“Updated as of: 26/05/2023”

Instruction 3/2023, of 26 May, of the Directorate-General of the Treasury, establishing certain criteria for the application of the incentives for the promotion of culture provided for in Sections One and Two of Article 66 quater of Provincial Regulation 11/2013, of 5 December, on Corporation Tax, as well as the mechanism for providing funding established in Article 66 quinquies of the same Provincial Regulation

On 23 November 2022, the General Assembly of Bizkaia approved in a Plenary Session Provincial Regulation 9/2002, of 23 November, updating and extending the tax incentives for the development of culture.

As stated in its preamble, audiovisual works, especially films, play an important role in shaping European identities, as they reflect the cultural diversity of the various traditions and histories of the Member States and regions of the European Union. Audiovisual works are both economic assets, offering significant opportunities for wealth and job creation, and cultural assets that reflect and shape our societies.

It is generally accepted that aid is important in order to support European audiovisual productions. It is difficult for producers to obtain a sufficient level of prior commercial backing and therefore to raise the financial resources to enable them to carry out their projects. Their businesses and projects are high risk, which, combined with a feeling that profitability in the sector is insufficient, makes them dependent on state aid. Based on market criteria alone, many of these films would not have been made due to the high levels of investment required and the limited audience for European audiovisual works. In these circumstances, the promotion of audiovisual productions by the Commission and the Member States plays an important role in ensuring that their culture and creative capacity can be expressed and that the diversity and richness of European culture are represented.

In relation to the above, the preamble of Provincial Regulation 9/2022 also states that we are witnessing a major boom of the audiovisual sector worldwide, possibly the largest in its history. Thanks to the enormous talent of our artists, technical teams, producers, and locations, our audiovisual industry is once again in the international spotlight. And, in this regard, the Basque Country is positioning itself as a prime area for filming locations and, more specifically, Bizkaia has hosted the filming of important internationally renowned productions in recent years. However, despite the fact that the tax authorities of the three Historical Territories were pioneers in establishing tax incentives for those entities that invested in film productions, their attractiveness from a fiscal point of view has recently been reduced as a result of the implementation of more favourable tax treatments by the tax authorities around us.

Therefore, taking into account the above and with the main objective of encouraging investment and expenditure on audiovisual productions by substantially improving the tax incentives applicable to them, new Articles 66 quater and 66 quinquies are introduced in Provincial Regulation 11/2013, of 5 December, on Corporation Tax, which regulate the tax incentives that replace the deduction previously contained in the 15th Additional Provision of the same Provincial Regulation.

We must begin by highlighting, in this regard, that the new regime relating to tax incentives linked to investments and expenses in productions of audiovisual works and live performing arts and music shows introduced in Provincial Regulation 11/2013, of 5 December, on Corporation Tax, by Provincial Regulation 9/2022, of 23 November, updating and extending the tax

incentives for the promotion of culture, has been notified to the European Commission, having obtained its authorisation through Decision C (2022) 4616 final, of 30 June 2022, issued in the case SA. 102040, with the legal certainty that this entails for all parties involved.

In view of the above, we can say that the new regulation contained in Article 66 quater of Provincial Regulation 11/2013, of 5 December, on Corporation Tax of the Historical Territory of Bizkaia, implemented in Article 38 quater of Provincial Decree 203/2013, of 23 December, approving the Tax Regulations, has led to a substantial improvement to the incentive in force until 31 December 2022 (specifically, that contained in the 15th Additional Provision of the aforementioned Provincial Regulation and in the 9th Additional Provision of its implementing Regulations), with regard to various aspects.

Firstly, three different deductions are established:

1. The deduction for investments and expenses in productions of audiovisual works (Section One of Article 66 quater).

2. The deduction for live performing arts and music shows (Section Two of Article 66 quater).

3. The deduction for book publishing (Section Three of Article 66 quater).

Starting with the deduction for investments and expenses in productions of audiovisual works, the first new feature is that the objective scope of application of the incentive has been extended in relation to that in force until 31 December 2022. Consequently, from the entry into force of the new regulation introduced by Provincial Regulation 9/2022, the deduction will apply not only to investments and expenses in the production of feature films and fiction, animation, or documentary audiovisual series, as was the case under the previous incentive, but also to short films and other audiovisual works.

Moreover, as of 1 January 2023, the incentive also applies to foreign productions, under the same conditions as domestic productions.

Likewise, from 1 January 2023, the deduction may also be claimed by the executive producer (and not only the producer), although only in those cases in which the producer is a non-resident in Spanish territory who does not operate in that territory through a permanent establishment, and solely, in this case, for the cost of production incurred by the executive producer.

Therefore, if we were to encounter a foreign production company, there are two ways in which its audiovisual works could be eligible for the new deduction provided for in Provincial Regulation 11/2013. The first one would be to open a permanent establishment in Bizkaia, and the second one would be to appoint an executive producer from Bizkaia. In the first case, i.e. if it has a permanent establishment in Bizkaia, it (the foreign production company) will have access to the incentive, resulting in the deduction of the total cost of production. In the second case, the deduction is generated by the executive producer from Bizkaia, albeit on the production cost borne by them (not on the total cost of production).

It should be kept in mind that, if we are dealing with a production company resident in Spain (but not taxed under the regulations of Bizkaia), it will in any case be the producer, and not the executive producer, who will be responsible for demonstrating that they are eligible for the deduction, depending on the tax regulations applicable to them in this case. Therefore, if the production company is resident in Spain, in common territory, and hires an executive producer from Bizkaia, then the incentive provided for in Provincial Regulation 11/2013 does not apply. It would not be available to the executive producer, despite being subject to the aforementioned Provincial Regulation, because of the above; if the producer is resident in Spain, then it is the producer who generates the deduction. Furthermore, the incentive provided for in Provincial Regulation 11/2013 will not apply to the production company either, because it will be subject to the regulations of the common territory (and will therefore generate the corresponding deduction according to the State Corporation Tax Law).

