Revocation of certificate

- 6.17. The NZFC may revoke a provisional certificate or a final certificate, if they are satisfied that the certificate should not remain in force, because an incorrect statement was made in the provision of information for the purpose of obtaining a certificate or for any other reason (section EJ 6(5)).
- 6.18. A revoked certificate is void from the time the certificate was issued (section EJ 6(6)).
- 6.19. The NZFC **must** give notice to the Commissioner immediately after revoking a provisional certificate or a final certificate (section EJ 6(7)).

Film production expenditure for films other than New Zealand films - section EJ 8

- 6.20. Section EJ 8 provides the timing rules in respect of a deduction for film production expenditure for films other than New Zealand films if:
- the film is not one for which a GSP payment is made; and
 - the film does not have a final certificate under section EJ 6.

Timing of deduction: up to completion of film

6.21. If a person has a film right at the end of the income year in which the film is completed, the deduction for film production expenditure incurred **in or before** the income year is allocated in two proportions as follows (section EJ 8(2)):

in the income year in which the film is completed:

- 50% of the deduction; **or**
- if the film income derived in the income year is more than 50% of the deduction, the lesser of the amount of film income and the total amount of the deduction (see Chapter 2 above for income from films); and

in the next income year: the remaining deduction.

6.22. “*Remaining deduction*”, for the purposes of section EJ 8, means for an income year the amount of the deduction for film production expenditure that has not been allocated to a previous income year (section EJ 8(5)).

Example 4:

Assume a film commences production in the 2005-2006 tax year and the film will be completed on 15 January 2008. A person (“X”) incurs film production expenditure of 4,000,000 in total up to the completion of the film. The film is not a New Zealand film. Assume there is no film income. The deduction for film production expenditure incurred by X is as follows:

Year ending 31 March 2006

Production costs \$1,200,000

No deduction allowed because the film has not yet been completed.

Year ending 31 March 2007

Production costs \$1,800,000

Deduction is again a nil figure because the film has not yet been completed.

Year ending 31 March 2008

Production cost \$1,000,000

The total production cost is \$4,000,000

Therefore, the allowable deduction is

50% of \$4,000,000 **\$2,000,000**

Marketing costs \$200,000

Total deduction allowed in the 2007-08 tax year **\$2,200,000**

Year ending 31 March 2009

Remaining deduction of \$2,000,000

Deduction allowed is **\$2,000,000**

Timing of deduction: after completion of film

- 6.23. If a person has a film right in an income year after the film is completed, a deduction for film production expenditure incurred after the film is completed is allocated to the income year in which it is incurred (section EJ 8(3)).

Timing of deduction: disposal of film right

- 6.24. If a person disposes of a film right in the income year in which the film is completed, and does not have a film right in the film at the end of the income year, the remaining deduction is allocated to the income year (section EJ 8(4)).
- 6.25. Section EJ 8(4) works to the effect that in any year where ownership of any film right is relinquished, all remaining deductions are brought forward and are allowed to be deducted as a lump sum in that income year.
- 6.26. The person must dispose of **all** his/her film rights before the deduction becomes available.

Deduction for deferred or contingent payments – section GB 19

- 6.27. Section GB 19 provides that where film production expenditure payments are deferred or contingent, the expenditure is treated as being incurred only at the time of payment.

Inter-relationship with other provisions

- 6.28. As with section DS 1, deductions otherwise available under section DS 2 are subject to the clawback provision contained in section DS 3 where property is disposed of under a film reimbursement scheme. The amount of allowable deductions will also be reduced by the deferred deduction rule contained in sections GB 45 – GB 48 if certain requirements are met. (See Chapters 7 and 8 for details of the clawback provision and the deferred deduction rule.)
- 6.29. The application of section DS 2 is also subject to sections GB 17 – GB 19. (See Chapter 10 for details of those sections.)

CHAPTER 7 – CLAWBACK OF DEDUCTIONS UNDER FILM REIMBURSEMENT SCHEMES: SECTIONS DS 3 AND DS 4

7.1. Deductions otherwise available under section DS 1 or DS 2 can be retrospectively clawed back under section DS 3 if a person disposes of property under a “film reimbursement scheme” (as defined in section DS 4).

Film reimbursement scheme – section DS 4

7.2. For an arrangement to be a “*film reimbursement scheme*”, three requirements must be met:

- a deduction for expenditure must be allowed (section DS 4(2));
- there is a right to dispose of property (section DS 4(3)); and
- some or all of the consideration for the property would not be film income (section DS 4(4)).

Deduction allowed: section DS 4(2)

7.3. The first requirement for a film reimbursement scheme is that **it is a scheme under which a person may incur expenditure for which they are allowed a deduction**, under -

- (a) section DS 1 or DS 2, or would be allowed a deduction in the absence of section DS 3;
- (b) subpart DA (General rules), if the expenditure is for –
 - (i) a film right;
 - (ii) a right to an amount that is dependent on or calculated by reference to income from the rental, sale, use, or other exploitation of a film.

Disposal of property: section DS 4(3)

7.4. The second requirement for a film reimbursement scheme is that **there is a disposal of property under the scheme** of any of the kinds as follows:

- (a) the scheme enables the person or an associated person to dispose of property; or
- (b) the scheme gives a right to the person or an associated person to dispose of property; or
- (c) the scheme gives a right, the right creates an obligation for the person or an associated person, and the person or the associated person may meet the obligation by disposing of property.

7.5. For the purposes of section DS 4(3), a shareholder in a loss attributing qualifying company and the company are associated persons, in addition to the associated persons described in Subpart YB (Associated persons and nominees).

Consideration not film income – section DS 4(4)

- 7.6. The third requirement for a film reimbursement scheme is that **it is a scheme under which some or all of the consideration for the property would not be film income** (see Chapters 2 and 3 for details of income from films).

