Dear Sirs

CALL FOR COMMENT: DRAFT GUIDE TO THE TAXATION OF FILM OWNERS

We refer to your call for comment regarding the above-mentioned document that was placed on your website. Set out below please find SAICA’s comments, which have been provided by members of our National Tax Committee.

1. Part A

1.1 The Guide is based on the legislation as at 25 July 2006. For example, in Part 3.1 it refers to the definition of “remuneration”, as set out in the Fourth Schedule to the Income Tax Act, No 58 of 1962 (“the Act”), as it read before it was amendment by the Revenue Laws Amendment Act, No 20 of 2006. Since the Guide is still in draft format, a risk exists that it may be out of date by the time that it is made available to the general public and this may cause unnecessary confusion and reduce the relevance of the Guide. We recommend that the Guide be updated so as to refer to the legislation currently in force.

1.2 The guide and all the references to section 24F still make reference to the taxation of film owners whereas section 24F, post the recent amendments, actually refers to an "allowance in respect of films".

1.3 Page 7 (third last Bullet point) states that it "no longer provide for separate deductions in respect of marketing expenditure and printing costs". It is the norm in the industry that, for internationally released films, the print and advertising costs (P&A) normally equates to the sum of the pre-production, production and post production costs. There is no longer an allowance for P&A in terms of s24F although film owners/investors normally would also fund these expenses unless
the films are so called "studio films". (The guide is, however, factually correct as s24F does not allow P&A expenses as part of the allowance).

1.4 Neither the Act, nor the guide, appears to deal with pre-production costs although some expenses that are normally categorised in the industry, as pre-production costs, are categorised as production cost in both the guide and in the Act. In terms of industry norms production only commences with principal photography. We recommend that this issue be addressed in the guide.

1.5 In part 2.3 the guide deals with the potential abuse of the deductions available under section 24F of the Act. We believe that this section is confusing in that it does not specifically state that it is considering this aspect in terms of the specific application of the general anti-avoidance rules (“GAAR”) contained in sections 80A to 80L of the Act. The impression is rather created that section 24F contains specific anti-avoidance provisions to address the issue. We recommend that this be clarified.

1.6 Part 2.3 (pages 20 to 23 of the guide) deals with “Abuse of the Film Allowance”. It should be borne in mind that various parties, including the Department of Trade and Industry, the Industrial Development Corporation and the National Film and Video Foundation are trying to build a self sustaining, feasible film industry in South Africa. This section addresses past abuse of the tax system and is believed to create the impression of distrust from SARS towards the film industry. Comments from foreign producers have been raised that pre-1990 abuse still seems to be at the top of SARS' mind when dealing with film companies.

2. Part B

2.1 The entire guide appears to deal with film owners as if they are involved in the production side of the film. Frequently this will not be the case as the film owners may employ special film manufacturers, or production houses, to produce the film. This section, relating to "other taxes" does, however, correctly state when film owners will be liable for such other taxes.

3. General comments

3.1 We believe that the guide does not adequately address the current employees’ tax implications for models, who, for example work for advertising agencies on an ad hoc basis. In terms of current law, they are in all likelihood often independent contractors, and therefore no employees’ tax need be deducted (they do not generally perform work at the premises of the person by whom they are paid or for whom they are performing the services- they would be ‘on location’). However, on the basis that the model agency in essence supplies the models (persons) for reward, to the production companies etc, they may be required to obtain labour brokers’ exemption certificates (forms IRP30) and to deduct employees’ tax from the models that they have on their books. This, together with the employees’ tax treatment of the behind the scenes workers, needs to be covered in more detail, since there is a lot of confusion as to the correct position in the Industry.
3.2 In general, it is believed that the guide will be of use to film owners that need general guidelines to the tax matters as it affects them. It is not intended as a technical reference guide and the information contained therein, although in agreement with the Act, is probably too basic to be of real assistance to film owners (to use SARS' film owner concept). We recommend that the guide be expanded to also give guidance on transactions between film owners/investors/funders and production houses and other standard, industry specific transactions.

Please do not hesitate to contact me should you require further information.

Yours faithfully

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