FILMMAKERS' RELIEF: A COMPARATIVE STUDY

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Soli Deo Gloria!

ABSTRACT

FILMMAKERS' RELIEF: A COMPARATIVE STUDY

by

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The South African film industry is the second oldest film industry in the world. Sadly though, the industry did not develop in the previous century to the same extent film industries developed in specifically North America and Europe.

Film tax relief is an incentive incorporated in tax legislations worldwide and is used as a catalyst for economic growth in film industries. South Africa has had specific tax legislation in this regard for decades and it is currently regulated in terms of Section 24F of the Income Tax Act. Two further incentives, the 'Foreign Investment Grant' and the 'Strategic Industrial Projects Grant' are also available from the Department of Trade and Industry.

Legislation is constantly reviewed and revised to achieve the objectives they intend to have. This study reviews current South African legislation in this regard, compares it with the current available film industry relief in India and Australia and concludes on film relief effectiveness in general.

Keywords:
Film industry
Film relief
Section 24F

Tax legislation

Tax offset

Qualifying production expenditure

OPSOMMING

FILMVERVAARDIGERSVERLIGTING: ‘N VERGELYKENDE STUDIE

deur

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Die Suid- Afrikaanse filmbedryf is die tweede oudste filmbedryf in die wêreld. Ongelukkig het hierdie bedryf egter nie in dieselfde mate ontwikkel as wat filmbedrywe in spesifiek Noord-Amerika en in Europa ontwikkel het nie.

Filmbelastingverligting is ‘n wetlik geïnkorporeerde verligting in belastingwetgewings wêreldwyd en dien as ‘n katalisator vir ekonomiese groei in filmbedrywe. Suid-Afrika beskik reeds vir dekades lank oor belastingwetgewing in hierdie verband en dit word huidig deur Artikel 24F van die Inkomstebelastingwet gereguleer. Twee addisionele aansporings, die ‘Buitelandse Beleggings Subsidie’ en die ‘Strategiese Industriële Projekte Subsidie’ is ook by die Departement van Handel en Nywerheid beskikbaar.

Wetgewing word voortdurend hersien en gewysig ten einde die doelstellings te bereik wat dit veronderstel het. Hierdie studie is ‘n oorsig van die huidige Suid- Afrikaanse wetgewing in hierdie verband. Dit word vergelyk met die huidige beskikbare filmbedryfverligting in Indië en Australië en ten slotte word ‘n gevolgtrekking gemaak oor die effektiwiteit van filmverligting in die algemeen.

Sleutelwoorde:
Filmbedryf
Filmverligting

Artikel 24F

Belastingwetgewing

Belasting verreken

Kwalifiserende produksieuitgawes

CHAPTER 1

INTRODUCTION

The history of film is just a little over one hundred years old. It started with images in black and white and in movements slightly faster than those of real life. As the hour-glass of the previous century filled, the images became clearer, later colourful and eventually real-life images could be depicted. Cinema was here to stay and soon an international film industry was booming. The United States of America (USA) became the leader of the film industry and everybody headed for Hollywood (Anon, 2011(a)).

South Africa (SA) was one of the first countries that had a film industry and in fact it has the second oldest industry in the world (Anon, 2011(g)). Sadly though, it never developed, due to and amongst others, the policies and principles of the reigning regime the country had for the largest part of the previous century (Botha & Van Aswegen, 1992).

It is common knowledge that the USA has a wealthy economy and during 2001 it was reported that California (*one* American state) had the fifth biggest economy in the world (Anon, 2001). Los Angeles (Hollywood) in California is the heart of the world's film industry. California houses the most imposing film production studios in the world leading to a vast output of film productions.

All the major film studios are in Los Angeles. This means maximum profits are sought and in turn stimulating even bigger growth in the industry, also stimulating employment and a greater tax income for the state of California.

One can conclude that if film relief is available (of which tax is one component of film relief), more films can be produced, and more revenue can be taxed and in this way the economy of a country will be stimulated.

1.1 BACKGROUND

The film industry in SA for decades was an industry for whites only and predominantly Afrikaans-speaking whites. High moral values were upheld as the norm and any issues contrary to these standards, were never addressed. If films did not value what the church and the government dictated, they were not promoted or even funded. The government of the day wanted to and did manipulate the industry. Confirming this, the government introduced a regulated subsidy system in 1956. Forty-three of the sixty films produced in SA between 1956 and 1962 were made in Afrikaans, only thirteen were in English, while four were bilingual. Films qualified for the subsidy only if a specific amount of money was made at the box-office. The subsidy then reimbursed filmmakers a percentage of their costs. Initially the subsidy allowed for a higher percentage reimbursement for Afrikaans films than for English films. Films in African languages were simply just not produced (Davies, 1989).

The turning point in the South African film industry came in 1986/1987 when several feature films began to critically examine the South African milieu, apartheid, as well as its colonial history – in other words, it was a new wave in the South African film industry (Tomaselli, 1988).

In a study by the Australian, Clark (1999), he referred to an American Professor Surrey who had identified the following three advantages of tax incentives way back in 1973 already:

1. Tax incentives encourage the private sector to invest: the greater the lure, the greater the investment will be, of which the film industry is a very good example of a high-risk industry.
2. Tax incentives promote private decision-making rather than government decision-making: if this is removed from government, more accurate and informed decisions will be made on, for example, the support and growth of the film industry.
3. Tax incentives promote creativity in the film industry and provide a wider investment base: where governments take a direct role in funding, it restricts the industry through regulation in other words dampening free expression.

In SA, taxation relief for filmmakers (hereinafter referred to as filmmakers' relief), section 24F of the Income Tax Act No 58 of 1962 (The Act), was introduced in 1987 and several hundred so-called 'tax shelter films' were produced. In retrospect, however, these films were rather obscure and did not present any South African culture at all. It was merely produced by overseas companies because the locations locally could resemble a country anywhere in the world, most importantly, at favourable budget costs. All these films ended up in video shops as inferior productions – acting and quality wise. This tax shelter scheme collapsed at the end of the eighties, mainly because of abuse by promoters and investors of films (Botha, 2004).

During the early nineties, SA was at the dawning of what was to become a democratic country, striving to build a South African culture, acknowledging all nationalities and official (most spoken) languages. This was in more than one way favourable also for the South African film industry.

In 1994 a comprehensive study by the Human Sciences Research Council (HSRC) was completed on the restructuring of the entire South African film industry and forwarded to the Department of Arts, Culture, Science and Technology. The 400 page report which received widespread praise, recommended that state aid to the local film industry should be administered by a statutory body referred to as the South African Film and Video Foundation (SAFVF). The report further stated that sustained government/private sector aid to the post-apartheid film industry would ensure the continued existence of South African cinema. Even 'first world' film industries like those of Canada, Australia, New Zealand and France cannot survive without continuous support from the state (Botha, 2004).

1.2 PROBLEM STATEMENT

In order to improve the development of the SA film industry and to realise its potential in contributing to the South African economy, relief needs to be provided to filmmakers in SA. In order to ascertain what can be done to promote a truly South African film industry, tax relief in the form of section 24F, will be compared to similar relief in other countries in order to make recommendations regarding the revision of section 24F in its entirety. Films and television productions that will proudly be acknowledged for their quality and stand on their own in a fast growing international film industry like those of Australia, New Zealand, Canada and India, will contribute to the South African economy.

An emerging South African industry has already claimed accolades for the Oscar winning *Tsotsi* (2006) as best foreign language film and *Yesterday* (2005) which was also nominated in the same category.

Oscar nominations mean box-office successes and this is the trigger needed to encourage local producers to invest in ambitious productions. Should government be a funding partner by increasing its relief, all parties will benefit and an industry of note would be build. Film relief should also cater for those foreign production companies that would like to film in SA for its climate, locations and also the favourable exchange rate. The relief for these productions should have prescribed conditions though, for instance, a certain percentage local skills should be employed and local production companies should be co-producers. This is what is lately happening in Australia and also New Zealand. Leading production companies that produced films like *Lord of the Rings* in New Zealand and *Moulin Rouge* in Australia for instance employed local production companies and local skills for these films.

