

Update

Entertainment Law

September 16, 2009

Ontario Production Services Tax Credit (OPSTC): Ontario Ministry of Finance Announces Additional Details Regarding Proposed Enhancements to the OPSTC

On September 10, 2009 the Ontario Ministry of Finance released the Bulletin entitled “*Bulletin: Proposed Enhancements to the Ontario Production Services Tax Credit (OPSTC)*”. The Bulletin provides additional details with respect to the June 29, 2009 announcement of the Ontario government regarding an expansion of the base of the OPSTC to include both labour and non-labour related expenditures. According to the Ministry, it is not intended as a substitute for any relevant legislation or regulations and the proposed enhancements to the OPSTC described in the Bulletin will be implemented through amendments to the *Taxation Act, 2007* (Ontario) which, when enacted, will be retroactive for all qualifying production expenditures which are incurred after June 30, 2009.

Proposed Enhancements to the OPSTC

As per the June 29, 2009 announcement of the Ontario government, the proposed enhancements to the OPSTC will expand the eligible expenditures that qualify for the OPSTC. The OPSTC tax credit rate of 25% will apply to the “qualifying

production expenditure” incurred after June 30, 2009 by an eligible corporation in respect of an eligible production as defined in the Bulletin.

Qualifying Production Expenditure

According to the Bulletin, a corporation’s “qualifying production expenditure” in respect of an eligible production for OPSTC purposes will be the amount by which the sum of the following amounts incurred by the corporation in respect of the production in the applicable taxation year exceeds any government or non-government “assistance” received in respect of the production:

- (a) eligible wage expenditure,
- (b) eligible service contract expenditure, and
- (c) eligible tangible property expenditure.

Eligible Wage Expenditure

A corporation’s eligible wage expenditure for a taxation year in respect of an eligible production will include employee salary and wages that are:

- reasonable in the circumstances;
- directly attributable to the eligible production;
- incurred by the corporation in the taxation year or the previous taxation year;
- related to services rendered in Ontario for the stages of production from the final script to the end of the post-production stage; and
- paid by the corporation in the year or within 60 days after the end of the year to the corporation’s employees who were Ontario-based individuals at the time the payments were made (amounts incurred in the previous year that were paid within 60 days after the end of the previous year are excluded).

An eligible wage expenditure would also include the fees a qualifying corporation must pay to guilds and unions such as the Alliance of Canadian Cinema, Television and Radio Artists

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(ACTRA) in respect of the production for Ontario-based individuals.

Eligible Service Contract Expenditure

A corporation's eligible service contract expenditure will include amounts that are paid to qualifying third parties (i.e. independent contractors) that are:

- reasonable in the circumstances;
- directly attributable to the eligible production;
- incurred by the corporation in the year or the previous year;
- related to services rendered in Ontario in the year or the previous year to the corporation for the stages of production from the final script stage to the end of the post-production stage; and
- paid by the corporation in the year or within 60 days after the end of the year (amounts incurred in the previous year that were paid within 60 days after the end of the previous year are excluded) to a person or partnership that carries on a business in Ontario through a permanent establishment and that is:
 - an Ontario-based individual at the time the amount is paid and who is not an employee of the corporation, provided the services are rendered in Ontario in respect of the production by the individual or the individual's employees at a time when they were Ontario-based individuals,
 - another corporation that is a taxable Canadian corporation, provided the services are rendered in Ontario in respect of the production by the corporation's employees at a time when they were Ontario-based individuals, or
 - a partnership, provided the services are rendered in Ontario in respect of the production by an Ontario-based individual who is a member of the partnership or the partnership's employees at a time when they were Ontario-based individuals.

Eligible service contract amounts will include the cost of on-set police services.

Eligible service contract amounts will not include: (i) travel where any portion is outside of Ontario; (ii) meals and entertainment (other than on-set catering); and (iii) living expenses (hotels, etc.).

Eligible Tangible Property Expenditure

A corporation's eligible tangible property expenditure will include all or a portion of an amount incurred by the corporation for the acquisition or rental, in Ontario, of tangible property used in the eligible production provided:

- the property is used in Ontario in a manner that is directly attributable to the eligible production;
- the property is used during the stages of production, from the final script stage to the end of the post-production stage;
- the expenditure is incurred in Ontario in the taxation year or the previous taxation year;
- the expenditure is paid by the corporation in the year or within 60 days after the end of the year (amounts incurred in the previous year that were paid within 60 days after the end of the previous year are excluded);
- the expenditure is reasonable in the circumstances; and
- the expenditure is paid to a person that carries on a business in Ontario through a permanent establishment and that is:
 - an Ontario-based individual at the time the amount is paid and who is not an employee of the corporation, or
 - a taxable Canadian corporation, and
 - the corporation's primary source of active business income is derived from selling or renting tangible property.

Under the proposed enhancements, generally, tangible property would have its ordinary meaning, i.e., physical property that can be touched. Eligible tangible property expenditures would include items such as equipment, studio rentals and computer software. Examples of expenditures that would not qualify for the OPSTC include financing and banking costs, insurance premiums, the cost of completion bonds and story rights.

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For depreciable tangible property that is acquired by the qualifying corporation and meets all of the above proposed criteria, the corporation's eligible tangible property expenditure for the year would include only the portion of the Ontario capital cost allowance (CCA) for the property for the taxation year under the *Income Tax Act* (Canada) that relates to the use of the property in Ontario in the year in the course of completing the eligible production.

Excluded Items

Under the current OPSTC rules, a corporation's qualifying production expenditure will not include remuneration determined by reference to profits or revenues, an amount to which section 37 of the federal *Income Tax Act* applies nor, for greater certainty, an amount that is not a production cost (e.g., an amount in respect of advertising, marketing, promotion, market research, etc.) or an amount related in any way to another film or video production.

A corporation's qualifying production expenditure may not include alcoholic beverages.

For further information, a link to the Ontario Ministry of Finance Bulletin is provided below:
http://www.fin.gov.on.ca/english/publications/bulletins/2009_09_10_filmtax.html

If you would like further information about this matter or have any questions with respect to the foregoing, please do not hesitate to contact any member of our Entertainment Law Group:

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