Reduction of deductions

- 7.7. The total deductions that have been allowed (or would be allowed) under section DS 1 or DS 2 must be reduced to an amount equal to the greater of zero and the amount calculated using the formula as follows (section DS 3(3)):

total deductions – total consideration

where –

- | | |
|----------------------------|--|
| total deductions | is the total amount of deductions that the person has been allowed under section DS 1 or DS 2 or the person would be allowed under section DS 1 or DS 2 if section DS 3 did not exist. |
| total consideration | is the total amount of consideration for the disposal of the property that the person derives and that is not film income. |

- 7.8. Deductions must be reduced in the same order as they have been allowed or would be allowed (section DS 3(2)).

No time bar for amendment of assessment resulting from section DS 3

- 7.9. Despite the time bar in section 108 of the Tax Administration Act 1994, the Commissioner may amend an assessment at any time in order to give effect to section DS 3 (section DS 3(6)).

Special return – section 44A of the Tax Administration Act 1994

- 7.10. If a taxpayer's deductions are reduced under section DS 3, that taxpayer and any other taxpayer who are affected by that reduction must file a special return. The special return is to be filed for the tax year in which the consideration is derived and by the date that the taxpayer's return of income for that tax year would be due (section 44A(2) of the Tax Administration Act 1994).

Exclusion – section DZ 11

7.11. Section DS 3 does not apply to a deduction for expenditure excluded under section DZ 11, which covers the circumstances set out as follows (section DZ 11(1))—

- (a) the film reimbursement scheme is entered into on or before 30 June 2001; and
- (b) the film has, under section EJ 6 (Certification of New Zealand films) -
 - (i) a final certificate that it is a New Zealand film; or
 - (ii) a provisional certificate, not obtained by the provision of materially incorrect information to the NZFC, that it is a New Zealand film; and
- (c) the film had not been completed before 7 July 1999; and
- (d) before 7 July 1999 –
 - (i) 1 or more contracts had been entered into for the supply of goods or services in New Zealand in relation to the film; and
 - (ii) at least \$1,000,000 of expenditure had been incurred under the contract or contracts; and
- (e) on or before 1 November 1999, a person who entered into a contract referred to in paragraph (d)(i) gave notice to the Commissioner that the requirements of paragraphs (c) and (d) were met; and
- (f) the expenditure for which persons are allowed a deduction under section DS 1 (Acquiring film rights) or DS 2 (Film production expenditure) is no more than 140% of the **physical cost of production** of the film; and
- (g) without limiting the application of section BG 1 (Tax avoidance), on the date the film reimbursement scheme is entered into, there is an expectation based on reasonable commercial assumptions that the income to be derived by person A as a result of the expenditure will be at least equal to the sum of—
 - (i) all expenditure incurred by person A under the scheme; and
 - (ii) a return on each amount of expenditure that is equivalent to the return on 5 year **government stock** measured on the date that the scheme is entered into; and
- (h) if the expenditure is incurred on depreciable intangible property of a kind listed in schedule 14 (Depreciable intangible property), the expenditure is an amount paid to person B in the circumstances described in subsection DZ 11(2).

7.12. Section DZ 11(2) sets out the circumstances, for the purposes of section DZ 11(1)(h), as follows:

- (a) the amount paid is income of person B; or
- (b) at all times in the tax year in which the payment is made, person B -

- (i) is resident in a country or territory specified in schedule 24, part A (International tax rules: grey list countries); and
- (ii) is liable to income tax in that country or territory by reason of domicile, residence, place of incorporation, or place of management in that country or territory; and
- (iii) has calculated its income that is liable to income tax in that country or territory without applying a feature of the taxation law of the country or territory specified in schedule 24, part B.

7.13. It should be noted that the exclusion contained in section DZ 11 is of very limited application. In order for the exclusion to apply, a significant amount of expenditure must have been incurred for an incomplete film as at 7 July 1999. The film reimbursement scheme in question must also be entered into before 30 June 2001.

Some definitions – section DZ 11(3)

7.14. “*Government stock*”, for the purposes of section DZ 11(1)(g), means stock issued under Part 6 of the Public Finance Act 1989.

7.15. “*Physical cost of production*”, for the purposes of section DZ 11(1)(f), means the expenditure incurred in producing a film (whether incurred in New Zealand or elsewhere), other than expenditure incurred -

- in marketing or selling the film; and
- on depreciable intangible property of a kind listed in schedule 14 (Depreciable intangible property).

7.16. A diagram showing how section DS 3 operates is included in Appendix B.

PART IV. SPECIAL RULES DEFERRING DEDUCTIONS FOR EXPENDITURE IN RELATION TO FILMS

CHAPTER 8 – DEFERRED DEDUCTION RULE: SECTIONS GB 45 – GB 48

- 8.1. Deductions otherwise available under section DS 1 or DS 2 will be deferred by sections GB 45 – GB 48 (the deferred deduction rule (“DDR”)) if certain criteria are met. The general purpose of the DDR is to combat aggressive tax arrangements which provide taxpayers with excessive tax advantages in the form of large deductions, regardless of the success of the arrangement.
- 8.2. Broadly, sections GB 45 - GB 48 require a taxpayer who is a party to an arrangement based on a limited-recourse loan, to defer the deductions in any of the first 3 years of the arrangement, when assessable income from the arrangement is less than the total deductions. The deferral mechanism operates by denying deductions that would otherwise be allowable to the extent that the limited-recourse loans are outstanding and the investor continues not to be at real risk of having to repay them. For arrangements which are commercially unsuccessful, such deferral can be permanent. Taxpayers involved in film investment arrangements are potentially subject to the DDR if the statutory criteria are met.
- 8.3. The Commissioner’s statement on the DDR under the Income Tax Act 1994 is set out in Tax Information Bulletin Vol. 16, No. 1 (February 2004), at pages 58-66. It should be noted that the DDR is applied as it was contained in the 1994 Act and there have been some minor changes to the rule since then.

