

11 JULY 2019

TAX & EXCHANGE CONTROL ALERT

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Stories from Down Under: Income tax provisions applicable to documentaries

When South Africans think about Australian television, many may remember the television soap opera, *Neighbours*, featuring the famous Kylie Minogue, which aired in South Africa during the 1990s.

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Stories from Down Under: Income tax provisions applicable to documentaries

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When South Africans think about Australian television, many may remember the television soap opera, *Neighbours*, featuring the famous Kylie Minogue, which aired in South Africa during the 1990s. Whereas South African tax law contains an income tax incentive for qualifying films and documentaries in s120 of the Income Tax Act, No 58 of 1962 (Act), effective from 1 January 2012. Australian tax law also contains specific provisions that apply to qualifying documentaries. We discussed the provisions of s120 of the Act in our [Tax and Exchange Control Alert of 8 September 2017](#).

Whether a television series qualified for the producer offset provided for under Australian tax law, was discussed in the recent decision of *Seven Network (Operations) Limited and Screen Australia (Taxation)* [2019] AATA 798 (1 May 2019), handed down by the Administrative Appeals Tribunal of Australia (Tribunal).

Facts

In 2017, the television series known as *Bride and Prejudice* (Series) was aired by Seven Network (Taxpayer). The Series

consisted of eight episodes and tracked the events preceding the marriage ceremonies of five couples who faced opposition to the marriages from their relatives. The Series sought to provide an exposition on the various racial, religious and other social biases with which the participants were confronted.

After the show was aired, the Taxpayer applied to Screen Australia for a certificate for purposes of qualifying for the producer offset provided for in s376.65 of the Income Tax Assessment Act 1997 (AUS ITA). The Taxpayer's application was refused, and the matter was referred to the Tribunal for a review of the decision. At issue in this matter was whether the series qualified as a "documentary" within the meaning of s376.65 of the AUS ITA.

The producer offset

Under the AUS ITA, a company can claim the producer offset, if it meets certain requirements, which include being issued with a certificate by Screen Australia, confirming that the company qualifies for the producer offset.

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The Tribunal noted with approval that extrinsic materials may be resorted to when the provision in question is “ambiguous or obscure”, or when the extrinsic materials are necessary to establish a policy adopted by the relevant fiscal authority.

Judgment

The AUS ITA defines a “documentary” as a film that is:

“(1) a creative treatment of actuality, having regard to:

- (a) The extent and purpose of any contrived situation featured in the film;*
- (b) The extent to which the film explores an idea or a theme;*
- (c) The extent to which the film has an overall narrative structure; and*
- (d) Any other relevant matters.”*

The concept of “creative treatment of actuality” was examined by the Tribunal and regard was had to various external sources in order to determine the scope and meaning thereof. The two most prominent sources that were examined were the Australian Communications and Media Authority (ACMA) Guidelines and the Explanatory Memorandum for the Taxation and Superannuation Laws Amendment Act 2013 (Explanatory Memorandum), both of which were influenced by the academic writings of John Grierson, a Scottish filmmaker.

Similar to the South African law of interpretation, the Tribunal recognised the extrinsic nature of these documents, as well as the academic literature on the subject matter, and gave significant consideration to the weight to be attributed to them in deciding what the legislature intended with the words

“creative treatment of actuality”. It was found that even though the origin of the expression (being the academic literature regarding filmmaking) dictated that s376.65 of the AUS ITA is addressed to professionals in the filmmaking industry, the ordinary meaning of the words ought to be attributed to the expression and not those derived from the academic literature.

The Tribunal noted with approval that extrinsic materials may be resorted to when the provision in question is “ambiguous or obscure”, or when the extrinsic materials are necessary to establish a policy adopted by the relevant fiscal authority. It was stated that extrinsic materials:

“may provide information about mischief and context, which may assist in preferring an alternative construction over the literal meaning of the a provision [...] but it will be the text of the Act, if clear, which will govern as the surest guide to legislative intention rather than extrinsic materials.”

However, the Tribunal also found that the ACMA Guidelines constituted a rational and cogent description of “creativity” in the filmmaking genre and the successive adoption of these guidelines by Screen Australia suggests that the guidelines have stood the test of time and that there is no reason to doubt their applicability to the industry. As such, extrinsic materials of this type may be used when it is appropriate to do so.

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The Tribunal opined that the application of the aforementioned factors and indicators requires an impressionistic analysis of the Series by a person who has viewed the Series personally.

The Explanatory Memorandum and the ACMA Guidelines were then used by the Tribunal in ascertaining the meaning of the factors to be taken into account when deciding whether a film is a "creative treatment of actuality". The following were regarded as indicators of the existence of a documentary:

1. The creative exploration or interpretation of a specified subject matter intended to enhance the viewer's understanding thereof;
2. The narrative structure or the manner in which the film was made is creative or innovative; and
3. The subject matter of the film is grounded in fact or real life and the context exists independently of the film itself.

Any film that qualifies as infotainment or a lifestyle programme (the sole or dominant purpose of which is to present factual information in an entertaining way and in which heavy emphasis is placed on the entertainment value) does not qualify as a documentary. Furthermore, the greater the level of contrivance of the matters being depicted, the less likely the film is to be a documentary.

The Tribunal opined that the application of the aforementioned factors and indicators requires an impressionistic analysis of the Series by a person who has viewed the Series personally. In coming to its conclusion whether or not the Series qualified as a documentary, the Tribunal found that the series did in fact explore a theme and had a narrative structure. However, it was held that the program model itself was contrived and this gave the Series the look and feel of reality television instead of a documentary. Ultimately, the Tribunal found that the series did not qualify as a documentary.

Observations and comparison between South African and Australian tax provisions

The Tribunal's judgment is interesting for comparative purposes. While we cannot comment much on the judgment, it illustrates somewhat how qualifying for the production offset under Australian tax law, compares to qualifying for the film incentive in s12O of the ITA. The first interesting observation is that, whereas the definition of a "documentary" is contained in the Aus ITA, it is not contained in the Act.

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A "film" is defined in the Act as a feature film, a documentary or documentary series; or an animation.

A "film" is defined in the Act as a feature film, a documentary or documentary series; or an animation. The Guide to the Exemption from Normal Tax of Income from Films issued by SARS in 2017 expands on the meaning of "a documentary or documentary series" and provides that –

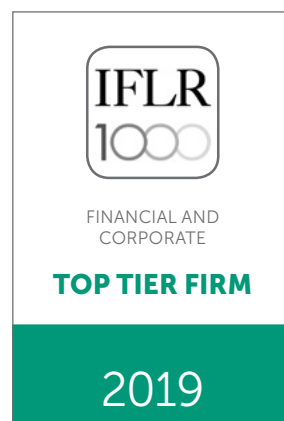
"A documentary or documentary series is:

- a non-fictional informative or educational programme or series recording real people or events that may involve some dramatization;
- with a duration of no less than 60 minutes in length, or in the case of a large format (IMAX) film, no less than 45 minutes;

- that is shot and processed to commercial theatrical release standards for cinema exhibition, television broadcast, direct-to-video or DVD; and
- in the case of a documentary series, is limited to 13 episodes."

The second interesting observation is that in terms of s12O of the Act, a film will only qualify for the incentive if it is approved by the National Film and Video Foundation (NFVF) for this purpose. If an application for approval is rejected and one wishes to have this decision set aside, the applicant would likely have to take the NFVF's decision on review to the High Court.

Louise Kotze and Louis Botha



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