KPMG

Film Financing and Television Programming

A Taxation Guide

For more than a decade, the KPMG Film Financing and Television Programming Taxation Guide has been recognized as a valued reference tool for industry professionals, filled with information drawn from the knowledge of the KPMG International global network of member firm media and entertainment Tax professionals. The 2022 edition is a fundamental resource for film and television producers, studio and streaming production executives, tax executives, finance executives, and attorneys involved with the commercial side of production.

Doing business across borders can pose major challenges and may lead to potentially significant tax implications, and a detailed understanding of the full range of potential tax implications can be as essential as the actual financing of a project. The Guide helps industry executives assess the many issues surrounding cross-border business conditions, financing structures, and issues associated with them, including development costs and rules around foreign investment. Recognizing the role that tax credits, subsidies, and other government incentives play in production financing, the Guide includes a robust discussion of relevant tax incentive programs in each country.

Each chapter focuses on a single country and provides a description of commonly used financing structures, as well as their potential commercial and tax implications for the parties involved. Key sections in each chapter include:

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

Key Tax Facts
At-a-glance tables of corporate, personal, and value-added (VAT) tax rates; normal nontreaty withholding tax rates; and tax year-end information for companies and individuals.

Financing Structures
Descriptions of commonly used financing structures in production and distribution, and the potential commercial tax implications for the parties involved. This section of each chapter covers rules surrounding co-productions, partnerships, equity tracking shares, sales and leaseback, subsidiaries, and other tax-efficient structures.

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

Austria

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

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

Streaming Tax Considerations
Provides a look at the unique tax issues that need to be addressed in this evolving segment of the industry. With considerations such as identifying tax collection and reporting obligations in a variety of jurisdictions, understanding international tax implications is essential for streaming providers.

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

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

Production opportunities are not limited to the countries contained in this Guide. KPMG and the other KPMG International member firms are in the business of identifying early-stage emerging trends to assist clients in navigating new business opportunities. We encourage you to consult a KPMG or KPMG International member firm Tax professional to continue the conversation about potential approaches to critical tax and business issues facing the media and entertainment industry.

We look forward to helping you with your film and television production ambitions.

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Austria

Introduction

Through various recognition over the past several years, the Austrian film industry established itself as a warrantor for sophisticated successful movies and consequently received the focus of the international filming business. Most notable were the enormous international success of the Austrian film production *Die Fälscher*, which won the 2008 Oscar for Best Foreign Film; the movie *Revanche*, which was nominated for the 2009 Oscar for Best Foreign Language Film; and director Michael Haneke, who was awarded at the 2009 Cannes Film Festival and nominated for an Oscar in 2013 for *Amour*. Additionally, Austrian actor Christoph Waltz was awarded an Oscar in 2009 and 2013 for his acting in Quentin Tarantino's films *Inglourious Basterds* (also awarded at Cannes 2009) and *Django Unchained*.

Nevertheless, despite these highlights, the Austrian film industry cannot be compared with the international film production industry at all. There are some public funds available to foster the Austrian film business, but there are no special tax rules to further support the development of the film business and no tax incentives to attract private money. According to the budget available for the Österreichisches Filminstitut, organized by the Austrian government, it is the biggest governmental promoter followed by funds controlled by several Austrian provinces; Vienna, as the capital of Austria, has the biggest budget for promoting the film industry in Austria.

Compared to Germany, Austrian legislation does not provide specific rules to promote the film business in Austria; Germany, for example, introduced a "media decree" providing guidance on tax issues in regard to the production, distribution, and financing of films. Besides, like in Germany, Austrian tax authorities limited possibilities to create a tax-efficient model of film funds for private individuals by applying § 2/2a of the Austrian Income Tax Law. According to that rule, losses arising out of tax deferral schemes may neither be used to offset income nor deducted pursuant to the general loss carryforward rules. Instead, such losses can only be used to offset income of the taxpayer arising from the same source as such losses. According to this legislation, a "tax deferral scheme" is given if a scheme or structure gives rise to tax benefits in the form of book losses. This rule that is pointed out in Nr. 160 of the Austrian Income Tax Guidelines has more or less prevented private investors from investing in film funds.

