



# Film Relief and the Finance Acts of 2008

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*“It ain’t what you don’t know that gets you into trouble. It’s what you know for sure that just ain’t so” – Mark Twain and cited by Al Gore in *An Inconvenient Truth**

Last year’s Finance Acts saw significant changes to s481 TCA 1997 with a view to enhancing this country’s attractiveness as a film location. However, is it enough? This article will attempt to address that question.

## Irish Film Industry

*Saving Private Ryan* (1998) was one of the most well-known movies to be filmed on these shores. The film opens with the Allied invasion of Normandy. During the battle, two brothers are killed in action. Earlier, a third brother was killed. Their mother, Mrs Ryan, receives all three of the dark telegrams on the same day. The United States army finds out about a fourth brother,

Private Ryan, and sets out to find him and bring him back home to his mother. The opening and very dramatic battle scene was filmed on the beaches of County Wexford. The movie was directed by Steven Spielberg and starred Tom Hanks, Matt Damon, Tom Sizemore and a host of others. It carried home five Oscars. We also had *Braveheart*, released in 1995, starring and directed by Mel Gibson. It too won five Oscars, and it too was filmed in Ireland. It has been some time since we have seen the likes of these blockbusters filmed here, but a review of the Irish Film Board’s website shows the level of activity in the Irish industry. For example, the following were filmed here:

- › *Once* (2007), which won an Oscar for Best Song and won Best International Film at the Raindance Film Festival in London

- › *The Garage* (2007), with Pat Shortt winning Best Actor at the Monte Carlo Film Festival
- › *The Wind that Shakes the Barley* (2006), with Cillian Murphy, who is fast becoming an international star, with starring roles in such films as *Red Eye* and *Breakfast on Pluto*
- › *Studs* (2006) and *The Tiger’s Tail* (2006), both starring Brendan Gleeson. The latter also starred Kim Cattrall of *Sex and the City* fame.

In addition, John Carney, the writer/director of *Once*, won the Most Promising Newcomer Award at the Evening Standard British Film Awards, and Daniel Day-Lewis won Best Actor at the recent BAFTAs for his work in *There Will Be Blood*, having already received a Golden Globe for this role. So, as can be seen from the above, the industry is doing well, but with additional tax incentives could it be doing better ... **here?**

## Summary of the Scheme

The film incentive scheme began from humble origins in 1984 under the Business Expansion Scheme, where individuals could claim tax relief on investments in shares in companies carrying on a trade in designated enterprise sectors, one of which was film production. It progressed from there to what we have today, s481 introduced in 1996.

Before the Finance Act (No. 2) 2008 the provisions of the relief for investment in film were as follows.

Production companies qualifying for assistance could raise up to 80% of the cost of production of a film with s481 funds up to a cap of €35 million.

Individual investors could:

- › invest a minimum of €250 and a maximum of €31,750 in any tax year,
- › claim tax relief on 80% of their investment and
- › carry forward unclaimed relief to subsequent tax years should earnings in the year be insufficient to absorb it.

Corporate investors could:

- › invest up to €10,160,000 in any 12-month period, subject to a cap of €3,810,000 in any one film (investment amounts over €3,810,000 could be invested only in films with budgets of €5,080,000 or less),
- › claim tax relief on 80% of their investment and
- › carry forward unclaimed relief to subsequent tax years if there were insufficient funds to absorb it in the year of investment.

Conditions governing the investment applied, and continue to apply after Finance (No. 2) Act 2008 (see Appendix 2), regarding:

- › a qualifying film,
- › a qualifying company,
- › qualifying investors,
- › relevant investment and
- › certification.

Finance (No. 2) Act 2008 brought about some amendments to the regime, which will be examined below. However, a major influencing factor in these changes was the Indecon Report.

## Indecon Report

This report was commissioned by the Government in connection with the film industry incentive incumbent in s481 TCA 1997. This report was completed in November 2007.