1.3 PURPOSE STATEMENT

The aim of this study is to assess what has transpired in the SA film industry since the dawn of democracy (1994) and what can be done by the government to help encourage film production companies to establish a national film industry that would help stimulate the entire economy and be recognised internationally.

1.4 RESEARCH OBJECTIVES

The collection of more tax for the government is part of stimulating the economy. The objectives of this study are therefore:

- To review the section 24F (S 24F) of the Act on tax relief available to filmmakers in SA.
- To compare the current South African filmmakers' tax relief with similar comparable industries of two other countries namely, India, also a developing economy, as well as with a developed economy, Australia.

- To review the 'Foreign Investment Grant' and the 'Strategic Industrial Projects Grant' offered by the Department of Trade and Industry (DTI). Apart from the tax relief introduced by the government, the DTI also makes these two available incentives available to enhance South African manufacturing projects which, of course, include film productions.

- To review the South African co-production treaty with Australia and a memorandum of understanding relating to filmmaking with India.

- To remark on the effectiveness of taxation relief for filmmakers.

In order to achieve the above, it will help to understand the historical events in SA and the influence thereof on the South African film industry, as well as the collection of taxes by SARS.

1.5 DELIMITATIONS AND ASSUMPTIONS

This study is based on legislation as at November 2011. The most recent available data or information has been included for reference purposes.

1.6 ABBREVIATIONS USED IN THIS DOCUMENT

Act - Section 285B of the Indian Income Tax Act, 1961

AsgiSA - Accelerated and Shared Growth Initiative for South Africa

ABN - Australian Business Number

AFTRS - Australian Film, Television & Radio School

CAG - Comptroller and Auditor General

DTI - Department of Trade and Industry

DTA - Double Tax Agreement

DTAA - Double Taxation Avoidance Agreement

DTC - Draft Direct Tax Code, 2009

FLIC - Film licensed investment company

GAAR - General Anti Avoidance Rules

GDP - Gross Domestic Product

HSRC - Human Sciences Research Council

ITAA 1997 - Income Tax Assessment Act 1997

NFVF - National Film and Video Foundation

PDV - Post, Digital and Visual Effects

QAPE - Qualifying Australian production expenditure

QSAPE - Qualifying South African production expenditure

RFTO - Refundable Film Tax Offset

S 24F - Section 24F of the South African Income Tax Act

SAC - Significant Australian Content

SA - South Africa

SAFTA – South African Film and Television Awards

SAFVF - South African Film and Video Foundation

SARS - South African Revenue Service

TDS - Tax deduction at source

The Arts Minister - The Minister for Environment Protection, Heritage and the Arts

USA - The United States of America

1.7 CONCLUSION

South Africa has a long filmmaking history. However, development of this industry has until recently, been slow and did not contribute to the economy of SA, as would have been expected of such an old industry.

To address this, the provisions of the S 24F taxation relief for filmmakers, the effect of tax treaties as well as the DTI relief, need to be reviewed, although the emphasis will be on S 24F since it is prescribed by Law and introduced to benefit filmmakers, specifically.

The South African relief for filmmakers will be discussed in the next chapter, the Indian film relief in chapter 3 and relief for Australia's film industry in chapter 4. Comparisons between the industries of India, Australia and South Africa will be made in chapter 5 as well as a final conclusion on research objectives achieved in chapter 6.

CHAPTER 2

SA FILM INDUSTRY AND THE IMPACT OF RELIEF ON SA FILMS

Most people in the filmmaking industry may not necessarily know what impact film tax relief has on the production of films, however, usually accounting practices will be able to provide these answers, specifically to questions such as, what film relief is, how it works, how it influences the payment of tax and what the conditions are to be entitled to film relief.

2.1 SA FILM INDUSTRY DEVELOPMENT

The South African film industry is one of the oldest in the world and includes the first ever newsreels which were filmed during the Anglo-Boer War (1899–1902). The weekly cinema newsreel, *African Mirror,* was launched in 1913 and it ran until the 1980s. The first South African feature film, *The Kimberley Diamond Robbery,* was filmed in 1910 (Anon, 2011(e)).

Since 1994, the emergence of a significant amount of talent from previously marginalised groups increased the local skills pool and consolidated the once fragmented industry (Botha, 2004).

The current South African industry has a world-class skills base in the area of film production as well as a superior distribution and exhibition infrastructure. The country has a variety of locations and enjoys 14 hours of sunlight during summer months, which makes it excellent for filming (the dti, 2011). In the international film production, *Lord of War,* Cape Town appeared as the setting for 57 different locations, as if it was filmed in the Middle East, Afghanistan, Bolivia and Sierra Leone, to mention a few (Anon, 2011(e)).

The National Film and Video Foundation was founded in 1999 to establish and encourage a truly South African film industry. In its first ten years of existence, the foundation reported its achievements in its 2009/ 2010 report. These achievements are summarised in Table 1.

Table 1: Recent South African Film Achievements

Film	Award/ Accolade
Tsotsi	Oscar for best foreign language film 2005
Hotel Rwanda	3 Oscar nominations 2005
Yesterday	1 Oscar nomination 2005
Elalini	Oscar for best student film 2006
U-Carmen e-Khayelitsha	Golden Bear, Berlin 2005
Wooden Camera	Silver Bear, Berlin 2004
Drum	The Golden Stallion & best art direction, Fespaco 2005
Zulu Love Letter	European Union Prize & best actress, Fespaco 2005
Max and Mona	Best first time director (feature), Fespaco 2005
Lion's Trail	Emmy award 2006
Skin	19 international awards 2009/ 2010
Izulu Lami	4 international awards 2009
Shirley Adams	Best film, Locarno 2009
Father Christmas	Best narrative short, Tribeca 2010

Source:NFVF Report 2009/2010

From the above table, it follows that the foundation of the NFVF was exactly what was needed to stimulate the industry. If no relief or financial assistance was available, the film productions could not have been made. It is not only English films that win accolades, but also other indigenous features like the Oscar-winning *Tsotsi* (in four different indigenous languages) and an Afrikaans feature, *Skoonheid,* screened as a foreign language feature at the 2011 Cannes Film Festival, a first for the Afrikaans language, also winning the Queer Palm award.

In order to promote and recognise achievement in film production, the South African Film and Television Awards (the SAFTAs), were introduced in 2005. These awards have been in existence for the past six years, encouraging the development of new talent within the industry and will continue to do so.

South Africa now has several national film festivals promoting the industry and uplifting all previously ignored communities, to name but a few:

- Durban International Film Festival
- Kwa Mashu Film Festival
- Encouters Documentary Film Festival
- Tri- Continents Film Festival
- Out in Africa Gay and Lesbian Film Festival
- Bafundi Student Film Festival
- Nab' ubomi Schools Film Festival.

The South African film industry definitely has come of age since the early years of the previous century and with the dawn of the 1990s, a new non-racial, democratic South Africa ignited a film industry that could soon be one of note.

2.2 CONTRIBUTION TO THE ECONOMY

The South African government's Accelerated and Shared Growth Initiative for South Africa (AsgiSA), identified the film industry as an excellent sector for growth potential. Since 1995, the number of people employed in the industry (including film-related transport, hospitality and catering jobs) has increased from 4 000 to around 30 000 in 2008 (Anon, 2011(e)).

A recent economic impact assessment study commissioned by the Cape Film Commission reported that, the industry had a direct turnover of more than R2.65 billion and it contributed an indirect turnover of more than R3.5 billion to the country's gross domestic product (GDP) (Anon, 2011(e)). According to the DTI, the industry is estimated to generate over R5.5 billion in economic activity annually (the dti, 2011).

2.3 SOUTH AFRICAN FILM RELIEF

Currently, several finance options, or relief, exist for South African film producers, contributing to the economy, such as:

- Co- productions treaties with certain countries;
- DTI film production incentives.
- The film investment incentive for tax paying residents and companies, S 24F of the Income Tax Act.
- Production grants from the NFVF.

The above options can be summarised as follows:

2.3.1 INTERNATIONAL CO-PRODUCTION TREATIES

These treaties allow the approved film/television program to be deemed a national production in each of the respective co-producing countries, therefore making it eligible to apply for any benefits available in either country (Anon, 2011(e)). These films will only be eligible if they comply with the relevant co-production agreement requirements.