Arrangements subject to the DDR – sections GB 45 and GB 46

- 8.4. Section GB 45 sets out the criteria for the DDR to apply. The criteria includes:
- an arrangement under which a taxpayer (called a “participant”) is either a party to or is affected by that arrangement; **and**
 - after the arrangement commences, a person sells or issues, or promotes the selling or issuing of the arrangement, whether or not for remuneration (section GB 45(1)(a)); **and**
 - as part of, or for the purposes, of the arrangement, the participant or an affected associate of the participant (as defined in section GB 48(1)) borrows a limited-recourse amount under a limited-recourse loan (section GB 45(1)(c); **and**
 - the arrangement results in deductions for the participant and the participant’s affected associates (section GB 45(1)(b)); **and**
 - the deductions are for the income year in which the participant or the participant and their associates acquired an interest in the arrangement (“the first income year”), or the first income year and the next year, or the first

income year and the next two income years (the “*assessment period*” as defined in section GB 45(3)); **and**

- assessable income resulting from the arrangement (except assessable income arising under sections GB 45 – GB 48) is less than the total amount of deductions of the participant and the affected associates of the participant (section GB 45(1)(b)); **and**
- the total cost of property held by the participant and the affected associates on the balance date for the assessment period is:
 - less than twice the total of the limited-recourse amounts borrowed (in other words, the limited-recourse loans are 50% or more of that total cost) (section GB 45(1)(d)); **and**
 - on the relevant balance date, the total cost of their arrangement property is more than 142.85% of the total cost of the part of the property that is **acceptable property** (section GB 45(1)(e)). **Acceptable property** is land, buildings, plant, machinery, certain listed company shares, employee share options and certain shares in a foreign company (section GB 45(3)). In other words, the cost of land, buildings and other acceptable property, expressed as a percentage of the total cost of all assets held, is 70% or less.

Consolidation of assessable income and deductions, and cost of property

- 8.5. The assessable income and deductions resulting from an arrangement for each participant (for the purposes of section GB 45(1)(b) and section GB 46), and the cost of property that is held by each participant as part of the arrangement (for the purposes of section GB 45(1)(d)) are consolidated to eliminate intra-group balances in accordance with generally accepted accounting practice (section GB 47(1)).
- 8.6. The assessable income, deductions and the cost of property held by individual members in a group of persons are calculated using the proportionate method in accordance with generally accepted accounting practice (section GB 47(2)). This method applies to members in partnerships or joint ventures, and shareholders in loss attributing qualifying companies.

Key definitions – section GB 48

- 8.7. Section GB 48 further defines some terms for the purposes of the DDR.

Limited-recourse loan – section GB 48(3)

- 8.8. “*Limited-recourse loan*” is defined in section GB 48(3) and means a financial arrangement that meets each of the following requirements—
- (a) it is not an excepted financial arrangement;
 - (b) it involves the provision of money by a person (“*lender*”) to another person (“*borrower*”); and

- (c). it has 1 or more of the following effects, or an effect which is substantially similar:
- (i).relieving the borrower from the obligation to repay all or some of the money, whether the relief is contingent or not;
 - (ii).requiring the borrower to make no repayment for a period of 10 or more years from the date on which the loan is made, other than repayments for the purpose of defeating the intent and application of section GB 46;
 - (iii).providing that the repayment of the money is in substance secured solely against assets that are employed in the arrangement;
- (d).if the lender is not an associated person of the borrower, the lender provides the money on terms that are not arm's length and the lender does not regularly provide money to persons on arm's length terms or the lender is a non-resident who does not carry on a business in New Zealand through a fixed establishment in New Zealand;
- (e).if the lender is an associated person of the borrower, the lender obtains the money under an arrangement that meets the requirements of paragraphs (a) to (c) above.

8.9. Loans made by banks and financiers who are regular providers of money to persons on arm's length terms **and** who are resident in New Zealand or carry on business in New Zealand through a fixed establishment in New Zealand are excluded from the definition of "limited-recourse loan" (section GB 48(3)(d)).

8.10. Some examples of a limited-recourse loan are provided in Tax Information Bulletin Vol. 16, No. 1 (February 2004), page 64.

Affected associate – section GB 48(1)

- 8.11. For the purposes of sections GB 45 and GB 46, a person is an "affected associate" of another person, for the arrangement, if each person is a party to the arrangement or is affected by the arrangement and –
- one person is a loss attributing qualifying company and the other person is a shareholder in that company; or
 - the persons are associated persons.

Limited-recourse amount – section GB 48(2)

8.12. For the purposes of sections GB 45 – GB 48, the limited-recourse amount for a limited-recourse loan means the total for the limited-recourse loan of the amounts for which the obligations of a borrower (as defined in section GB 48(3)(b)) are affected in a way that is described in section GB 48(3)(c). (Refer to paragraph 8.8 above).

Deferral of surplus deductions from arrangement – section GB 46

Application – section GB 46

- 8.13. Section GB 46 will apply to defer surplus deductions resulting from an arrangement to which the DDR applies, if -
- the participant (not being a loss attributing qualifying company), or the participant and the affected associates of the participant (not being a loss attributing qualifying company that has incurred a net loss from the arrangement for the income year), considered together, have from the arrangement assessable income that is less than the deductions resulting from the arrangement (sections GB 46(1)(a)-(e)); and
 - the arrangement involves a limited-recourse loan for which the participant or an affected associate of the participant is a borrower (section GB 46(1)(f)).