A major review of the various property and area tax incentive schemes was conducted in 2006. The Minister for Finance announced in his Budget speech in that year the possible termination of a number of schemes that had achieved their objectives or were no longer considered cost-effective. He made it clear that any new reliefs should be subject to an assessment of cost and benefits before introduction.

Film investment relief was due for renewal on 31 December 2008. The Minister announced that it would be fully reviewed to ensure that it was delivering its desired effect before renewal. To this end the report was commissioned.

Factors that were considered in reviewing the scheme included the level and type of investment generated, the cost to the Exchequer of the tax incentives and the impact on Exchequer revenues, the level of private finance, the impact of the scheme on the film industry and the beneficiary profile – investor or film-maker.

A brief outline of the recommendations made in the report is:

- › Section 481 should remain for the next three to five years.
- › No changes should be made to the incentives for television production.
- › The cap on eligible expenditure should be increased from €35 million to €50 million.
- › The percentage of eligible expenditure should be increased from 80% to 90%.
- › A grant scheme should be established.
- › A ten-year strategic plan should be developed by the Film Board to address the industry's vulnerability to changes in tax incentives.

The report gave a tax cost/benefit analysis in Exchequer terms in connection with s481 in the

period 2004 to 2006, and the benefits exceeded costs by c. 7%. This tax incentive as it applied then was paying for itself. But how long has it been since *Braveheart* was filmed here?

Interestingly, the report notes that the reduction in the corporation tax rate from 40% in 1993 to 12.5% in 2003 has led to a reduction in corporate investors engaging in film investment schemes.

The report continues that in recent years all investors in s481 projects have been individuals. Why is this happening? It is because the corporate investor will get an effective reduction in tax at only 12.5%, compared to the individual's 41%. This is not rocket science; the country's competitive advantage in the 12.5% rate is actually harming film relief. Let's be clear here: I am not advocating a change in a rate that has done so much for this country in recent times. But perhaps we could change the manner in which film relief is given to corporate entities like that given for R&D expenditure. FA (No. 2) 2008 increased the R&D credit from 20% to 25% for expenditure incurred in accounting periods ending on or after 1 January 2009.

Why not do the same for film relief? Tom Maguire's paper at the 2006 ITI Annual Conference made reference to a line from the Kevin Costner movie *Field of Dreams*: "if you build it, he will come". Why are we not building this relief to ensure that we see the return of the likes of *Braveheart*?

A lot of activity happens when a film is produced in Ireland. The beaches of Wexford were a mass of activity when *Saving Private Ryan* was being filmed there. Tourists came to watch or to get a glimpse of Tom Hanks *et al.* Brendan Gleeson starred in *I Went Down*, an Irish movie, back in 1997. It told the story of a couple of amateur kidnappers. One of the scenes in the movie involved a "meet" with certain people in the Black and Amber pub in Islandbridge in Dublin. The locals tell stories of the activity that came about during the filming there, and more importantly the increased traffic in the pub after it appeared on the silver screen. This is but a small example of the magic of cinema – it can make businesses busier!

All of this costs money, and surely it is in our interest to ensure that these costs are expended

here to the benefit of our economy. If you build it, tourism will come. FA (No. 2) 2008 went some of the way in doing this.

## Finance Acts of 2008

As a result of the Indecon Report, various amendments to film investment relief were introduced in FA (No. 2) 2008:

- › The relief is to remain until 2012, an extension of four years.
- › The cap on the level of eligible expenditure per project was increased from €35 million to €50 million.
- › Both individual and corporate investors can claim tax relief on 100% of their investment, increased from 80%.
- › The investment cap for individual investors has increased from €31,750 to €50,000.
- › Individuals can carry forward unclaimed investments for relief up to and including 2012 subject to the limit of €50,000 in any one year.

