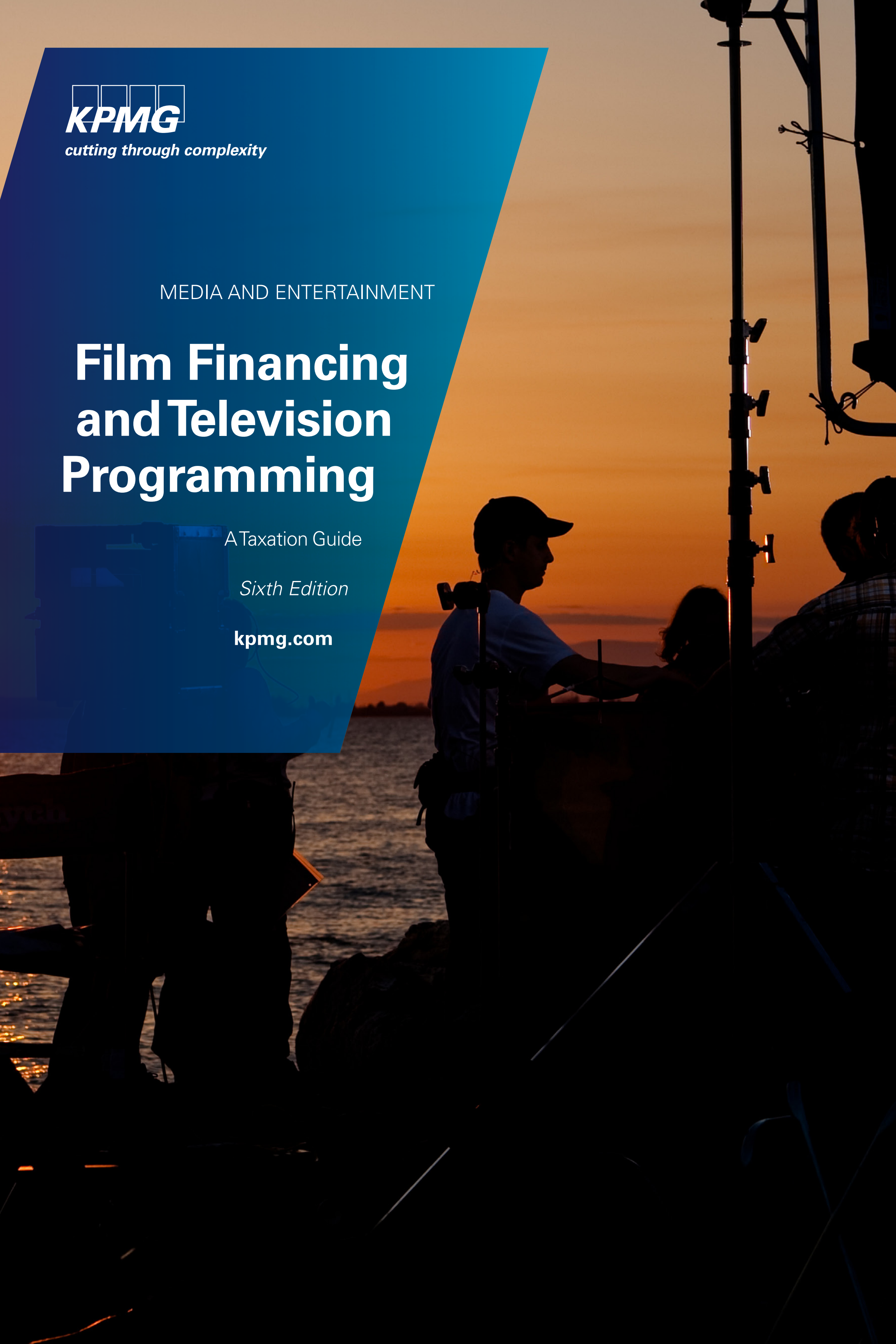

MEDIA AND ENTERTAINMENT

Film Financing and Television Programming

A Taxation Guide

Sixth Edition

kpmg.com

Contents

Preface

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tony Castellanos
+1 212.954.6840
acastellanos@kpmg.com

Benson Berro
+1 818.227.6954
bberro@kpmg.com

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Chapter 21
Malaysia

Introduction

The tax treatment of the film industry falls under the general provisions of the Malaysian Income Tax Act 1967 (Act). There are, however, various tax incentives available for Malaysian companies or Malaysian resident individuals who meet the requisite criteria. These are briefly discussed below.