Formula – sections GB 46(2) and (3)

- 8.14. Broadly, a participant in an arrangement that is subject to the DDR is treated as deriving an amount of assessable income calculated under a formula provided for in section GB 46(2):

$$\frac{\text{participant's excess deductions}}{\text{total individual excess deductions}} \times \text{total ineligible amount}$$

- 8.15. The terms used in the formula are defined in section GB 46(3):

where –

- (a). **participants excess deductions** is the amount by which the deductions of the participant from the arrangement for the income year exceed the participant's assessable income from the arrangement;
- (b). **total individual excess deductions** is the total amount by which the deductions from the arrangement for the income year exceed the assessable income from the arrangement for that year of the group comprising the participant, and any affected associates, other than loss attributing qualifying companies, who each have total deductions exceeding assessable income from the arrangement;
- (c). **total ineligible amount** is the lesser of-
- (i). the amount by which the total deductions for the income year from

the arrangement exceed the assessable income from the arrangement for that year of the group comprising the participant and any affected associates (excluding any person which is a loss attributing qualifying company) who have incurred a net loss from the arrangement; **and**

(ii).the total limited-recourse amounts which, at the relevant balance date for the participant and affected associates, those persons have undischarged obligations to repay as part of or for the purposes of the arrangement.

8.16. Such assessable income is, in turn, allowed as a deduction in the following year (section GB 46(4)).

Obligation to repay limited-recourse amount not discharged – section GB 46(5)

8.17. For the purposes of section GB 46(1) and of paragraph (ii) of the definition of item (c) in section GB 46(3), set out above in paragraphs 8.14 and 8.16, an obligation to repay a limited-recourse amount is not discharged by a transaction to the extent that the transaction –

- (a). involves, as part of the arrangement, the use of -
 - (i). a put or call option that is not a contract for the sale for future delivery of goods at market value:
 - (ii). a contract of insurance or guarantee; and
- (b). does not give rise to assessable income for the person who is the borrower of the limited-recourse amount under the limited-recourse loan.

PART V. OTHER SPECIFIC ANTI-AVOIDANCE PROVISIONS DEALING WITH FILMS

CHAPTER 9 – INTRODUCTION

- 9.1. Deductions otherwise allowed under section DS 1 or DS 2 will be reduced under certain circumstances by specific anti-avoidance provisions.
- 9.2. Depending on the nature of the film expenses, different provisions will apply:
- section GB 17: Excessive amounts for film rights or production expenditure;
 - section GB 18: Arrangements to acquire film rights or incur production expenditure;
 - section GB 19: When film production expenditure payments delayed or contingent.
- 9.3. Chapter 10 will discuss these provisions in detail.

CHAPTER 10 – SPECIFIC ANTI-AVOIDANCE PROVISIONS: SECTIONS GB 17 – GB 19

- 10.1. Deductions otherwise allowed under section DS 1 for expenditure incurred in acquiring film rights or under section DS 2 for expenditure incurred in producing a film may be subject to adjustment under sections GB 17 or GB 18 by virtue of section EJ 9 (Avoidance arrangements). These sections relate to:
- excessive amounts for film rights or production expenditure (section GB 17); and
 - arrangements to acquire film rights or incur production expenditure (section GB 18).
- 10.2. The timing of deductions allowed under sections DS 2, EJ 7 and EJ 8 may be affected if the payments are delayed or contingent. Such payments are covered by section GB 19 (When film production expenditure payments delayed or contingent).

Section GB 17: Excessive amounts for film rights or production expenditure

- 10.3. Section GB 17 will apply to reduce deductions otherwise allowed under section DS 1 for expenditure incurred in acquiring a film right, if (section GB 17(1)) -
- the Commissioner considers that the buyer and the person from whom the film right, goods or services were acquired (the seller) were not dealing with each other at arm's length; and
 - the amount of expenditure incurred by the buyer is more than the market value of the film right, goods, or services at the time they were acquired.
- 10.4. The deduction is reduced to an amount equal to the market value (section GB 17(2)).
- 10.5. If the buyer acquires only a share in a film right, section GB 17 applies only to the part of the total market value of the film right that is attributable to that share (section GB 17(3)).

Section GB 18: Arrangements to acquire film rights or incur production expenditure

- 10.6. If the Commissioner considers that two persons have made arrangements so that sections DS 1, DS 2, EJ 4, EJ 5, EJ 7, or EJ 8 apply more favourably in relation to a person in an income year than they would have without the arrangements, the deduction allowed to the person under section DS 1 or section DS 2 must be reduced to the amount that the Commissioner considers would have been allowed if the arrangements had not been made (section GB 18(2)).

- 10.7. In addition, the deduction allocated under section EJ 4, EJ 5, EJ 7 or EJ 8 is allocated to the income year to which the Commissioner considers it would have been allocated had the arrangements not occurred (section GB 18(3)).

Section GB 19: When film production expenditure payments delayed or contingent

- 10.8. For the purposes of sections DS 2, EJ 7 and EJ 8, section GB 19 applies to treat certain film production expenditure as being incurred only at the time of payment where the payments for goods or services are deferred or contingent. For section GB 19 to apply, there must be an agreement to defer payment between the provider of the goods or services and another person and the period of deferral must be excessive.

PART VI. SCREEN PRODUCTION GRANTS

CHAPTER 11 – SCREEN PRODUCTION GRANTS

General Information

- 11.1. The NZFC administers the following three schemes for the screen production industry:
- the Large Budget Screen Production Grant Scheme (“LBSP grant” or “LBSPG Scheme”), introduced in November 2003;
 - the Post, Digital and Visual Effects Grant Scheme (“PDV grant”) introduced in July 2007; and
 - the Screen Producers Incentive Fund (“SPIF grant”) introduced in July 2008.
- 11.2. An applicant may only apply for one grant for each large screen production. The NZFC is responsible for administering the grants and, essentially, determining the entitlement of film or television production companies to a grant. The criteria for eligibility developed by the NZFC (“the NZFC Criteria”) are available on the NZFC’s website (<http://www.nzfilm.co.nz>). This Chapter is based on the NZFC Criteria for both the LBSPG Scheme (including the PDV grant) and the SPIF grant, dated October 2007 and July 2008 respectively. Potential applicants are advised to refer to the full criteria.
- 11.3. The Inland Revenue Department (“IRD”) **does not** administer the entitlement to grants or set the criteria for grants. The IRD does have a role in the validation of the information that is provided by screen production companies in support of their applications for grants. The contact person in the IRD for the GSP payment at the present time is Vince Costa, Screen Production Industry Desk Leader in the Large Enterprises segment of IRD. Vince can be contacted by telephone on (04) 890 3240 or by email: vince.costa@ird.govt.nz. All external inquiries in relation to the screen production industry should be directed to the Screen Production Industry Desk at screen@ird.govt.nz or 0800 SCREEN (0800 727 336).
- 11.4. In terms of tax, the three grants administered by the NZFC fall within the definition of a “*government screen production payment*” under section YA 1. A GSP payment is defined in that section as a payment that:
- (a) is in the nature of a large budget screen production grant; and
 - (b) is made in relation to a film or television production; and
 - (c) is authorised by the NZFC in relation to a company that –
 - (i) is resident in New Zealand; or
 - (ii) has a permanent establishment in New Zealand
- 11.5. Appendices C and D provide an overview of how the LBSPG (and PDV) Scheme and the SPIF grant work.