The financing, as well as the taxation of a movie and filming production in Austria, is based on the general tax legislation. Hence, the following should give an overview about the possibilities available for financing and structuring filming productions in Austria.

Key Tax Facts

Corporate income tax rate	25% (expected to be reduced to 24% in 2022 and 23% in 2023)
Flat rate on branch profits of nonresident corporate entities	25% (expected to be reduced to 24% in 2022 and 23% in 2023)
Highest personal income tax rate	50% (for income earned in 2016 to 2020, parts of income in excess of EUR 1 million are subject to a 55% tax)
VAT rates	10%, 13%, 20% (temporarily 5% in 2021 due to COVID-19)

Normal nontreaty withholding tax rates for nonresidents	
Dividends	27.5%
Interest	0%
Tax year-end: Companies	December 31*
Tax year-end: Individuals	December 31

A loss carryforward is basically possible; there is no loss carryback.

* A different tax year-end for companies is possible.

Organizational Setup

The tax consequences differ depending on the business structure chosen. As mentioned before, there is no unique structure available for the film business in Austria, thus the general tax rules and the general company law apply. The final decision regarding what form of organization is chosen depends on various reasons like limitation of liability, economic factors, decision procedure, taxation, etc.

Co-production Joint Venture

It is possible for an Austrian as well as for a foreign investor to enter into a co-production joint venture to finance and produce a film in Austria. Each participant in the joint venture is entitled to the film rights and, consequently, to the exploitation in particular countries or regions.

The participants to the co-production joint venture are seen as the holder of the film rights. To create a joint venture, the participants set up an agreement that states the terms and conditions of cooperation in regard to producing a film. In most cases, joint ventures are set up in the legal form of the Austrian Gesellschaft bürgerlichen Rechts (GesbR) or as a co-entrepreneurship.

In order to start the business of the co-production joint venture, the participants contribute, e.g., film rights or funds, to the legal form chosen (GesbR or co-entrepreneurship). The ownership right of the participants is not defined by share capital but by contractual agreements and by the budget contributed to the film production. The cooperation agreement concluded between the parties involved regulates the control rights, as well as the profit distribution during the film production and during the exploitation of these film rights. After production, the film rights belong to the partners according to and on the basis of the cooperation agreement.

If the financing structure of a co-production joint venture is chosen, regularly, a permanent establishment is created by foreign investors in Austria. According to § 29 of the Austrian General Tax Code, a permanent establishment is every fixed place of business in which the business of an enterprise is wholly or partly carried on. Hence, the production of films in Austria through foreign investors could meet the requirements of § 29 of the Austrian General Tax Code. If a film production in Austria does not take longer than six months, a permanent establishment is usually not created. A film production in Austria that lasts longer than six months creates a permanent establishment with all the tax consequences of the profits attributable to the permanent establishment. Despite this, no withholding tax in Austria is due when the profits are distributed out of the permanent establishment.

Partnership

In principle, a partnership is a more formal arrangement than the co-production joint venture in the legal form of a GesbR described above. Austrian tax law treats partnerships and joint ventures as transparent for tax purposes; this means that the partnership itself is not treated as a taxable entity, but the related partners are taxed with their respective partnership profits. This transparent tax treatment applies not only to partnerships created under Austrian law, but also to comparable entities created under foreign law.

Austria has two different types of partnerships: the unlimited and the limited partnership. The unlimited partnership is characterized through full liability of the partners, whereas the limited partnership has, on the one hand, fully liable partners but also partners that are only liable to the extent of their capital contribution.

Moreover, the production of a film through a partnership could create a permanent establishment in Austria, according to § 29 of the Austrian General Tax Code. The profits would be subject to 25% (in 2021) corporate income tax (in case of corporate partners) or progressive income tax (in case of individuals), but no withholding tax if the profits are distributed.

In contrast to the GesbR described above, the partnership is able to conduct business and sign contracts in its own name and, as a result, the partnership itself is able to hold rights in films.