Also, where a South African investor is entitled to a share of foreign exploitation rights and no DTA relief is available, the investor would be entitled to a rebate in respect of foreign taxes paid thereon provided that the rebate does not exceed the normal tax attributable to the inclusion of the royalties in the investor's taxable income.

Where a foreign investor is actively involved with the production of film in South Africa and a DTA exists, there is a possibility that the foreign investor would be taxed in South Africa on profits arising from such activity on the basis that this constitutes a permanent establishment of the foreign investor. In all the DTA agreements entered into by South Africa, a 'permanent establishment' is defined, *inter alia,* as a place of management, branch, office, factory, workshop, mine, quarry or other place of extraction of natural resources and a building site or construction or assembly project which exists for more than 6-12 months.

Co-productions treaties in essence are therefore arrangements between two countries whereby relief is provided to a taxpayer, which had already been taxed in the foreign country on income from that country, by allowing a credit for the tax paid in the foreign country against the taxpayer's South African income – in other words it merely prevents the double taxation of income.

2.3.2 DTI FILM PRODUCTION INCENTIVES

In 2004 the DTI introduced the Film and Production Rebate Programme with the objective to attract large foreign and local productions to South African shores. In 2008 it was replaced by the location film and television production incentive.

The DTI has specifically introduced the location film and television production incentive for international productions filming in South Africa, whereby foreign-owned productions filming in South Africa with a 'qualifying South African production expenditure' (QSAPE) of R12 million and above are eligible for a rebate of up to 15% of the QSAPE, capped at R10 million.

For local productions, the incentive allows for a rebate of up to 35% of QSAPE on productions of a total budget of R2.5 million and upwards, also capped at R10 million.

The key changes introduced are the reduction of the threshold from R25 million QSAPE for foreign-owned productions to R12 million, a differential requirement that local-owned productions and co-productions must have at least R2.5 million of the total production budget and an increase of the rebate from 25% to 35% for local productions in order to ensure higher financial support for local productions.

The changes were introduced in order to stimulate a truly South African film industry, which in turn will stimulate the South African economy.

The DTI's assistance usually takes the form of loan finance, by means of equity, quasi-equity, commercial loans, wholesale-finance, share warehousing, export/import finance, short-term trade finance and guarantees (the dti, 2011).

2.3.3 SECTION 24F

South African taxpayers investing in films are film owners and film investments qualify for tax deductibility under S 24F of the Income Tax Act. A film owner is allowed a deduction in terms of the Income Tax Act as follows:

> "A film owner is allowed a deduction, known as the 'film allowance' in respect of the production and post-production costs. Section 24F allows a film owner to deduct production expenses as an allowance. The allowance is not ring-fenced and can be set-off against any other income."

A 'film' is defined in the Act and is regarded as a recording of moving visual images and sound by means of cinematographic film, video tape, video disc or otherwise, including any copy of the film and any right therein.

A 'film owner' is defined as any person who, either solely or jointly, owns a film.

All the taxable income of a film owner, for instance ticket sales income, distribution fees, royalties as well as income from other sources such as interest on investments, together with income from all other sources, will be added together in order to determine the film owner's (taxpayer's) gross income.

Film owners who are SA residents may also earn income from foreign sources. Under these circumstances the income from foreign sources may be subject to both South African tax and tax in the foreign countries which could result in 'double taxation'. Countries have therefore entered into agreements for the avoidance of double taxation to eliminate or reduce the potential for such double taxation. These agreements provide that income of a particular nature will be taxed in only one of the countries, or may be taxed in both countries with the country of residence allowing a credit for the tax imposed by the other, or exempting the income. South Africa uses the 'credit method' and, as a result, entered into double taxation agreements with a number of countries. The credit method being foreign taxes paid taken into account against local income.

Once the gross income for the film owner is determined, any exempt income must then be deducted from this amount in order to arrive at 'income'. An example of exempt income is for instance an amount paid or payable to a film owner in terms of the Film and Television Production Rebate Programme administered by the DTI.

A film owner may also be entitled to certain deductions and allowances in order to determine the person's 'taxable income', before any capital gains or losses have been taken into account. The allowable deductions/allowances will include the special deduction in S 24F of the Act (the film allowance) that relates to the acquisition/ production of a film and post-production costs as well as those deductions allowable to taxpayers in respect of expenditure other than expenditure related to the production and post-production costs of the film, incurred in the production of income for the purposes of trade.

The current S 24F allows for a deduction by a 'film owner' in brief as follows:

(a) the total amount of all production costs or post- production costs actually incurred in connection with any film used by that film owner in the production of income, if at least seventy-five percent thereof is paid or payable in the Republic in respect of services rendered or goods supplied in the Republic;
(b) the total amount of all production costs or post-production costs actually incurred where the film is approved as a co-production; and
(c) in any other case, so much of any production costs or post-production costs actually incurred as is paid or payable in the Republic in respect of services rendered or goods supplied in the Republic;
(d) any production costs or post-production costs actually incurred not allowed in paragraphs (a) to (c), provided that the deduction is limited to ten percent of the amount of those costs in the year of assessment in which the completion date of the film falls and ten percent in each of the nine subsequent years of assessment;
(e) the deduction as set out in (a) to (d) may not in aggregate exceed the production costs and post-production costs thereof and shall be in lieu of any deduction or allowance in respect of such production costs or post- production costs which may otherwise be allowed in terms of the provisions of the Income Tax Act.

The above film allowance is, however, subject to five basic requirements:

- Only film owners qualify for the film allowance.
- The film allowance only applies to production and post-production costs.
- The costs must be paid within a certain period (18 months from the date of completion) to qualify for the film allowance.
- The film must be used in the production of income.
- The film must be completed.

Production costs are defined as the total expenditure incurred by the film owner in respect of the acquisition or production of such a film, excluding expenditure incurred in the erection, construction or acquisition of any buildings, structures or works of a permanent nature, but including:

- any remuneration, salary, legal, accounting or other fee, commission or any other amount paid or payable to any person for the purpose of or in connection with the production of the film;
- the cost of acquiring the story rights, script, screenplay, copyright or any other rights in relation to the film;
- any insurance premiums while in the production of the film;
- interest or finance charges incurred in connection with the production of a film;
- the cost of acquiring/creating music, sound and other effects which will form part of the film;
- any allowance usually allowed under section 11(e) or (o) or 12C in respect of any machinery, implements, utensils or articles used in the production of a film; and
- expenditure incurred in respect of the purchase, hire or construction of sets and the hire of any machinery, implements, utensils or articles used in the production of the film.

There is also the ‘at risk’ rule for the film owner by which a tax deduction is only allowed in respect of “real liabilities” (monies actually incurred in the film production) or where expenditure has been paid or financed by means of a loan. To a certain extent this has been alleviated by the practice of insuring against risk in the form of insurance shortfall guarantees. The film owner, however, remains at risk until such time as an insurance company pays out any claim.

Any film investor can also acquire a loan to fund a movie and still get an immediate deduction (write-off) while the actual repayment period for the loan is 10 years.

Any expenditure, however, incurred after the completion date as well as any expenditure incurred in the marketing, promotion or soliciting of orders for the film, are excluded for the purposes of S 24F of the Act.

In the February 2011 Budget Speech, it was announced by Finance Minister Pravin Gordhan that the current incentive will be transformed into a tax incentive that encourages profits. This is due to the incentive being widely abused over the years by many taxpayers who claimed deductions based on artificial expenditure. Taxpayers inflated their expenditure by borrowing through artificial non-recourse loans or by incurring excessive costs imposed by connected persons.

In the Taxation Laws Amendment Bill 2011 (the draft Bill), the Finance minister proposed the scrapping of the sometimes controversial S 24F. In terms of the amendment, a new easier to administer and more effective tax exemption is intended in terms of section 12O of the draft Bill. According to the explanatory memorandum issued with the draft Bill in early June 2011, the National Treasury declared S 24F as a “deadweight loss’’, because it has failed to provide any incentive for the production of films in South Africa and because of its complex provisions which have “created fertile ground” for schemes as opposed to genuine film productions (Kingdon & Lewis, 2011).