The LBSP and PDV Grants

- 11.6. The LBSP grant was introduced to provide an additional financial incentive for the production of both foreign and domestic large budget film and television projects in New Zealand. The PDV grant was introduced to foster capacity and new business development for large budget PDV production in New Zealand. Both grants constitute the LBSPG Scheme. An applicant seeking either a LBSP or PDV grant will not be eligible for any other Government film finance or tax incentives in relation to that screen production.
- 11.7. Successful applicants will receive a grant of 15% of the Qualifying New Zealand Production Expenditure (“QNZPE”) that they have spent on:
- an eligible screen production (for the LBSP grant); or
 - PDV production on an eligible screen production (for the PDV grant).

Eligibility Criteria for the LBSPG Scheme

- 11.8. The eligibility criteria for the LBSPG Scheme includes:
- format;
 - expenditure thresholds;
 - relevant entity; and
 - residency status.

Format

- 11.9. Eligible screen productions must be in one of the following formats:
- (a). **a feature film** (including those shot direct-to-video) where the film is:
- a film commonly screened as the main attraction in commercial cinemas;
 - no less than 60 minutes, or in the case of a large format (IMAX) film no less than 45 minutes; and
 - shot and processed to commercial release standards for exhibition to the public in cinemas, by way of telecasting (including broadcasting by way of the delivery of a television programme by a broadcasting service), or for distribution to the public as a video recording (whether on video tapes, digital video disks or otherwise).
- (b). **a television movie** being a drama (i.e. a composition which tells a story through the development of theme and plot, by means of dialogue and action and the portrayal of characters, settings, and life situations) of a like nature to a feature film capable of exhibition on television where television movie is:

- no less than one commercial television hour in length, or in the case of a programme predominantly utilising cell, stop motion and/or computer animation not less than one half commercial television hour; and
 - is shot and processed to commercial release standards, for cinema exhibition or telecast.
- (c). **a television drama series or mini-series** being an episodic television drama, including animation, which is either:
- an extended but self-contained drama made for television wherein the key dramatic elements of character, theme, and plot are introduced, developed and concluded so as to form a narrative structure (similar to that of a novel) which features a major continuous plot enhanced by minor plots and there is the expectation of an ending that resolves the major tensions and is arranged into consecutive episodes for screening purposes; **or**
 - an anthology of drama works for television where the key dramatic elements of character, theme and plot are introduced, developed and concluded so as to form a narrative structure within each episode (similar to that of a novel or a short story) but there is no continuity of plot between episodes (although there may be host elements common to each episode) and is made to be broadcast under one generic title; **and**
 - the series is shot and processed to commercial release standards, for telecast.

11.10. It should be noted that the definition of a feature film under the LBSPG Scheme is different from that contained in section YA 1 of the 2007 Act. (See paragraph 5.5 above for the definition of “*feature film*” for income tax purposes.)

11.11. Screen productions that are specifically excluded from eligibility include:

- documentaries;
- reality TV;
- advertising programmes or commercials;
- discussion programmes, current affairs, news, a panel programme, a variety programme, or a programme of a like nature;
- a production of a public event, including a sports event; and
- a training programme.

Expenditure thresholds

11.12. To be eligible for a grant, production expenditure must fall within the following expenditure thresholds:

- **for an LBSP grant** – the value of the QNZPE must be more than NZ\$15 million. Individual episodes of a television series which have completed principal photography within any 12 month period and have a minimum

average spend of \$500,000 per commercial hour may be bundled to achieve the total of NZ\$15 million.

- **for a PDV grant** – the value of the QNZPE (either spent directly on PDV production or necessarily related to that production) must be between NZ\$3 - 15 million. An applicant who exceeds this threshold should apply for an LBSP grant.

11.13. Two or more screen productions can be bundled to achieve a total QNZPE of NZ\$30 million or more where:

- each production has a minimum QNZPE of NZ\$3 million or more; and
- all productions have completed principal photography (or PDV production) within 24 months following the date that the first of those screen productions commenced principal photography (or PDV production).

Relevant Entity

11.14. An applicant must be the entity responsible for all activities involved in:

- making the screen production in New Zealand (for the LBSP grant); or
- all PDV production for the screen production in New Zealand (for the PDV grant); and
- the applicant must have access to full financial information for the production in New Zealand which can be made available to the NZFC upon request.

11.15. Only one entity per screen production can be eligible for a grant. The applicant for each screen production within a bundle must be the same entity OR must be related to each other applicant in the bundle by having 50% or more of its shareholding in common.

Residency status

11.16. A film or television production company is eligible to apply to the LBSPG Scheme if it is a New Zealand resident company or a foreign corporation operating with a fixed establishment in New Zealand for the purposes of lodging an income tax return.

11.17. A company is a New Zealand resident company if:

- the company is incorporated in New Zealand; or
- although not incorporated in New Zealand, it carries on business in New Zealand and has either its central management or control in New Zealand, or its voting power is controlled by shareholders who are residents of New Zealand.

