

Analysis of the bill to reform the tax incentives for investments in film productions, audio-visual series, live performing arts and music shows



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Let's talk

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The Socialist and Confederal Parliamentary Groups of -En Comú Podem-Galicia have presented a bill to amend the tax incentives for investments in film productions, audio-visual series, live performing arts and music shows, regulated by the Corporate Income Tax Act (hereinafter CIT Act). Among the changes proposed, the following are worthy of mention:

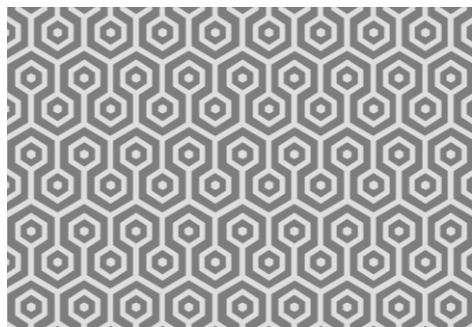
1. Firstly, the maximum limit of the tax credit for investments in Spanish and international film productions and audio-visual series is increased.

In this respect, the maximum amount of the tax credit increases from 10 to 20 million euros for productions carried out in Spanish territory. Similarly, in the case of productions of audio-visual series, the tax credit will be determined for each episode produced, which seems a more appropriate limit for

the cost of large transnational productions.

Although these measures would have effect for years starting on or after 1 January 2023, the bill regulates a suspensive condition clause by virtue of which its application would be suspended until the moment a positive response was obtained from the European Commission as regards its compatibility with EU rules on State aid.

2. Secondly, and with effect for years starting on or after 1 January 2022, amendments are proposed to the regulation of the tax credit for taxpayers who participate in the financing of production costs relating to Spanish feature-length films, short-films, audio-visual fiction, animation or documentary series, or live performing arts and music shows, (section 7 of Article 39 of the CIT Act), in the terms specified below:



- It is expressly regulated that contributions by taxpayers to the financing of productions may be made at any time during production, prior to or after the moment in which the producer incurs the production costs, until the nationality certificate of the production (in the case of film productions or audio-visual series) or the certificates issued by the National Institute of Performing Arts and Music (in the case of live performing arts and music shows) are obtained.

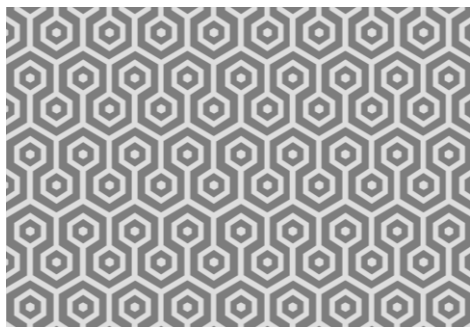
The inclusion of this amendment is justified in the bill so that, with effect for FY starting as of 1 January 2022, the taxpayer is able to apply the tax credit generated by the producer during the production phase, regardless of the point of production at which the taxpayer makes the contribution, provided it is made during the production phase of the work that is financed and prior to the obtaining of the aforementioned certificates.

For the purposes hereof, it should be borne in mind that the Directorate General for Taxes (DGT) has recently stated that the tax credit generated by the producer may only be transferred to the investor for the production costs it incurs from the moment the financing agreement is executed until the obtaining of the nationality certificate, although, in our opinion, as the large majority of the industry has been interpreting, it may be interpreted that the current wording of the rule does not establish said limitation.

As we stated in our article ‘ El mayor Hub Audiovisual de Europa sigue encurso’, de la 23ª edición del informe ‘Entertainment and Media Outlook 2022-2026. España’, report drawn up by PwC (<https://www.pwc.es/es/entretenimiento-medios/entertainment-media-outlook-espana-2022-2026.html>), the consolidation of the DGT criterion in practice would determine the impossibility of transferring a large part of the tax credit generated by the producer given that in the large majority of projects, given their nature, the incorporation of the investor is only feasible in the final stages of the production.

Even though the proposed amendment would partially palliate the situation described, giving the incentive greater legal security vis-à-vis the future, it would not solve, among other problems, the potential risk derived from having transferred to the investor the tax credits generated by the producer in 2021 prior to the signing of the financing agreement (given that the reform limits its effects to years commencing on or after 1 January 2022).