Key Tax Facts

Corporate income tax rate	25%
Highest personal income tax rate	26%
Service tax	6%
Normal non-treaty withholding tax rates: Dividends	0%
Interest	15%
Royalties	10%
Tax year-end: Companies	Financial year end
Tax year-end: Individuals	December 31

Film Financing

Financing Structures

The financing structures used would depend on the nature of the involvement of parties, legal and commercial considerations. In Malaysia, businesses can be carried out via a company or a partnership.

Company

A company is governed by the Companies Act 1965. A company may be financed by share capital or shareholders' loans or both. A company is taxed as a separate legal entity. After tax profits may be distributed to shareholders in the form of dividends.

Where the share capital is in the form of preference shares, the returns paid to the holder of the preference shares are treated as dividends for tax purposes notwithstanding that preference shares may be classified as debt in the financial statements of the issuing company.

It has to be noted that, for exchange control purposes, Central Bank approval is required for the issuance of redeemable preference shares to a non-resident.

Partnership

A partnership is governed by the Partnership Act 1961 or the partnership agreement, if one exists. A partnership is defined as the relationship between parties carrying on business in common with a view to profit and hence, not a separate legal entity.

A partnership is not taxed but it is required to compute and submit a tax return to ascertain the profit attributable to the respective partners. The partners are to include the profit so ascertained in their tax return.

Joint Ventures

A joint venture may be an incorporated or unincorporated joint venture. An incorporated joint venture is established as a company under the Companies Act 1965. An unincorporated joint venture is akin to a partnership where the rights of the respective parties are documented in the joint venture agreement. The tax treatment of these is as discussed above.

There may be instances where an unincorporated joint venture is based on revenue share and not profit share. Such a joint venture does not have to file a tax return. Joint venture partners must compute any revenue they derive and any expenditure they incur in respect of the joint venture and include these in their respective tax returns.

Other Financing Considerations

Exchange Controls and Regulatory Rules

Malaysia has a limited exchange control regime. Dividends and profits may be repatriated without restriction. However, where the financing is in the form of a foreign currency loan which is in excess of Ringgit Malaysia (MYR) 100 million equivalent (in aggregate), the loan has to be approved by the Central Bank. This restriction does not apply if the loan is from a licensed onshore bank, an international Islamic bank, a resident related company (i.e. ultimate holding company, parent or head office, branches, subsidiaries, associate companies and sister companies) and non-resident non-bank related company.

Where the financing is in the form of a MYR loan, Central Bank approval is required for loans in excess of MYR 1 million. This restriction does not apply if the lender is the non-resident non-bank parent company of the borrower and the loan is used to finance activities in the real estate sector in Malaysia.

Corporate Taxation

Recognition of Income

Malaysia operates a territorial basis of income taxation, where only income accruing in or derived from Malaysia or received in Malaysia from outside Malaysia is subject to income tax. However, income sourced outside Malaysia and received in Malaysia is currently exempt from income tax except for resident companies in the business of banking, insurance, air and sea transport. The corporate income tax rate in Malaysia is 25 percent with effect from the 2009 year of assessment.

Companies with an ordinary paid up share capital of MYR 2.5 million or below at the beginning of the basis period for a year of assessment are subject to income tax at a rate of 20 percent on the first MYR 500,000 of their chargeable income and the balance is taxed at 25 percent. However, such preferential treatment shall not apply if such company is related to a company which has a paid up capital in ordinary shares of more than RM 2.5 million at the beginning of the basis period for a year ofassessment.

Companies undertaking a promoted activity or a promoted product are eligible to apply for tax holidays (known as Pioneer Status) or additional capital allowances on qualifying capital expenditure (known as Investment Tax Allowance). Approval is, however, at the discretion of the relevant authority. At present, production of films or videos and post-production for films or videos are promoted activities.