11.18. A foreign corporation operating with a fixed establishment in New Zealand for the purposes of lodging an income tax return (both when it lodges the grant application and when the grant is paid). Advice can be obtained from the IRD's

Non-Resident Contractors team (phone 04 890 3056) as to whether a company is a fixed establishment in New Zealand for the purposes of lodging an income tax return.

11.19. The Commissioner has a role in validating information provided in support of applications for the LBSP grant. Section 85F of the Tax Administration Act 1994 authorises the Commissioner to communicate information held by the IRD to the NZFC for the purposes of enabling the NZFC to determine the entitlement of a company to a LBSP grant. Upon request from the chief executive of the NZFC, the Commissioner may provide to any authorised officer of the NZFC all of the following information that is held by the IRD:

- (a). particulars relating to the amount of expenditure incurred in relation to a film that is the subject of an application for a LBSP grant;
- (b). particulars relating to the amount of expenditure incurred in New Zealand in relation to a film that is the subject of an application for a LBSP grant; and
- (c). the Commissioner's opinion as to the accuracy of any information provided by an applicant in relation to the application for a LBSP grant.

11.20. If any of the information specified in section 85F(2) is not held by the IRD, the Commissioner may use any of the Commissioner's powers contained in Part III of the Tax Administration Act 1994 to obtain information.

Applications for the LBSP and PDV Grants

11.21. An application for an LBSP or a PDV grant can be submitted to the NZFC when:

- all QNZPE for the screen production is complete; **or**
- each time the QNZPE for the screen production has exceeded a multiple of NZ\$50 million. Where this occurs, a final application setting out the remaining QNZPE must also be provided once all QNZPE for the production is complete.

11.22. For bundled screen productions, an application can only be made when QNZPE on all screen productions within a bundle is complete, however, an interim application may be made in respect of any individual screen production which has either complete QNZPE where QNZPE is NZ\$15 million or more or incurred QNZPE of NZ\$50 million or more.

11.23. Film or television companies need to apply for the grants within 3 months of completion of the screen productions. Each application must be made on the Application Form provided on the NZFC's website. This can be obtained from <http://www.nzfilm.co.nz/RegulatoryApprovals/LargeBudgetGrantScheme.aspx>.

11.24. The following information must be included on each application (refer to the NZFC Criteria for a detailed analysis of each item):

- audited expenditure statement;
- sample footage;

- statutory declaration; and
- further information as requested.

11.25. Payment of the final funding will be dependent on the IRD verifying the information provided to the NZFC and the decision of the NZFC. Provided the application is complete and has been validated, the NZFC will endeavour to approve payment within 3 months of application. The grant will be paid by the Ministry of Economic Development (“MED”).

The SPIF Grant

11.26. On 1 July 2008, the New Zealand Government created the SPIF Fund to provide grants to eligible New Zealand feature film, television and other format screen productions deemed to have significant New Zealand content. The purpose of the Fund is to:

- support increased production of medium and larger scale New Zealand cultural screen content, for the benefit of audiences;
- support the retention of New Zealand screen talent, stories and infrastructure by maintaining New Zealand’s international competitiveness; and
- incentivise the New Zealand screen production industry to develop closer market connections and private finance for larger screen productions.

11.27. The Fund provides:

- a grant of 40% of the QNZPE that an applicant has spent on an eligible feature film; or
- a grant of 20% of the QNZPE that an applicant has spent on an eligible television or other format screen production.

11.28. Productions that have not started principal photography before 1 July 2008 are eligible to apply. Productions that received any Government production funding prior to that date are not eligible for a SPIF grant.

Access to other Government Incentives

11.29. Unlike the LBSPG Scheme, eligible feature film productions that receive production funding (or any other funding in relation to the production) through a New Zealand Government agency (including for example NZFC, NZ On Air or Te Mangai Paho) will remain eligible to receive the SPIF grant. This does not include the LBSP or PDV grants.

Eligibility Criteria for the SPIF grant

11.30. The eligibility criteria for the SPIF grant includes:

- format;
- expenditure thresholds;
- New Zealand production with ‘significant New Zealand content’;
- relevant entity;
- residency status; and
- recoupment position.

Format

11.31. A screen production must be in one of the following formats:

- (a). a **feature film** (including theatrical documentary features, animated features and IMAX) where the film:
 - is at least 60 minutes in length (45 minutes for IMAX); and
 - is intended to be screened as the main attraction in commercial cinemas.
- (b). a **single episode programme** (including telemovies, films released direct to DVD, the internet or a mobile phone delivery platform but not including a documentary) being:
 - a stand alone programme of at least one commercial hour in length; and
 - exhibited commercially on a medium other than cinema.
- (c). a **single episode documentary** which is at least one commercial half-hour in length
- (d). a **series or season** which:
 - is exhibited commercially on a medium other than cinema;
 - has at least two episodes;
 - each episode being at least one commercial half-hour in length (with the exception of animation);
 - has a common theme, contains dramatic elements that form a narrative structure and has a new creative concept (as assessed by the NZFC)
- (e). **short form animation** being one episode or a collection of episodes, predominantly utilising cell, stop motion, digital or other animation and being not less than at least one commercial quarter-hour in duration.

11.32. The following are specifically excluded from eligibility:

- reality programmes;
- advertising programmes or commercials;
- discussion programmes;

- a production of a public event;
- a training programme; and
- computer games.

Distribution Requirements

11.33. Screen productions will also be required to have a confirmed commercial distribution agreement on an appropriate platform, whereby access to the screen production is available in New Zealand. Examples include New Zealand television broadcast, commercial distribution on DVD in New Zealand or a new media platform (such as online or mobile content) accessible to New Zealanders.