Some administrative changes were implemented as part of the new regulations brought about by S.I. 357 of 2008. The period for application for certification to the Revenue Commissioners by a qualifying company has been increased from 7 to 21 days. The Film Regulations 2008 also give legal certainty to Revenue's practice of requesting additional information and the provision of more detailed certification from the auditors, including amounts raised and usage of same, foreign currency rates and related-party transactions.

A penalty of €4,000 was introduced and will be applied in circumstances where a company issues a false or misleading statement to Revenue certifying that the conditions for the relief are satisfied or issues a false or misleading certificate to an investor in relation to the film investment relief. In addition to the penalty payment, the s481 relief will be withdrawn.

## Conclusion

Fiona Reddan put it well in her recent book *Ireland's IFSC – A Story of Global Financial Success*, when she said:

*"The IFSC had been launched in difficult circumstances [referring to late 1980s and*

*early 1990s], against a background of economic depression in Ireland, and market uncertainty globally, and this environment continued to characterise its early years."*

And just look how that turned out. As part of the marketing of the IFSC, the IDA visited various locations globally, spreading the word, and Ms Reddan notes:

*"Other incentives of the IFSC regime were also disclosed in detail such as the remittance taxation, which enabled those employed under a foreign contract to pay Irish tax only on income that was remitted to Ireland. This was an important step in overcoming concerns over Ireland's high personal tax rate, and the incentive was to last until 2006 when the government abolished it, amidst much controversy."*

F(No. 2)A 2008 restored a version of the remittance basis, but it is not as effective as its predecessor. But, once again, just think back to how successful the IFSC was to become. Dermot Desmond once said:

*"the IFSC is the source of the greatest amount of revenue in the history of the State without any loss or investment by the taxpayer"*.

Ireland's film and acting capability is, quite frankly, astounding – just look back at the credits at the opening of this article. Think of Gabriel Byrne (from *Bracken* to *Hollywood*), Cillian Murphy, Brendan Gleeson, Colin Farrell (who recently co-starred with Tom Cruise in *Minority Report* and Bruce Willis in *Hart's War*). The list goes on and on. Stephen Rea (*The Crying Game*, *Interview with a Vampire*) once said:

*"You have to know who you are; if you don't, you have nightmares"*.

Ireland has never had such difficulties – it has always known what it is and what its competitive advantage is. Ireland has had a tax system that encouraged investment in the past, and so it was

and could be again with film relief. Let's make the necessary changes outlined in this article. We have precedent for such changes in the R&D regime. We have precedent for successful tax regimes: the IFSC, the low corporate tax rate of

12.5% and so on. So let's not have nightmares; let's live the dream and put our country on the big screen. Let's promote Ireland as the global FISC (film incentive services centre). The world is waiting, and more importantly the world is watching!

The IFSC is part of our history; let's make the FISC a part of our future.

## Appendix 1: e-Brief No. 46/2008 Film Relief – New Regulation Made

The Revenue Commissioners have recently introduced Film Regulations 2008 (S.I. No. 357 of 2008), which replace the Film Regulations 2004

(S.I. No. 869 of 2004). The new Regulations come into effect on 12 September 2008 and incorporate the administrative arrangements that have applied from 1 January 2005. These arrangements are already provided for in Guidance Notes issued in October 2005 and July 2006 in relation to the scheme. The arrangements also require the Minister for Arts, Sport and Tourism to issue an authorisation to the Revenue Commissioners, before any certificate is issued, that the film involved is within certain eligible categories and satisfies certain criteria. The new Regulations give legal certainty to Revenue's practice of requesting the submission of specific information currently contained in guidelines, and for the provision of more detailed certification by the auditors of the qualifying company. The following Guidance Notes have been updated accordingly:

- › "Guidance Note for Film Producers and Promoters on the Certification of Qualifying Films, under 'Section 481' – Tax Relief Incentive for Investment in Film".