The new draft proposal seeks to eliminate all income tax on film profits for a 10-year period with the intention of providing a proper enticement to filmmakers to consider SA as a location for their productions (Kingdon & Lewis, 2011).

National Treasury, that will administer this proposed tax benefit, will rely on existing infrastructure within government which regulates film and television productions. One requirement for instance is that the production has been approved as a domestic production or a co-production (in terms of one of the approved co-production treaties) by the already established NFVF. Also, the production must qualify as a production in terms of the Programme Guidelines for the South African Film and Television Production and Co- Production Incentive of the DTI (Kingdon & Lewis, 2011).

The producer (individual/company/collection agent), however, must report regularly to the NFVF on all receipts and accruals of the film for 10 years after completion of the film. Failing to do so, the taxpayer will become liable for a penalty. The exemption of income only applies to profits in the hands of those who were entitled to it at the time of production of the film, or in other words, only the initial investors. The exemption further excludes income from guaranteed payments and fixed-amount salaries, retaining something of section 24F's at-risk-rules (Kingdon & Lewis, 2011).

The income accrued from the film will, after 10 years from the date on which the film is first ready for exhibition, no longer be exempt. Losses incurred for qualifying films will not be deductible since they are incurred for exempt income. Non-qualifying film losses incurred will be ring-fenced and may only be deducted from income derived from that same non-qualifying film (Kingdon & Lewis, 2011).

The proposed draft Bill incentive will apply to films that begin production on or after 1 January 2012 and complete production before 1 January 2017.

2.3.4 PRODUCTION ASSISTANCE FROM THE NATIONAL FILM AND VIDEO FOUNDATION

The NFVF helps the industry access funds, promoting incentive schemes that create an environment attractive to international film productions, promoting development of South African film and also facilitating the export of South African film and video production talent. The Cape Film Commission, the Durban Film Office and the Gauteng Film Office are regional support bodies for the NFVF (the dti, 2011).

With the NFVF being the catalyst, it contributed a substantial number of productions for the South African film industry. In their Annual Report 2009/10, the NFVF stated funding of the number of products funded from 2001 to 2010 in Table 2 below:

Table 2: NFVF funding from 2001-2010

	No of Productions	**Productions In Development**	**Total**
Documentaries	186	121	307
Features	57	113	170
Shorts	33	17	50
Animation	8	5	13
TV Series	0	24	24

Source: NFVF Report 2009/2010

In this report, the NFVF also stated that 26 films with a production budget value of R680 million had been certified and that SA's participation in these films amounted to R380 million of the total production values. R369,4 million of this amount was spent in South Africa and qualified for the local and co-production film and television incentive.

2.4 SOUTH AFRICAN FILM RELIEF INADEQUACIES

In the same annual report of the NFVF mentioned above, the following problem areas are mentioned as current inadequacies that need to be addressed:

- 66% of all pay-outs by the DTI have gone to servicing companies of which all are white owned.
- The IDC is not able to support new entrants due to the lack of structured financing experience.
- Difficulty of financing institutions making decisions on creative merits of projects by the IDC.
- The IDC's commercial investment criteria skew support to large budget foreign films.

- Film investment is driven by acquisition of TV rights for SA films while no clearly defined film investment policy exists.
- S 24F of the Income Tax Act being highly complex for individual producers to access and previous abuse has led to restrictions making it impractical for film usage.
- S 24F being technically incompatible with the DTI rebate and other instruments that exist.
- Finally, the foundation’s own production finance grants are too small to make material difference in maintaining creative input.

It remains to be seen if and how the new, easier and more effective tax exemption intended in terms of section 12O of the draft Bill issued to replace S 24F, will address at least some of the inadequacies.

2.5 CONCLUSION

The various film relief availabilities introduced since 1994, culminated in the development of a blooming South African film industry. Productions have escalated and have been critically acclaimed if recent film awards are taken into account.

The foundation of the NFVF can be regarded as the most important event in the history of South African filmmaking. The NFVF can be further commended for the wok it has done to establish an inclusive, South African film industry. If the industry was not expanding, the DTI would not have increased its incentives and SARS not revised its tax policy on filmmaking.

The NFVF envisage SA in ten years to be a competitor in the filmmaking chain. If SA positions itself as a filmmaking nation, it can become a filmmaking destination and a co-producing partner of choice.

The industry in essence therefore needs to have substantial investment as well as improved co-ordination of all role players to address the inadequacies.

Continuous revision and improvement of filmmaker's relief will ultimately benefit the government. More and better films could be produced and audiences will increase, or in other words more taxable income in terms of ticket sales, from refreshments sold at theatres and also from film memorabilia sold. If quality pictures can be produced, the international audiences would also want to see those films and those sales could only benefit the South African economy.

Section 24F (and the new section 12O) is part of the Act and inadequacies should be addressed primarily in legislation in order to achieve the above.

In the next chapter, the *Bollywood* (India) phenomenon will be discussed and compared to the South African industry in chapter 5, specifically with respect to incentives required to stimulate film investment.

CHAPTER 3

FILM INDUSTRY IN INDIA AND IMPACT OF RELIEF ON INDIAN FILM INDUSTRY

There are many similarities between South Africa and India. Both are large countries, both were under the rule of England, both love cricket, both have diverse cultural extremities and both encounter huge income disparities between the rich and the poor.

There are also similarities in their film industries. Both countries (largely) produce films for specific national audiences and both started producing films in the early 1900s. But the main similarity is that both are considered to be developing countries. And the main *difference* for purposes of this document? India has a throbbing film industry ("*Bollywood*") and produces even more films per year than the USA (Khanna, 2003), while South Africa's industry is only blooming more recently.

3.1 INDIAN FILM INDUSTRY DEVELOPMENT

The first full-length motion picture was produced in India in 1913, a silent film in Marathi. The first Indian talking film was released in 1931. The Indian *Masala film* (slang used for commercial films with song, dance and romance) came up following the Second World War (Anon, 2011(b)).

India is currently the world's largest (in quantity) producer of films. At the end of 2010 it was reported that in terms of annual film output, India ranks first, followed by Hollywood (USA) and China. Indian cinema furthermore found markets in more than 90 countries where films from India are screened (Khanna, A. 2003). In 2009 only, India produced 1 288 feature films (Central Board of Film Certification, 2011).

The Hindi language film industry of Mumbai – also referred to as "Bollywood" – is the largest and most popular branch of Indian cinema (Bain, 2006). This industry has even influenced Western musical films and Baz Luhrmann noted that his film *Moulin Rouge* (2001) was directly inspired by *Bollywood* musicals. The Oscar-winning film of Danny Boyle, *Slumdog Millionaire* (2008), was also inspired by Indian films (Caldwell, 2011).

To date, three Indian films have been nominated for the Academy Award for Best Foreign Language Film, *Mother India* (1957), *Salaam Bombay!* (1988) and *Lagaan* (2001). Indian film winners of Academy Awards include Bhanu Athaiya (costume designer), Satyajit Ray (filmmaker), AR Rahman (music composer), Resul Pookutty (sound editor) and Gulzar (lyricist).

3.2 CONTRIBUTION TO THE ECONOMY

In 2000, the Indian film industry was granted the status of an ‘industry’ by the Indian government, which has since mooted several initiatives to liberalise the regulations in film production and financing. In January 2010 the film industry contributed 27% to the entire entertainment industry of India. The industry now consists of a more corporate structure where most producers are corporate entities rather than individuals, resulting in easier access to funding from banks (Suri, 2010).

The provision of 100% foreign direct investment has made the Indian film market attractive for foreign enterprises such as 20th Century Fox, Sony Pictures, Walt Disney Pictures and Warner Bros (Anon, 2010).

Earnings from screenings and DVDs of Indian productions to Indians across their border, accounting for some 12% of the revenue generated by a mainstream film and contribute substantially to the overall revenue of Indian cinema of which the net worth was found to be US$1.3 billion in 2000 (Potts, 2006).

It was reported in the Press Trust of India of 25 March 2011, that according to The Comptroller and Auditor General (CAG), the Indian film industry registered a growth of 9.7% during 2005-2009 and it has generated revenues of around Rs 9,500 crore in 2009 (approximately R12.8 million) (Potts, 2006).