There is also a statutory order exempting non-resident film companies, actors and film crews who are in Malaysia, from the payment of income tax in respect of income derived from filming activities commencing on or after 31 March 1999 which has been approved by the Jawatankuasa Filem Asing, Ministry of Home Affairs, Malaysia.

Amortization of Expenditure

Deductions

Generally, expenses which are wholly and exclusively incurred in the production of gross income are tax deductible. Such deductible expenses include:

- Interest on loans employed in producing gross income. However, where a loan is employed in business and investments, the interest on the loan would have to be segregated and deducted in accordance with the attributed category, subject to satisfying the wholly and exclusively test.

  With effect from 1 January 2009, the deductibility of interest is also subject to the application of Section 140A(4) of the Act. Section 140A(4) provides that where the value of all financial assistance to an associated person is excessive in comparison to the fixed capital of the recipient of the financial assistance, the interest, finance charge or other consideration payable on the excessive value shall not be deductible.

  Associated person is defined as a person who has control over the recipient of financial assistance or a person who is controlled by the recipient of financial assistance or a person who, together with the recipient of financial assistance is controlled by a third person.

It is noted that Section 140A(4) requires various rules to be issued including the definition of financial assistance and the permissible debt to equity ratio. Since the rules have not been issued, thin capitalization has not yet been implemented. However, the Ministry of Finance announced that the implementation of the rules has been deferred to the end of December 2012. In view of this, it appears that thin capitalization may become effective in January 2013.

- Rent payable in respect of any land or building or part thereof occupied for the purpose of producing gross income.
- Expenses for the repair of premises, plant, machinery or fixtures.
- Bad and doubtful trade debts that arise during a period. Conversely, debts that had been previously allowed as a deduction but are subsequently recovered are taxable in the year the recovery takes place.
- Compulsory contributions made by employers to an approved pension or provident fund for employees (subject to a prescribed limit).

These expenses need to be incurred, laid out or expended during the basis period to be allowed a deduction. Expenses which are domestic, private and capital in nature are not deductible.

Tax Depreciation/Capital Allowances

Accounting depreciation, being a capital expense, is not deductible. However, tax depreciation (referred to as capital allowances) is granted on qualifying assets used in a business. The prescribed capital allowance rates can be classified as follows:

Type of Asset	Initial Allowance Rate* (%)	Annual Allowance Rate (%)
Heavy machinery and motor vehicles	20	20
Plant and machinery (general)	20	14
Office equipment, furniture and fittings and others	20	10
Industrial buildings	10	3

* Only available in the first year of assessment

Some assets, such as security control equipment and small value assets that meet certain criteria may be written off in one year. Similarly, information and communication technology equipment including computers and software incurred in years of assessment 2009 to 2013 may be written off in one year (subject to certain exceptions).

Withholding Tax

Malaysian withholding tax is applicable on prescribed payments derived from Malaysia and made to non-residents of Malaysia.

Dividends

Dividends paid are not subject to withholding tax regardless of the place of incorporation and the tax residency of the shareholder.

Interest

Interest derived from Malaysia and paid to a non-resident, except where such interest is attributed to the business of such non-resident in Malaysia, is subject to 15 percent withholding tax unless otherwise reduced by an applicable tax treaty.

- Interest is deemed to be derived from Malaysia if, among others: the responsibility for the payment lies with a Malaysian resident and the loan is laid out on assets used in or held for the production of any gross income derived in Malaysia or the loan is secured by an asset situated in Malaysia
- The interest is charged as an outgoing or expense against any income accruing in or derived from Malaysia

However, certain interest paid to non-residents is exempt from withholding tax, for example, interest paid by a bank licensed under the Banking and Financial Institutions Act 1989 or Islamic Banking Act 1983 or interest paid pursuant to Islamic securities originating from Malaysia, other than convertible loan stocks, issued in currencies other than MYR and approved by the Malaysian Securities Commission.

Royalties

Royalty is defined in the Act to include –

a. any sums paid as consideration for the use of, or the right to use –

   i. copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks, or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;

   ii. know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

b. income derived from the alienation of any property, know-how or information mentioned in paragraph (a) of this definition.