- The report justifying the measure clarifies that the tax credit in the taxpayer who participates in the financing of production costs relating to Spanish feature-length films, short-films, audio-visual fiction, animation, or documentary series, does not include expenses for obtaining copies, advertising or promotion, expenses which by contrast do form part of the tax credit base in the producer, in contrast to the criterion upheld until now by the sector.



This clarification (the new wording proposed for Article 39.7 of the CIT Act does not differ on this point with respect to the previous wording) simply reiterates what appears to be the criterion upheld by the DGT, that the producer shall be able to transfer the tax credit it has generated during the year, only as from the signature date of the financing agreement, in respect of disbursements made by the finance provider which have been used by the producer to meet production costs.

In our opinion, this being a debatable issue, it could, in any event, be argued that insofar as the investment made by the producer for obtaining of copies, advertising and promotion forms part of the producer's tax credit base for investments, (being unrelated to the actual production process), there is no reason to exclude the application of the tax credit in the investor, thus it would have been advisable to propose an amendment to the wording of Article 39.7 of the CIT Act to achieve this end.

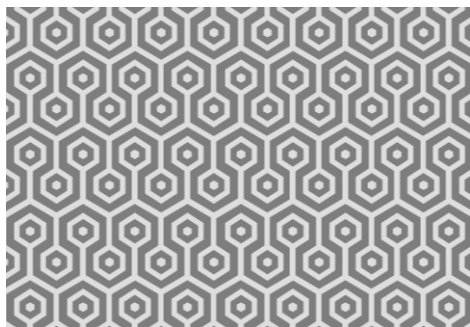
- Several changes are introduced to the current wording of Article 39.7 of the CIT Act, so that if the proposed amendment is carried out, the investor could apply the relevant tax credit to the contributions made during the years that the production stage lasts (i.e. including those made in a year prior to the end of the production) in the year in which the tax credit may be applied pursuant to the provisions of Articles 36.1 and 36.3 of the CIT Act, which is the year in which the financing agreement and relevant certificates have to be presented to the tax authorities.

In the case of film productions, the tax credit could be applied by the the

investor in the year in which the production ends, provided the nationality certificate of the production has been applied for in the actual year, which is the year in which the communication requirements envisaged in the rule must be complied with.

The amendments proposed would give the incentive legal security, especially in the case of multi-annual Spanish film productions and audio-visual series, in which there is a time lag between the period in which the tax credit is generated and the period in which it can be applied. In these cases, with the current wording, it is not clear when the investor can apply the tax credit, given that although under Article 39.7 of the CIT Act it seems possible that the investor can apply the tax credit prior to the end of the work, when the contribution is made, in practice it is impossible to comply with the communication requirements insofar as it is not possible to obtain the nationality certificates required by the rule.

- The above notwithstanding, once again the proposed amendment does not solve the problem of the tax credit for investments in multi-annual projects (2021 and 2022) during 2021, which, in accordance with the criterion used by the DGT, it seems cannot be transferred using the mechanism envisaged in Article 39.7 of the CIT Act.
- The minimum requirements of the financing agreement regulated by Article 39.7 of the CIT Act shall be those regulated by the CIT Act exclusively, eliminating the possibility of establishing new requirements through the issuance of enabling regulations, thereby giving greater legal security to the incentive.



- It is also established that the tax credit cannot be applied when the investor and the producer are related parties.
- Lastly, a final paragraph is added to section 7 of Article 39 of the CIT Act to indicate that the amount of the tax credit that is applied by the taxpayer who participates in the financing shall be taken into account when applying the joint limit of 25 per cent established in section 1 of Article 39 of said Act. In no event shall the increased limit of 50 per cent referred to in this section be applicable.

In relation to this last amendment, it should be pointed out that in the justification of the actual amendment

it is indicated that it is a clarification, unlike the other amendments that would have effect only with respect to investments made with effect for years which commenced on or after 1 January 2022.

In any event, we will have to remain attentive to the text that is finally approved by the Congress of Deputies. The complexity of the reform and its non-application to situations arising prior to years commenced on or after 1 January 2022 renders it advisable to review in detail the agreements concluded as from 2021, and to correctly plan any projects that are carried out in the future.