3.3 INDIAN FILM RELIEF

In order to understand the tax relief in India, taxation in India in brief is levied as follows (Anon, 2011(f)):

- in accordance with the provisions of the Indian Constitution, the government has a three-tier federal structure, comprising the Union Government, the State Governments and the Urban or Rural Local Bodies,
- the Union Government is empowered to levy Income Tax (except agricultural income which the State Governments can levy), Customs Duties, Central Excise and Sales Tax and Service Tax.
- the State Governments levy Sales Tax (tax on intra-state sale of goods), Stamp Duty, State Excise, Land Revenue (levy on land used for agricultural/ non-agricultural purposes), Duty on Entertainment and Tax on Professions and Callings.
- the Local Bodies are empowered to levy tax on properties, such as buildings, Octroi (tax on entry of goods for use/consumption within areas of the Local Bodies), Tax on Markets and Tax for utilities like water supply.

The state governments which are responsible to levy tax on industries like the entertainment industry (operating multiplex theatres), also introduced general tax incentives for industries.

Tax incentives to multiplex theatres have aided the multiplex boom in India (a 50% deduction of profits and gains was available for a period of five years to undertakings engaged in the business of building, owning and operating multiplex theatres or convention centres constructed before 31 March 2005). As a result hereof, by 2003, as many as 30 film production companies had been listed in India's National Stock Exchange.

A synopsis of the latest taxation of film owners was explained by Dhruv Suri in Media Sarkar of 15 January 2010:

> Any film producer of a film in India is required to furnish a statement to the income tax authorities, in accordance with section 285B of the Income Tax Act, 1961

("Act"), with details of all payments in excess of INR 50,000 made or due from him, to any person engaged by him in the production of the film. Per Rule 121A of the Income Tax Rules, 1962 ("Rule"), the producer is entirely responsible to furnish the relevant statement to the IT authorities within 30 days from the end of the financial year, during which the production of the film was carried on, or within 30 days from the date of completion of the film, whichever is the earliest. Any non-compliance of the said provision will attract a penalty of INR 100 for each day of being in default.

To ascertain the taxable income of a film producer can be an extremely cumbersome process, especially since revenue is only earned once the production of the film is complete. This completion could take between 60 months to 6 years and quite often, most of the revenue generated will be in the initial period of the film's release. It is, therefore, crucial to understand how production expenses can be written off against revenues.

Production cost of a feature film can be claimed as a deduction under Rule 9A of the Income Tax Rules. As defined in Rule 9A, 'cost of production' includes all expenditure incurred on the production of the film except expenses incurred on positive prints of the film and in connection with the advertisement of a film after it is certified for release by the Censor Board. Even remuneration paid 'in kind' to actors or any other member of the production is also added while computing the cost of production. Any subsidy, however, received by the producer from the government is allowed to be deducted at the time of computation and is taxed as revenue receipts. In the Supreme Court case, Sahney Steel & Press Work Ltd v. CIT, it was held that a subsidy received to assist in carrying on of a trade or business is "revenue" and taxable as revenue receipts and if the producer incurs a loss due to the film being abandoned, such loss may be deducted as a business loss (Suri, 2009).

Subject to the above, the entire cost of production can be allowed as a deduction while computing profits and gains. This is possible in the previous year if

- the film is exhibited on a commercial basis by the producer in some or all areas;
- the producer sells the rights of exhibition in some or all areas; or
- the producer does both and the film is released for exhibition on a commercial basis 90 days before the end of such previous year.

Where the film is not released 90 days before the end of the previous year, the cost of production will be allowed as a deduction while computing the profits and gains of the previous year, as long as such cost does not exceed the amount realised by the film producer by exhibiting the film or selling the right to exhibit the film on a commercial basis. In a case where there is any balance, it will be carried forward to the next year as a deduction in that year. If the film is not exhibited on a commercial basis by the producer, nor sold, no deduction will be allowed and the entire cost will then be carried forward to the next following previous year and allowed as a deduction. Sale of rights of exhibition also includes the lease of such rights or their transfer on a minimum guarantee basis.

The meaning of “exhibition on a commercial basis” has evolved through various judicial pronouncements. In the Income Tax Appellate Tribunal in Vieshesh Films Pvt. Ltd v. Deputy CIT, Mumbai (2008), it was held that since no mode of exhibition is prescribed under Rule 9A, an exhibition of films on television on a commercial basis will also fall within the scope of Rule 9A.

Rule 9A, however, does not have any overriding effect on other provisions of the Act or Rules. Expenditure that cannot be deducted under Rule 9A can still be deducted under section 37 of the Act. Sections dealing with related party payments and deductions allowed on actual payments should therefore be given preference while computing the aforementioned deductions.

Remuneration paid in kind to actors, composers, directors and such must accurately be accounted for and will be added to the total cost of production. Tax deduction at source (TDS) will be deducted accordingly from such remuneration in kind. TDS will also be deducted from the expense incurred on the hiring of general and technical equipment with its operating staff.

3.4 INDIA FILM RELIEF INADEQUACIES

The Indian Finance Minister released the Draft Direct Tax Code, 2009 (DTC) that aims to replace the Act. This will have radical changes in India’s taxation laws, for instance, it will supersede all DTAAs entered into by India, introducing the General Anti Avoidance Rules (GAAR) that will be invoked if the taxpayer has entered into an arrangement, the main purpose of which is to obtain a tax benefit. If the Income Tax Commissioner is satisfied that the arrangement will be governed by GAAR, he will be able to declare such arrangement as impermissible and thereafter determine the tax liability accordingly. It will therefore be important to be familiar with the DTC in order to determine the pre- and post-production strategy of forthcoming films.

In his Budget speech 2011-12, the Indian Finance Minister Pranab Mukherjee announced that it is proposed that the DTC will replace its country's Income Tax Act from 1 April 2012 as reported by the Press Trust of India (2011).

3.5 CONCLUSION

India, like South Africa, has a very old film industry. There are a number of similarities with relief available to filmmakers and both countries have decided to review current legislation and to implement it from 2012. However, India will replace its income tax legislation in total, while South Africa will only replace section 24F with a new section 12O.

As there are inadequacies in every country's taxation laws, the new legislation will, without a doubt, also not be without shortcomings, but that will only be known in the next few years. The bottom line, however, is that film industries are huge contributors to the economy and each country would encourage filmmakers to make more films. Tax relief for filmmakers will therefore always be a specific inclusion in taxation laws.

In the next chapter, the Australian film industry relief will be discussed and the similarities with South African film relief will be discussed in chapter 5.

CHAPTER 4

AUSTRALIAN FILM INDUSTRY AND IMPACT OF RELIEF ON AUSTRALIAN FILM INDUSTRY

4.1 AUSTRALIAN FILM INDUSTRY DEVELOPMENT

The Australian industry followed in the shadow of Hollywood. In the late 1940s, the large pre-war companies began breaking up to become smaller specialist enterprises who combine on a project-by-project basis to produce a film, and then disband in search of the next opportunity (Jacka, 1997).

In the late 1990s, the imbalance in financial assistance of the Australian film industry caused the Minister for Communications and the Arts to commission Mr David Gonski to review the assistance provided to the industry. His suggestions were both radical and innovative. He proposed Film Licensed Investment companies and a removal of the tax incentives in place at the time (Clark, B. 1999).

In 2001, the Australian government introduced a refundable tax offset scheme as a financial incentive for the producers of large budget films to locate in Australia. This offset was intended to complement Australia's diverse locations, the skills and flexibility of its crews and creative teams, technical facilities and post-production services. This refundable film tax offset was reviewed in 2006 and new Australian Screen Production Incentives were introduced.

After the introduction of the new Australian Screen Production Incentives in 2006, Screen Australia was established to bring together the functions of the Australian Film Commission, Film Finance Corporation Australia Limited and Film Australia Limited to carry out additional functions regarding the support and promotion of Australian film and the provision of tax incentives to film producers.

4.2 CONTRIBUTION TO THE ECONOMY

Clark (1999) wrote an article on the use of tax incentives to encourage investment in the Australian Film Industry. He argued for expansion of tax incentives to encourage private investment in the Australian Film Industry and added that an increase in investment may well promote the quality, creativity and commercial viability of Australian films.