Austrian Limited Liability Company or Corporation
If a foreign film production company intends to maintain an ongoing Austrian film production activity in which Austrian-resident investors receive a return, it could be advisable to establish an Austrian subsidiary. Austrian investors generally prefer to receive dividends directly from an Austrian company rather than through a foreign parent company.

If dividends are distributed to shareholders abroad, 27.5% withholding tax is levied from the payments. However, there are possibilities to reduce or completely avoid the withholding tax either on the basis of a double tax treaty or if the receiving company is seated within the European Union (EU).

Camera-for-Hire Model
The basic idea of a “camera-for-hire model” is to carry out film productions through a special purpose vehicle set up in Austria by the parties or the party that is aiming to produce a film; usually, this model is carried out through a limited liability company subject to Austrian corporate taxation. This production company produces the film on a “work-made-for-hire” basis under a production contract with the parties or the party (contracting entity) involved, entitling it to an appropriate production fee, but would not become the owner of any rights in and to the film; all rights in and to the film should remain at the (foreign) contracting entity. The film rights would then be exploited by the contracting entity.

The camera-for-hire model is, from a tax point of view, nothing more than a service provided from one company to another even though the contracting entity is shareholder of the special-purpose company. However, this business structure and the production fees paid should comply with the arm’s length principle; otherwise, the Austrian tax authorities would not accept this structure.

Accounting and Tax

The taxation of businesses in Austria depends mainly on the legal form and on the business structure chosen. A corporate entity is subject to corporate income taxation (25% flat rate in 2021), whereas the partnership is treated as tax transparent, which means that taxation depends on the legal form of the shareholders (25% corporate income tax in 2021 or income tax up to 50% [55%]).

The applicable accounting and tax rules in regard to the commission production and the sale or the licensing of films are described below, independent of the legal form in which the business is carried out.

Independent Production and Distribution of Films and Film Rights in Austria
In this structure, a company in Austria is set up that produces and exploits the film independently.

From a tax point of view, it has to be noted that a film that is self-produced and self-exploited cannot be capitalized as a fixed asset within the balance sheet, according to § 197/2 of the Austrian Company Law and § 4/1 of the Austrian Income Tax Act. Expenses incurred in course of the self-production are immediately deductible from the tax base. Due to the fact that self-produced film rights cannot be capitalized as fixed assets, no amortization takes place in later years. The deductible costs of the production years usually generate a loss carryforward that can be offset with exploitation profits in later years (specific restrictions in regard to the offset of loss carryforwards need to be obeyed).

Revenue generated from the exploitation of the film rights are subject to 25% corporate income tax (in 2021) if the exploitation is carried out through a corporate entity or an Austrian permanent establishment of a foreign corporate. If a partnership or joint venture exploits the film rights, taxation depends on the shareholders behind the partnership or the joint venture, and whether or not an Austrian permanent establishment exists.

Sale or Licensing of Distribution Rights

If an Austrian resident company intends to transfer the exploitation rights in a film to a third party, it has to be clarified whether this transaction qualifies as a sale or a license. Usually, such transactions are characterized through lump-sum payments and/or subsequent periodic payments.

The qualification as a sale or a license depends mainly on the restrictions agreed in connection with the exploitation of the film rights. In this respect, a sale is assumed if no restrictions, like a limited period of time, are applicable and the beneficial ownership is transferred. Such sale agreement is concluded after the production (at the own risk of the production company) is finished. If a sale agreement was entered before the actual production, such contract would qualify as a commission production (see below). The revenues generated from a sale are subject to 25% corporate income tax (in 2021) if the selling entity is a limited liability company or corporation. If the sale is carried out through a partnership or joint venture, taxation depends on the shareholders behind the partnership or the joint venture and whether or not an Austrian permanent establishment exists.

A license model is usually characterized through a limited period in which a company is able to exploit the film right. The licensee does not acquire beneficial ownership of the film right itself. However, in the case of a license, the license fees are only subject to taxation when actually realized.