**The locals tell stories of the activity that came about during the filming [of *I Went Down*], and more importantly the increased traffic in the pub after it appeared on the silver screen. This is but a small example of the magic of cinema – it can make businesses busier!**

- › “Guidance Note for Film Producers and Promoters on Post Certification Requirements For Qualifying Companies Under ‘Section 481’ – Tax Relief Incentive for Investment in Film”.

It should be noted that both Guidance Notes include new forms for completion.

Full details of the changes are contained in the new Regulations.

## Appendix 2: Definitions

### A qualifying film

A qualifying film is defined in s481(1) TCA 1997 as a film made on a commercial basis for cinema or television that is in a category of film eligible for certification from the Revenue Commissioners.

Eligible films include:

- › feature films,
- › television dramas,
- › animation (whether computer-generated or otherwise, but excluding computer games),
- › creative documentaries, where the project:
  - › is based on an original theme, preferably demonstrated by a script or treatment the design and style of which bear the undeniable stamp of creative originality and personal perspective,
  - › contains a certain “timeless” element so that there is no loss of interest when the event with which it may be linked has passed,
  - › involves production arrangements that give evidence of, in particular, a substantial period of preparation and a significant period devoted to post-production and
  - › contains significant original filming, and does not merely report information.

Films for advertisement, private purposes or non-profit-making purposes do not qualify.

The following types of film are **not eligible** for certification:

- › films made for exhibition as an advertising programme or as a commercial or
- › films comprising or substantially based on:
  - › public/special performances staged for filming or otherwise,
  - › sporting events,

- › games/competitions,
- › current affairs/talk shows,
- › demonstration programmes for tasks, hobbies or projects,
- › review/magazine-style/lifestyle programmes,
- › unscripted or “reality”-type programmes or
- › products produced in-house by a broadcaster or for domestic consumption in one country.

### A qualifying company

A qualifying company is defined in s481(1) TCA 1997 as a company that is incorporated and resident, or trading through a branch or agency, in the State and is carrying on a trade of production and distribution of a film.

The company requires approval from the Revenue Commissioners to certify that a proposed film qualifies for the relief and to determine the level of funding allowed under s481.

The maximum film production or distribution is limited to one per company.

The company must not contain in its name the words “Ireland”, “Irish”, “Éireann”, “Éire” or “National”, where the company name in question is registered under either or both of the Companies Acts 1963 to 1999 and the Registration of Business Names Act 1963 or is registered under the law of the territory in which it is incorporated.

### Qualifying investors

A qualifying investor in the case of a company is one that is not connected with the film company. Companies are connected to each other if one company controls the other or both are under control of the same person or persons.

A qualifying investor in the case of an individual is one who is domiciled, resident, ordinarily resident or a citizen of Ireland or another EU Member State and is not connected with the film company.

### Relevant investment

A relevant investment is an amount paid by the investor for shares in a qualifying company that will be used by that company for the production of an authorised film. It is a requirement that the

company use the funds for film production or distribution within two years of receipt.

The investment must be made on the basis that it will not be repaid except if certification is not granted by the Revenue Commissioners.

### Certification

As stated above, for a company to be a qualifying company, Revenue certification is required. The company is required to make an application to Revenue to be eligible for film relief status.

In order for Revenue to issue a certificate of qualification to the company, it is necessary that authorisation is sought by it from the Department of Arts, Sport and Tourism.

The Department of Arts, Sport and Tourism has to be satisfied that the film:

- › is in a category eligible for certification,
- › will contribute to the development of the Irish film industry and/or the promotion of Irish culture and
- › will act as a stimulus to film-making in Ireland through employment and training opportunities.

The Revenue Commissioners, after consultation with the Minister, will issue a notice in writing to the applicant company within 21 days of the receipt of a properly completed application form and required supporting documentation. Receipt of this notice is necessary before:

- › principal photography, first animation drawings or first model movement, as the case may be, commences (a certificate will not be issued if such activities commence before an application is made) or
- › an investment qualifying for tax relief under s481 is made (otherwise the investment will not qualify for relief).