Clark (1999) listed three main policy reasons to support the motion picture industry, namely

- economic benefits (and risks);
- cultural benefits; and
- pro-competitive reasons.

Clark (1999) wrote that Gonski, in his review of the Australian film industry, commented that 90% of Australian films return no more than what is invested. Therefore, it is a high-risk and volatile investment. The direct economic benefit though, is that it is a labour intensive industry and film budgets provide immediate economic benefit to those regions where films are shot and produced, while the cultural benefit is to promote cultural diversity and the Australian identity. As the Australian film industry was still in its infancy at the turn of the last century, the pro-competition reasons to improve in quality were listed as widespread funding and greater competition - competition needed in order for films to compete with those films produced in the USA.

In 2006-2007, Australia produced and co-produced 28 feature films with a total production value of $270 million and 45 television drama programs with a total production value of $272 million. The value of foreign film and television production in Australia in the same year was $49 million according to the Australian Department of Foreign Affairs and Trade (2008:1).

Also according to the Australian Department of Foreign Affairs and Trade (2008:1), Australian actors like Eric Bana, Cate Blanchett, Geoffrey Rush, Russel Crowe, Hugh Jackman, Nicole Kidman,Heath Ledger and Naomi Watts have all won international critical acclaim and commercial success and the Australian production, *Happy Feet*, won an Oscar in 2007 for Best Animated Feature.

4.3 AUSTRALIAN FILM RELIEF

4.3.1 AUSTRALIAN FILM TAX INCENTIVES

The Australian Government introduced tax incentives in 1981 in order to promote investment in the film industry (Clark, 1999).

As a result of a review in 2006, the Division 10B and Division 10BA tax incentives have been phased out and the new Australian Screen Production Incentives introduced. The reason for the change was because of the limited effectiveness of the investor-based incentives offered by Division 10BA and Division 10B and was designed to make Australia a more attractive location for overseas film investments by improving the accessibility of the available tax relief.

In order to qualify for tax relief, the films should be "Australian" feature films, single episode programs, series, a season of a series or other short form animated dramas.

An Australian film is defined as a film made wholly or substantially in Australia with "significant Australian content" or it is a film made in accordance with the requirements of a co-production agreement or in other words, it is considered to meet the significant Australian content test.

Screen Australia provides the following guidance to "significant Australian content".

- the subject matter of the film – whether the film looks and feels significantly Australian, in other words, whether it is about Australian themes, stories, characters, if it is set in Australia, reflects Australian perspective or involves Australian citizens or residents;

- the place where the film was made – whether it was to a significant extent produced in Australia;
- the nationalities and places of residence of the persons who took part in the making of the film – whether the nationality and residence of filmmakers are Australian;
- the details of the production expenditure incurred in respect of the film – the extent to which the Australian film industry benefits from a film's production expenditure, in other words the extent to which the expenditure is spent on Australian goods and services; and
- any other matters that the film authority considers to be relevant – for example policy issues, copyright ownership and creative control.

4.3.2 QUALIFYING AUSTRALIAN PRODUCTION EXPENDITURE (QAPE)

QAPE refers to production expenditure incurred in Australia while filming and is defined as those costs that are eligible for the tax offset and the production expenditure for the film that is incurred or reasonably attributable to

- goods and services provided in Australia
- the use of land located in Australia
- the use of goods located in Australia at the time they are used in making the film.

The following costs are specifically excluded from QAPE:

- Financing expenditure
- Foreign (outside of Australia) development expenditure
- Foreign-held copyright acquisition (acquired from a non-Australian resident)
- Publicity and promotion expenditure
- Deferments and profit participation (deferred until production provides financial returns)
- Costs incurred for the acquisition of depreciating assets
- Costs incurred in distribution of the film and its promotion and marketing.

4.3.3 AUSTRALIAN SCREEN PRODUCTION INCENTIVE

In the June 2010 'Fact Sheet for Film Industry Investors' published by the Australian Taxation Office in Canberra, the current Australian screen production incentive is explained as follows:

> Division 376 of the Australian Tax Assessment Act of 1997 (ITAA 1997) provides three tax offsets for certain Australian production expenditure incurred by a production company in making a film where a minimum level of expenditure has been incurred. The company is only entitled to one of the three offsets in relation to a film. These are:
>
> 1) A refundable tax offset for producers of large budget Australian films for expenditure in making a film, known as the 'location tax offset'. The amount of the location tax offset is 15% of the company's total qualifying production expenditure (QAPE) on the film.
>
> The location tax offset is available for films that do not satisfy the significant Australian content test required for the producer tax offset.
>
> The location tax offset applies to films commencing principal photography or production of the animated image on or after 8 May 2007.
>
> The location tax offset is available to a company for the making of a film when the following conditions are met:
>
> - The Minister for Environment Protection, Heritage and the Arts (the Arts Minister) has issued to the company a final certificate for the film in relation to the location offset – the central requirement for the company's entitlement to the location tax offset in respect of the film. An application to the Arts Minister for such a final certificate is considered by the Film Certification Board, comprising industry representatives and a senior official from the Department of the Environment, Water, Heritage and the Arts, which advises the Minister on whether to issue a final certificate. In essence it means that the Arts Minister must be satisfied of the following:

i) The film is of an eligible format and genre.

ii) The company's total QAPE on the film is at least $15 million.

iii) If the company's total QAPE on the film is less than $50 million – that total QAPE must be at least 70% of the company's total 'production expenditure' on the film and the company has either carried out, or made the arrangements for carrying out, all the activities worldwide necessary for the making of the film.

iv) If the company's total QAPE on the film is at least $50 million – the company has either carried out, or made the arrangements for carrying out, all the activities in Australia necessary for the making of the film.

- If the company's total QAPE on the film is less than $50 million – the company claims the tax offset in its income tax return for the income year in which the company's 'production expenditure' on the film ceased.
- If the company's total QAPE on the film is $50 million or more – the company claims the tax offset in its income tax return for the income year in which the company's QAPE on the film ceased.
- The company is either an Australian resident or a foreign resident with a permanent establishment in Australia and an ABN.

Like with the producer tax offset, the company's total QAPE on the film is determined as part of the final certification process for the location tax offset and that information along with a copy of the final certificate is provided to the Australian Taxation Office to verify claims and process payment of the location tax offset.

2) A refundable tax offset for Australian expenditure in making Australian films, known as the 'the producer tax offset'.

The producer tax offset is a refundable tax offset for Australian expenditure in making Australian films. The amount of the producer tax offset is:

- 40% of the company's total QAPE on a feature film
- 20% of the company's total QAPE on a film that is not a feature film

The producer tax offset applies only to QAPE incurred:

- on or after 1 July 2007; and
- before 1 July 2007, to the extent that the QAPE is attributable to goods or services provided on or after 1 July 2007.

The producer tax offset is available to a company for the making of an Australian film when the following conditions are met:

- The ‘film authority’ (Screen Australia) has issued to the company a final certificate for the film in relation to the producer tax offset – this being the central requirement for the company’s entitlement to the producer tax offset in respect of the film. Screen Australia will only issue such a final certificate to a company where it is satisfied the criteria set out in Division 376 of the ITAA 1997 for the issue of such a certificate have been met. In essence it means:
    - i) The film is completed
    - ii) The film has ‘significant Australian content’ or it is an official co-production between Australia and another country
    - iii) The film is of an eligible format and genre
    - iv) The applicant company has either carried out, or made the arrangements for carrying out, all the activities necessary for the making of the film
    - v) That the company’s total QAPE on the film meets or exceeds relevant thresholds.
    - The company claims the tax offset in its income tax return for the income year in which the film was completed.
    - The company is either an Australian resident or a foreign resident with a permanent establishment in Australia and an Australian Business Number (ABN).

The company claims the producer tax offset in its tax return for the income year in which the film was completed and the Australian Taxation Office will calculate the company’s producer tax offset based on the final certificate issued by Screen Australia and its determination of the company’s total QAPE on the film. The tax offset will be applied against the company’s Australian tax liability for the income year in which the film was completed and any remainder will be refunded to the company.