Expenditure thresholds

11.34. To be eligible for a SPIF grant, a screen production must fall within the following thresholds:

Format	Minimum QNZPE (NZ\$) (maximum \$15 million)	SPIF Grant
Feature Film	\$2.5 million	40% of QNZPE
Single episode programme other than a documentary	\$1 million total and no less than \$800,000 per commercial hour	20% of QNZPE
Single episode programme, documentary	\$250,000 total	20% of QNZPE
Series of programmes other than documentary	\$1 million and total No less than \$500,000 per commercial hour	20% of QNZPE
Series of programmes, documentary	No less than \$250,000 per commercial hour	20% QNZPE
Short form animation	\$250,000 and no less than \$1 million per commercial hour	20% of QNZPE

11.35. The maximum amount of eligible QNZPE for any individual screen production is \$15 million so the maximum SPIF grant will be \$6 million for film and \$3 million for television. Productions over \$15 million may meet the criteria for the LBSPG Scheme.

11.36. Unlike the LBSPG Scheme, applicants for a SPIF grant cannot bundle screen productions (other than series or seasons outlined above) to achieve a larger total amount of QNZPE.

11.37. For official co-productions undertaken under an agreement or an arrangement between the New Zealand Government and the government of another country, **Total Production Expenditure** will count towards meeting the minimum QNZPE thresholds (see below for what is included in *Total Production Expenditure*).

New Zealand production with 'significant New Zealand content'

11.38. Productions must have been certified by the NZFC under section 18 of the NZFC Act as a New Zealand film with 'significant New Zealand content.'

Relevant entity

11.39. An applicant must be the entity responsible for all activities involved in making the production in New Zealand and must have access to full financial information for the production worldwide which can be made available to the NZFC upon request.

11.40. Making the production includes:

- pre-production activities;
- production activities;
- post-production activities; and
- any other activities undertaken to bring the production up to the state where it could reasonably be argued that it was ready to be distributed, broadcast or exhibited to the general public.

Residency status

11.41. An applicant must be a New Zealand resident company or a foreign corporation operating with a fixed establishment in New Zealand for the purposes of lodging an income tax return.

Recoupment position

11.42. An applicant shall be entitled to a share of the income from the production that is commensurate with the expected value of the SPIF grant, with the position for recoupment of that share being similar to that of any other equity investors in the production.

Qualifying New Zealand Production Expenditure – all NZFC grants

11.43. The concept of QNZPE is relevant to all three grants from the NZFC. The following information is a synopsis of the NZFC Criteria for the LBSP, PDV and SPIF grants. Potential applicants are advised to refer to the NZFC website for full information and criteria for eligibility.

11.44. QNZPE is generally defined as the production expenditure spent by the applicant on the screen production where that expenditure is incurred for, or is attributable to:

- goods and services provided in New Zealand;
- the use of land located in New Zealand; or
- for the LBSP and PDV grants, the use of a good that is located in New Zealand at the time that the good is used in the making of the screen production.

11.45. The following New Zealand expenditure items are specifically **included** in QNZPE:

- **New Zealand development and pre-production expenditure**, which is defined as expenditure incurred in New Zealand on the development and pre-production stages of the screen production i.e. prior to the commencement of principal photography, including expenditure to cover:
 - location surveys and other activities undertaken to identify and assess locations for possible use in the production;
 - storyboarding and script writing;
 - research for the production;
 - casting actors;
 - developing a budget;
 - developing a shooting schedule for the production; and
 - for the LBSP and PDV grants, those legal costs relating to writers' contracts or to copyright issues, including chain of title.
- **New Zealand copyright acquisition** (provided the cost is allowed as a deduction or depreciation allowance under the 2007 Act);
- **New Zealand business overheads**, to the extent that the amount does not exceed the lesser of:
 - **for the LBSP grant** - 3% of the total of the company's QNZPE on the screen production;
 - **for the PDV grant** – 3% of the company's qualifying PDV production expenditure (refer to paragraphs 11.47-11.48 for what constitutes *qualifying PDV expenditure*);
 - **for the SPIF grant** – 5% of the total of the company's **Total Production Expenditure** (see below) on the screen production; or
 - NZ\$500,000
- **New Zealand copyrighted publicity and promotion expenditure**, if:
 - the expenditure was incurred by the applicant company before completion of the production; and

- copyright in the publicity material is held by a person the 2007 Act treats as either being resident in New Zealand or who carries on a business in New Zealand through a fixed establishment.
- **Travel to New Zealand**, where that travel relates to incoming journeys:
 - for cast personnel whose remuneration qualifies as QNZPE, regardless of the number of days spent working on the screen production in New Zealand; and
 - for non-cast personnel whose remuneration qualifies as QNZPE and who work on the screen production in New Zealand **for a period totalling fourteen days** or more (LBSP and PDV grants);
 - for non-cast personnel whose remuneration qualifies as QNZPE and who work on the screen production in New Zealand **for a period of at least fourteen consecutive days** (for the SPIF grant).
- **Advances** on a payment in respect of deferments, profit participation or residuals where they satisfy the criteria specified in the general definition of QNZPE above at paragraph 11.44;
- **Production insurance and completion bonds** (with the exception of Errors and Omissions insurance for the LBSP and PDV grants);
- **International freight** (provided that it is paid in New Zealand).

For the SPIF grant only, the following is also QNZPE:

- **Additional audiovisual content** that is intended to be released with the production in some form;
- **Expenditure incurred in a foreign country:**
 - where:
 - the expenditure is incurred during principal photography only;
 - the location being used for principal photography is reasonably required by the subject matter of the production;
 - the expenditure is for the remuneration of a New Zealand resident or the purchase of goods or services from a New Zealand resident company; and
 - where the remuneration of the person travelling for the screen production is QNZPE under this rule, the person's travel costs to or within any other country are also QNZPE.
 - where financing expenditure is directly related to cash flowing the amount of the SPIF grant and is expended in certain countries;
 - where the expenditure is for a completion guarantor's fee.
- **Above the line costs** up to a maximum of 20% of the **Total Production Expenditure** including:
 - development including story rights;

- remuneration for the principal director;
- remuneration for the producers and the producer's unit; and
- remuneration for the principal cast.
- **Financing expenditure** including returns payable on amounts invested in the screen production and interest due, subject to specified caps.
- **Legal and audit fees** relating to writer's contracts or copyright issues including chain of title, cast and crew contracts and preparation and negotiation of financial and security documents.