Where there is an applicable tax treaty, the definition of royalty as defined in the tax treaty shall prevail.

Royalties derived from Malaysia and paid to a non-resident, except where attributed to the business of such non-resident in Malaysia, are subject to withholding tax at a rate of 10 percent unless otherwise reduced by an applicable tax treaty.

Royalties are deemed derived from Malaysia where:

- The responsibility for payment lies with a resident of Malaysia; or
- The royalty is charged as an outgoing or expense against any income accruing in or derived from Malaysia.

Other Payments

In addition to the above, the following payments, where deemed derived from Malaysia, are also subject to withholding tax:

- Fees for services rendered in Malaysia by a non-resident person or their employee in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such non-resident
- Fees for technical advice, assistance or services rendered in Malaysia in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme
- Fees for rent or other payments made under any agreement or arrangement for the use of any movable property
- Miscellaneous gains or profits which do not constitute the business income of the non-resident

The payments are deemed to be derived from Malaysia if, among others:

- The responsibility for the payment lies with a Malaysian resident
- The payment is charged as an outgoing or expense in the accounts of a business carried on in Malaysia

Tax Relief for Foreign Tax Suffered

Where there is an applicable tax treaty, bilateral relief is available to a Malaysian resident in respect of foreign taxes paid. The amount of relief given will be the lower of the tax suffered in the foreign country and the Malaysian tax attributable to the income.

Where there is no applicable tax treaty, unilateral relief is given and this is restricted to the lower of half of the tax suffered in the foreign country and the Malaysian tax attributable to the foreign income.

Indirect Taxation

Malaysia does not have a broad-based VAT/GST regime but it does have single stage consumption taxes known as service tax and sales tax.

Service Tax

Service tax at 6 percent is chargeable on taxable services provided by taxable persons. The production of film or video is not a taxable service.

Sales Tax

Sales tax at rates ranging from 5 – 10 percent is chargeable on taxable goods manufactured in or imported into Malaysia for local consumption. Certain equipment relating to the production of films are given sales tax exemptions.

Personal Taxation

General Taxation Rules

An individual is taxed on income accruing in or derived from Malaysia. Such income will be subject to tax at a rate of 26 percent if the individual is a non-resident or at a graduated scale of 0 – 26 percent if the individual is a tax resident in Malaysia.

An individual would be deemed to be a tax resident of Malaysia for a particular year of assessment if:

- They are in Malaysia for 182 days or more in a basis year
- They are in Malaysia for less than 182 days, however, the period is linked by or linked to another period of 182 or more consecutive days
- They are in Malaysia for 90 days or more, and for three out of four immediate preceding years of assessment, they are either resident of or in Malaysia for periods amounting to 90 days or more
- They are resident in the year following the particular year of assessment and in each of the three years immediately preceding the particular year of assessment

The above is subject to relief which may be available under applicable tax treaties.

Public Entertainers

A public entertainer is a stage, radio or television artiste, a musician, sports person or an individual exercising any profession, vocation or employment of a similar nature. Resident public entertainers are assessed to tax at graduated rates of between 0 and 26 percent. An exemption of MYR 10,000 is, however, available for a royalty or payment in respect of the publication of, use of or right to use any artistic work (other than an original painting) and for a royalty in respect of recording discs or tapes. Limited exemptions are also available for resident individuals receiving income from musical compositions.

Income of a non-resident public entertainer consisting of remuneration or other income in respect of services performed or rendered in Malaysia is subject to withholding tax of 15 percent on their gross income.

However, there is a statutory order exempting non-resident film companies, actors and film crews who are in Malaysia from the payment of income tax in respect of income derived from filming activities commencing on or after 31 March 1999 which have been approved by the Jawatankuasa Filem Asing, Ministry of Home Affairs, Malaysia.

KPMG Contact

KPMG's Media and Entertainment tax network member:

Nicholas Crist

KPMG Tax Services Sdn Bhd
Level 10 KPMG Tower
8 First Avenue
Bandar Utama
47800 Petaling Jaya

Phone: +603 7721 3388
Fax: +603 7721 7288