3) A refundable tax offset for Australian expenditure on post, digital and visual effects production for a film, known as the 'PDV tax offset'. The amount of the PDV tax offset is 15% of the company's total QAPE on the film that relates to post, digital and visual effects production for the film and it is available to productions which do not necessarily shoot in Australia.

The PDV tax offset applies to the production of PDV for a film that commences on or after 1 July 2007. It is designed to attract post-production digital and visual effects production to Australia, no matter where the film is shot.

The PDV tax offset is available to a company in respect of a film when the following conditions are met:

- The Arts Minister has issued to the company a final certificate for the film in relation to the PDV tax offset – the central requirement for the company's entitlement to the PDV tax offset in respect of the film. In essence it means that the Arts Minister must be satisfied of the following:
  - i) The film is of an eligible format and genre.
  - ii) The company's total QAPE related to PDV production for the film is at least $5 million.
  - iii) The company has either carried out, or made the arrangements for carrying out, all the activities in Australia necessary for the PDV production for the film.

PDV production for a film is:

- i) The creation of audio or visual elements (other than principal photography, pick-ups or the creation of physical elements such as sets, props or costumes) for the film
- ii) The manipulation of audio or visual elements (other than pick-ups or the creation of physical elements such as sets, props or costumes) for the film

iii) Activities that are reasonably related to the activities mentioned above (including expenditure on VFX, 2D and 3D animation, audio post, editing, green-screen photography and miniatures undertaken in Australia).

- The company claims the PDV tax offset in its income tax return for the income year in which the company ceased incurring QAPE related to PDV production for the film. This is determined as part of the final certification process for the PDV tax offset and that information along with a copy of the final certificate is provided to the Australian Taxation Office to enable them to verify claims and process payment of the PDV tax offset.
- The company is either an Australian resident or a foreign resident with a permanent establishment in Australia and an ABN.

Where the production company has chosen to claim one of these three tax offsets for an eligible film, neither of the other two tax offsets is available in relation to the film. This means that a film may be certified for only one stream of the Australian screen production incentive. Additionally, a company is not entitled to any of the three tax offsets in relation to an eligible film if

- the company, or anyone else has claimed a deduction under Division 10B or Part 111 of the ITAA 1936 in relation to copyright in the film; or
- a final certificate for the film has been issued at any time under Division 10BA of the ITAA 1936.

Further, a company is not entitled to the producer tax offset in relation to an eligible film in either of these additional circumstances:

- The company or anyone else has deducted money paid for shares in a film licensed investment company (FLIC) and the FLIC has invested in the film
- Anyone has received production assistance for the film (other than financial assistance towards the development costs for the film) from the Film Finance Corporation Australia Limited, the Australian Film Commission, Film Australia

Limited or the Australian Film, Television & Radio School (AFTRS) prior to 1 July 2007.

Subsequent to the above relief, increased funding and tax rebate reforms were announced in the federal budget for Australia for the 2012 financial year. This will encourage an ongoing diversity of films produced in Australia while a healthy and long-term sustainable film industry will be maintained (Caldwell, 2011).

4.4 AUSTRALIAN FILM RELIEF INADEQUACIES

The Australian Government has already identified and addressed some of the inadequacies of the current film taxation legislation. More films of varying styles and budgets, in particular documentaries, will in future be able to claim the Production Offset tax rebate due to the changes in eligibility and the lowering of the thresholds (Caldwell, 2011).

The stronger the Australian dollar becomes, the less economically viable a country like Australia becomes for films to be made there since it means less government funding is effectively going into overseas projects. However, this makes it difficult for local Australian film practitioners to work in Australia. The solution addressed in the budget is by doubling the PDV Offset from 15 to 30 percent. This is one measure to attract foreign productions back to Australia and having the knock-on effect of growing their local expertise and infrastructure (Caldwell, 2011).

Caldwell (2011) maintains that there is a chance that the increased PDV Offset will mean Australia becomes a large post-production facility for overseas films and will benefit those working in post-production, but it won't benefit their local screen culture. In other words, it will keep practitioners working in Australia, but not on local productions. Furthermore he is of the opinion that although PDV support will benefit the entire industry, an increased focus on special effects for instance is likely to mostly benefit genre films such as horror, science fiction, action and animation as long as these films remain part of the cross-section and do not dominate the industry.

Apart from the above inadequacies addressed, new incentives in the Producer Offset tax rebate will have more money available to spend on marketing, publicity and distribution.

4.5 CONCLUSION

Australia film tax relief has quite a few similarities with the current South African tax relief. While South Africa, as well as India, have revised its current legislation in this regard totally from 2012, Australia merely addressed inadequacies and updated current legislation.

Despite changes in legislation announced, shortcomings still remain. This might also be because of subjective interpretations, depending on whose argument is viewed: that of the film investor, actor, artisan or distribution agent. Tax legislation will always be open for debate and interpretations of definitions in legislation surely the origin of new tax cases.

In the next chapter, simplified comparisons in film relief in India, Australia and South Africa will be made, and the effectiveness of film relief discussed in general and interesting remarks on and extracts from similar studies reviewed. In the final chapter, the research objectives will be reviewed, recommendations made and future research addressed.

CHAPTER 5

FILM RELIEF COMPARISONS AND EFFECTIVENESS TO STIMULATE THE ECONOMY

In chapters 2 to 4 the film relief of India, Australia and South Africa were discussed in detail with regard to qualifying entities (filmmakers), expenditures and the inclusion in specific income tax years. Although there are similarities in all three country's legislation, direct comparisons are not easy to make. Therefore to compare, the main tax relief qualifications and inclusions in income tax years of assessment can be summarised as follows:

5.1 INDIA

In India, a film producer who sells the entire exhibition rights of the film, is entitled to a deduction of the entire cost of production incurred by him in the same year in which the Censor Board certifies the film for release in India and also for a film distributor for the outright sale of the film distribution rights acquired. Where it is a partial sale or partial exhibition of film rights by the film producers/distributors, it is necessary that the film should be released at least 90 days before the end of the tax-year to claim a full deduction of specified production/specified costs of acquiring distribution rights. If the film is not released at least 90 days before the end of such tax year, then the cost of production/ acquisition cost of the film distributor, limited to the amount earned from the film, shall be allowed as a deduction in the tax year and the remaining cost shall be allowed in the following year.

5.2 AUSTRALIA

Three tax incentives are available for Australian film productions namely, the Producer Offset, the Location Offset and the PDV Offset.

The Producer Offset is a 40% refundable tax offset of a film's QAPE for all Australian feature films and 20% where it is not an Australian feature film. The Producer Offset is claimed for expenses incurred on or after 1 July 2007 in the income year in which the project is completed and is only available to a production company if it is either an Australian resident or a foreign resident that has a permanent establishment in Australia and that has an ABN. The offset applies to Australian film as defined by Screen Australia, but for a feature film specifically, the qualifying threshold for QAPE is (Australian) $1 million.

The Location Offset can be claimed for the income tax year in which the film is completed and can only be claimed by an eligible film production company that is either an Australian resident company or a foreign corporation with an ABN that is operating with a permanent establishment in Australia. It applies to productions that commenced on or after 8 May 2007. To qualify for the offset, the threshold for the QAPE is (Australian) $15 million.

The PDV Offset is available to those post-production, digital and visual effects productions attracted to Australia (as part of large budget productions), no matter where the film is shot. This Offset is also to be claimed in the filmmakers' income tax return in which the qualifying expenditure ceased to be incurred and is available for productions that commenced on or after 1 July 2007.

5.3 SOUTH AFRICA

The South African legislation specifically defines 'film owner', 'completion date', 'film' and 'production costs'. A film is regarded to be completed on a date on which it is first in a form in which it can be regarded as ready for copying and distribution, for presentation to the general public or for the acquisition of a film, which means the date it was acquired.

The amount of the film allowance is the aggregate of the production cost of the film and any post-production cost incurred in the year of assessment in which the completion date of the film falls and any post-production cost incurred during any subsequent year of assessment as well as any film allowance disallowed in the preceding year of assessment under the provisions of the section. The film allowances are, however, subject to a cap and cannot exceed the sum of the amount of production cost and post-production cost actually paid by the film owner and any production costs and post production costs which have not been paid and for which the film owner is ‘at risk’ on the last day of assessment.