11.46. The following expenditure items are specifically **excluded** from QNZPE:

- **Financing expenditure** (LBSP and PDV grants only);
- **Costs relating to short-term visits for non-cast personnel;**
- **Costs of services embodied in goods** (This is where the costs of certain services are embodied in the cost of a good that is delivered to the applicant company, and those services were predominantly performed outside New Zealand) (LBSP and PDV grants only);
- **Deferments, profit participation and residuals** (except where they are **advances** as set out in paragraph 11.45 above); and
- **Others** including Errors and Omissions insurance (LBSP and PDV grants only), cast perks, gifts, entertainment and gratuities;
- **Acquisition of a depreciating asset** (SPIF grant only).

Qualifying PDV Expenditure

11.47. Qualifying PDV expenditure is defined as QNZPE that is spent directly on PDV production in relation to a single screen production which meets the format requirements listed above in paragraph 11.31. A list of activities that are considered PDV production activities is set out in the NZFC Criteria.

11.48. Qualifying PDV expenditure also includes expenditure on all activities which are *necessarily related* to PDV production. Such activities include:

- **Cost of personnel** including per diems except non cast personnel who travel to New Zealand and work on the screen production for thirteen days or less;
- **Studio and office hire;**
- **Equipment purchase and hire;**
- **Travel to New Zealand**, where that travel relates to incoming journeys:
 - for non-cast personnel whose remuneration qualifies as QNZPE and who work on the screen production in New Zealand for a period totalling fourteen days or more; and
 - for cast personnel whose remuneration qualifies as QNZPE, regardless of the number of days spent working on the screen production in New Zealand; and

- **Depreciation of assets** (where depreciation is allowed under the 2007 Act).

11.49. The screen production itself need not meet any timing or expenditure thresholds.

Total Production Expenditure for the SPIF Grant

11.50. For the SPIF grant, the concept of Total Production Expenditure (“TPE”) is relevant. TPE is defined by the NZFC as production expenditure incurred in, or that is reasonably attributed to, actually making the screen production, whether in New Zealand or elsewhere, to bring the production up to the state that the production is ready to be distributed, broadcast or exhibited to the general public.

11.51. TPE must necessarily include all expenditure items calculated as part of QNZPE. To that end, the NZFC specifically exclude the following items from TPE **except where they qualify as QNZPE**:

- financing expenditure;
- development and pre-production expenditure;
- copyright acquisition;
- general business overheads;
- publicity and promotion expenditure;
- advances;
- acquisition of a depreciating asset.

11.52. The NZFC specifically excludes the following expenditure:

- **Deferments, Profit Participation and Residuals** (This includes expenditure that is dependent on the screen production’s commercial performance such as payments deferred until the screen production provides financial returns through box office receipts and payments dependant on eventual profits made);
- **Other exclusions** such as cast perks, gifts, entertainment and gratuities.

Applications for the SPIF grant

11.53. Before an applicant has commenced production or at any time during production, an application can be made to the NZFC for provisional certification of eligibility for a SPIF grant. A Provisional Certificate does not guarantee that a Final Certificate will be issued but it does indicate that:

- the production qualifies as having significant New Zealand content;
- the production is likely to meet the minimum QNZPE threshold; and
- the evidence of commercial distribution meets the criteria.

11.54. Within six months of the completion of the screen production, an applicant can apply for a Final Certificate. The following information must be included on each application (refer to NZFC Criteria for a detailed analysis of each item):

- audited expenditure statement;
- sample footage;
- statutory declaration; and
- further information as requested.

11.55. Payment of the SPIF grant will be made within 3 months of the application depending on verification of the information by the IRD.

LIST OF REFERENCE MATERIAL

Tax Information Bulletin

Vol. 16, No. 1 (February 2004), pages 58-66 (Deferred Deduction Rule). Note this is now sections GB 45 – 48 of the 2007 Act.

Vol. 15, No. 5 (May 2003), page 75 (Interest Component of Reimbursement for Film Production Expenditure). Note this is now section DZ 11(1) & (2) of the 2007 Act.

Vol. 20, No. 3 (April 2008), page 126 (Large Budget Screen Production Grant).

Vol. 21, No.8 Part II (October /November 2009), page 101 (Film and Government Funding)

New Zealand Film Commission

Website:

<http://www.nzfilm.co.nz/>

Certification as a New Zealand film

<http://www.nzfilm.co.nz/RegulatoryApprovals/NZCertification.aspx>

Application pack for Provisional Approval of Certification (pdf)

<http://www.nzfilm.co.nz/RegulatoryApprovals/NZCertification.aspx>

Application pack for Final Approval of Certification (pdf)

<http://www.nzfilm.co.nz/RegulatoryApprovals/NZCertification.aspx>

LBSP, PDV and SPIF Grants

Large Budget Screen Production Grant Criteria (pdf dated 19 October 2007):

<http://www.nzfilm.co.nz/RegulatoryApprovals/LargeBudgetGrantScheme.aspx>

Application Form:

<http://www.nzfilm.co.nz/RegulatoryApprovals/LargeBudgetGrantScheme.aspx>

Screen Production Incentive Fund Grant Criteria (pdf dated 10 October 2011)

http://www.nzfilm.co.nz/getattachment/e1e7f559-66f2-4d4c-9e41-29a635caabdf/SPIF_Criteria_24_Dec_2010.aspx?disposition=attachment

Application Form:

http://www.nzfilm.co.nz/DevelopmentAndFinancing/Screen_Production_Incentive_Fund.aspx

IRD's Screen Production Desk

Website:

<http://www.ird.govt.nz/industry-guidelines/screen-production/>

0800 phone number:

0800 SCREEN (0800 727 336)

Email:

screen@ird.govt.nz