In addition, it should also be considered that the sale or the license payments between related parties must meet the requirements of the arm’s length principle.

Commission Production

If a company produces a film for a third party without the intention to own and exploit the film right itself, it has to be clarified whether this commission production is qualified as a genuine commission production or a modified commission production. Both business structures create different taxation obligations, which are described hereunder:

Genuine Commission Production (echte Auftragsfertigung)

A genuine commission production is characterized through a production company that produces a film at its own risk for a third party with the obligation to assign all rights in the produced film to the third party. Moreover, the production costs incurred, as well as the intangible rights created, have to be capitalized as current assets without the possibility of amortization over the useful life at the level of the production company. After production, the film rights are transferred to the company that intends to exploit the film rights. In this regard, the production company is only awarded for the production itself and is not involved in the exploitation.

However, if both the production company as well as the third party are closely linked to each other, the business structure should comply with the arm’s length principle.

Modified Commission Production (unechte Auftragsfertigung)
A modified commission production is characterized through a production company that renders services to a third party only in connection with the film production. In contrast to the genuine commission production, the whole risk of production is with the third party and, consequently, the production company does not capitalize the production costs or the intangible rights generated as current assets. The production costs are fully deductible as business expenses at the time they occur, and the production fee paid by the third party is booked as income when the production is finished and the rights are transferred to the third party.

As mentioned before, the production fees paid should comply with the arm's length principle if both companies are related to each other.

Acquisition of Film Rights
If film rights are bought by a distribution company in Austria, the film rights have to be capitalized within the balance sheet. The film rights may either be regarded as current or fixed assets. This may also apply if the right to exploit a film was acquired through a licensing model without purchasing economic ownership of the film right itself.

Withholding Tax on License Payments
License payments for film rights made by Austrian residents to nonresident persons are subject to a 20% withholding tax, which may be reduced or eliminated under double taxation treaties (formal requirements apply in this regard).

Tax and Financial Incentives

Investors

There are no specific tax incentives for investors.

Producers – Federal Incentives
In order to promote the production and marketing of Austrian films, the Austrian Filmförderungsgesetz regulates the granting of incentives. Incentives are given to productions that fulfill specific requirements, such as the necessity that the applicant is seated within the European Union and the necessity for the produced film to be shown in cinema. Moreover, the film is not allowed to be produced by an international film production company. Consequently, more or less, only low-budget films that cannot be financed without subsidies are supported by the Austrian government.

In order to receive incentives from the government, a request has to be made to a government committee that decides about the granting of the incentives.

Apart from the Filmförderungsgesetz, the Office of the Federal Chancellor also awards incentives, especially to Austrian low-budget film projects. In this respect, the Office of the Federal Chancellor supports innovative Austrian new talent, documentary and experimental films, as well as animation films. Funding can be made available for production, script development, release and marketing, and film festival participation.

The Austrian government does not grant tax relief or specific tax rulings for film producers; the general taxation rules are applicable.

Producers – Regional Incentives
In addition, there are a number of regional funds that grant incentives to film productions at the provincial and municipal level. In respect to the budget available, the Filmfonds Wien is the biggest regional funding organization in Austria.

Actors and Artists

There are no specific incentives available for actors or artists engaged in a film production.

Cinemas and Film Supporting Industry

There are also incentives for cinemas and the film supporting industry in Austria that follow the requirements mentioned before. It is possible for these businesses to claim subsidies at the federal as well as regional level.

Digital Media

Electronic services and digital media are subject to the common general tax rules in Austria. The most important tax types are 20% VAT based on the turnover, 25% corporate income tax (in 2021), or income tax up to 50% (55%) based on the net profit generated. It should be carefully checked whether the supply of contents or films/music might qualify as licenses and therefore may be subject to a withholding tax in Austria.

As of January 1, 2015, electronic service provision is taxable in the country where the address of private individuals is located for VAT purposes. Consequently, all electronic services provided to Austrian individuals by European or non-European companies, like downloading movies, will be taxable in Austria independently from the location of the service provider.

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