5.4 EFFECTIVENESS OF FILM RELIEF

The film industry has come of age in SA but it is also in this new century a global economic contributor. This is the reason why every country with a film industry, specifically includes a section on the taxation of its industry in its tax legislation. Incentive schemes have been in place for decades in some countries and they have often been revised, along with the other taxation sections of the various income taxation laws.

In the preface to their fifth edition of the *Film Financing and Television Programming: A Taxation Guide* (2009), KPMG remarks on the worldwide taxation of films in 36 countries as follows:

> The global financial community has seen unprecedented impact and change in the past year. And Film and Television Finance, a relatively complex area to comprehend in previous times, has just become more challenging than ever for the Entertainment executive. Today’s choices around financing techniques and credit incentives may now have larger impact on your overall project. Deal structures, shooting timetables, location choices, and national and local tax incentives are all considerations that are critical to success...

In Clark’s study (1999) on the Australian Film Industry, he quoted Professor Surrey (USA) from his 1973 publication on tax reform *Pathways to Tax Reform* as follows:

> “I stress strongly that the advantages must be clear and compelling to overcome the losses that accompany the use of the tax incentive, even the well-structured incentive.”

Clark (1999) further mentions in his study that the view of Professor Surrey is supported by Miles Mogulescu in his 1985 published article "The Tax Reform Act of 1976 and Tax Incentives for Motion Picture Investment: Throwing out the Baby with the Bath Water."

Clark also mentions four more arguments by Mogulescu that support the use of tax incentives in the film industry, which are:

- If there is direct funding by the government of cultural expression, the government will control that expression.
- Tax incentives would be less costly.
- Taxation is only deferred, all revenue eventually returns to the revenue.
- Tax incentives are indiscriminately available, as distinct from direct government funding.

Despite the above advantages, Professor Surrey also identified five main disadvantages of tax incentives which are, after nearly 40 years, still applicable. These are:

- Tax incentives are regressive by nature: this is based on the rationale that tax incentives inequitably benefit high income earners, e.g. greater sums of money are invested by those;
- Tax incentives create windfalls: it encourages taxpayers to do what they would have done anyway, though in high-risk industries like the film industry it is unlikely that the lure of tax incentives will benefit those who would have invested in the film industry nonetheless.
- Tax incentives are more difficult to develop and control: compared to subsidies, tax incentives are regulated by government departments who have little knowledge on non-tax commercial issues and industry policy with effect that the film industry, where creativity should be encouraged, governmental regulation may be dampening free expression.
- Tax incentives distort the choices of the marketplace: though not necessarily a disadvantage, it is only valid if the incentive creates an unfavourable result for instance where it promotes avoidance schemes.

- Tax incentives keep tax rates high: this is based on the view that tax incentives maintain a narrow tax base.

5.5 CONCLUSION

Similar to the above, film relief provisions are available in all countries that have a film industry. Comparisons can therefore be made, but with acknowledging differences in state collections and economies, cultures and languages and of course, audiences. The more viewers of a feature, the more revenue can be attracted. Features will then not necessarily have to be made for an international audience. India is a perfect example of a country that has such a large population that it could make hundreds of films a year and not necessarily have to export it. All their cultures are acknowledged and productions cater for most spoken languages.

However, if a country could attract foreign investors, it would not only stimulate its economy, but also at the same time market its attractions for tourism for instance. Countries with smaller populations like Australia and South Africa are very good examples. Australia has a further advantage that is has only one official language, English, which is also an international language. Their productions therefore have huge export potential. It could compete directly with the American and British film industries of note.

South Africa on the other hand has eleven official languages. It makes it more difficult, although English is still, for most people in the country, a second language. It is experienced in the South African media, government departments, in the business world and in the daily South African activities.

The government has an uplifting responsibility as well and all people and cultures should be treated equally. Sport and entertainment have always been a common denominator for everyone and if quality films in indigenous languages can be made, the film industry will grow.

Tsotsi, Yesterday and *Skoonheid* are perfect indigenous language examples of what can be achieved - accolades received from around the world for stories distinctly South African. These productions might have only been seen by niche audiences worldwide, but what is important is that producers of note could see that expertise is available in our country and that is what attracts investment and that is also the main research objective of this document.

In the last chapter, the research objectives of film relief will be addressed. A final conclusion on film relief will also be made.

CHAPTER 6
RESEARCH CONCLUSION

6.1 INTRODUCTION

In chapter 1 the aim of this document was stated as to assess the development in the South African film industry since 1994 and what the role of SARS is in the establishment of a South African industry that would stimulate our economy.

Comparisons were made between the industries of India, Australia and South Africa and the effect of film relief emphasised.

In this chapter the outcome of the research objectives, recommendations and future research in this study field, will be discussed.

6.2 RESEARCH OBJECTIVES ACHIEVED?

To establish whether the research objectives have been achieved, the objectives are listed again with specific reference to what could be established in this document:

1. To review the S 24F tax relief availability and the impact thereof for filmmakers

   This objective has been discussed in chapter 2. The impact for filmmakers is the available tax relief. It is much more viable to produce a film now than it was twenty years ago. Importantly, all cultures are equal and no discrimination exists anymore. Quality pictures can now be produced and a South African film industry be established.

2. To review the DTI grants

   This objective was discussed in chapter 2. The DTI's assistance usually takes the form of loan finance, but certain criteria are to be met regarding QSAPE. This ensures that South African stories are told and South African expertise are utilised. Once again the objective is to establish a South African film industry.

3. To compare the South African film relief with the film relief in India and Australia respectively

   The relief for film in India was discussed in chapter 3 and the film relief in Australia in chapter 4. In chapter 5 it was mentioned that direct comparisons regarding film relief are difficult to make and that there are not many common denominators. What was established is that inadequacies are forever present in any country's legislation. All state bodies will however endeavour to provide relief, but provisions to exploit relief should always be incorporated.

4. To review the South African co-production treaty with Australia and a memorandum of understanding relating to film with India

   It was mentioned in chapter 2 that these treaties allow the approved film/television program to be deemed a national production in each of the respective co-producing countries, making it eligible to apply for any benefits available in either country. These films will only be eligible if they comply with the relevant co-production agreement requirements. In all the DTA agreements entered into by South Africa, the same definitions will also apply and for purposes of this document a co-production treaty and a memorandum of understanding in essence have the same objectives.

5. The final research objective, to conclude on the effectiveness of film relief

   In paragraph five of this chapter, references are made to similar studies conducted in the USA as well as Australia with the outcome that the advantages of relief in general outweigh all disadvantages associated with relief. In legislation around the world relief has been included for decades. If the required outcome could not be achieved, the legislation was merely revised or amended.

In my view the research objectives have been achieved. However, subjective interpretations and simplified statements have been included. One has to wait to be able to see if future revised and draft legislation will have an even more profitable effect on filmmakers. This may surely be an interesting future research topic.

The recent success of indigenous films have been mentioned as well as the new draft proposal that seeks to eliminate all income tax on film profits for a ten- year period with the intention of providing a proper enticement to filmmakers to consider SA as a location for their productions. In other words, a South African film industry that will be able to stimulate its economy can now be established.

6.3 RECOMMENDATIONS

With electronic third generation communication the world has become a global society in which information is at all times available to anyone. Statistics are much easier and more quickly accessible and this is particularly an advantage where adjustments need to be made, for instance where legislation does not have the desired outcome.

The South African film industry should consider aspects included in other countries' legislation, if implemented and the desired outcome had been achieved in the country where it was first introduced.

The current revised legislation for film relief will have to be tested and results will only be available in a few years' time.

6.4 FUTURE RESEARCH

The desired outcome of the current draft Bill will be interesting to be reviewed in a few years from now in a longitudinal study and comparisons with the current legislation will inevitably be done. The real results will be manifested in what will be a South African film industry that will continue to grow and that will be an international industry of note.

Accolades are also always an indication of standards and this determines success. Accolades draw attention and media interest and coverage which ultimately lead to box office hits.

South African film makers should make use of all available relief and endeavour to produce proudly South African films that audiences worldwide would like to see and that are worthy of accolades and acclaim.

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