If the production company, which is resident in Spain, is subject to the tax regulations of Bizkaia, then it may itself qualify for the incentive provided for in Provincial Regulation 11/2013.

As we shall see, in order for the deduction for expenses and investments in audiovisual works to be generated in accordance with the new regulation contained in Article 66 quarter of Provincial Regulation 11/2013, and the limits set out in said Regulation, it is necessary for the producer or, if applicable, executive producer, to be subject to or taxed under the regulations of Bizkaia.

From this point, the new regulation provides for two ways of benefiting from or applying this deduction. Firstly, by the producer or executive producer who has generated it, and secondly, by a third party who provides funding to carry out the production. In the latter case, the Provincial Regulation establishes that the right to generate the deduction does not correspond, in whole or in part, to the producer or executive producer, but that the deduction is generated ex lege directly in the self-assessment of the financier or investor, who will apply it, albeit with certain limits (Article 66 quinquies of Provincial Regulation 11/2013 and Article 38 quinquies of the Tax Regulation).

In relation to this aspect, it is important to state that Provincial Regulation 11/2013 does not provide for any monetisation of the deduction (there is no tax rebate, not even for foreign productions), but rather what it establishes is precisely this possibility of transferring the right to generate the deduction to third parties, so that they, and not the person carrying out the activity that generates the right to the deduction, are the ones who benefit from it in their Corporation Tax returns.

In addition, the traditional scheme of Economic Interest Groupings (hereinafter, EIGs) remains valid, with the assignment of the deduction through the corresponding allocation to their resident members, under the terms that will be explained below.

As will also be developed below, it should be noted that there is no expenditure requirement in terms of geographical location in order to be eligible for the incentive. What we need, in order to be able to apply the deduction in accordance with Provincial Regulation 11/2013, is for the producer (or, if applicable, executive producer, if the producer is not resident in Spanish territory) to be subject to the regulations of Bizkaia. This being so, it does not matter where the cost of the work (in any of its phases; pre-production, filming, and post-production) is understood to have been incurred in order to qualify for the deduction and for that cost to form part of the deduction base.

Another aspect is that, in order to determine what the applicable deduction percentage is, we do have to consider where the expense is understood to have been incurred, as we will also discuss. The higher the percentage of investments and expenses that are deemed to have been incurred in the Historical Territory of the taxpayer's tax domicile, the higher the percentage of deduction to which the taxpayer will be entitled. For these purposes, and in summary, all expenses linked to filming shall be understood to be incurred in the place where the filming takes place (proportionally, if applicable, if the filming takes place in different territories). All other expenses shall be deemed to be incurred at the place from which the service is rendered or the transaction for which it is incurred is carried out.

For its part, Section Two of Article 66 quater introduces a new deduction of 30% for expenses incurred in the production and exhibition of live performing arts and music shows, or 40% if the show is in Basque. This deduction will have a limit per taxpayer and tax period of 1,000,000 euros.

In relation to this new deduction, the taxpayer who generates and applies the deduction may be the taxpayer who carries out the incentivised activity, or a third party who applies it in their place, in exchange for the contribution of funding precisely so that the activity that generates the right to the deduction can be carried out (Article 66 quinquies of Provincial Regulation 11/2013, and Article 38 quinquies of the Tax Regulation).

Lastly, with regard to the deduction for book publishing, Section Three of Article 66 quater stipulates that investment in book publishing that allows for the production of a physical format

prior to its industrial serial production shall give rise to a deduction of 5% of the net tax liability. However, this deduction will not be analysed in this Instruction, which focuses on the first two deductions referred to.

Taking into account the impact that this updating and improvement of these incentives is having, the purpose of this Instruction is to explain in detail how in particular the deductions provided for in Sections One and Two of the aforementioned Article 66 quater function, and the mechanism provided for in Article 66 quinquies, both from Provincial Regulation 11/2013, of 5 December, on Corporation Tax, as well as to establish various interpretive criteria aimed at their implementation in practice.

1. Preliminary issues.

1.1. Communication to the European Commission.

As we said in the introduction, the new regime relating to tax incentives linked to investments and expenses in productions of audiovisual works and live performing arts and music shows introduced in Provincial Regulation 11/2013, of 5 December, on Corporation Tax, by Provincial Regulation 9/2022, of 23 November, updating and extending the tax incentives for the promotion of culture, has been notified to the European Commission, having obtained its authorisation through Decision C (2022) 4616 final, of 30 June 2022, issued in the case SA. 102040, with the legal certainty that this entails for all parties involved.

In particular, the European Commission decided “not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107 (3) (d) of the Treaty on the Functioning of the European Union”.

Consequently, on 2 December 2022, the aforementioned Provincial Regulation 9/2022 of 23 November was eventually published in the Official Gazette of Bizkaia, updating and extending the tax incentives for the promotion of culture, with effect for tax periods starting from 1 January 2023.

It is worth noting at this point that, although the Commission decision states that “(...), the Spanish authorities estimate that the average annual budget of the measure will amount to EUR 5,000,000. (...)”, this does not imply any kind of aid ceiling for this amount, either individually or for all taxpayers as a whole. This is merely an estimate of what the measure could cost annually, on average, based on past data (relating to the application of the incentive in its current wording until 31 December 2022).

Therefore, with a sufficient deduction base, the annual deduction for audiovisual works, per taxpayer, could exceed five million euros.

1.2. Starting point for applying the incentive: being subject to the tax regulations of the Historical Territory of Bizkaia.

In order to be able to apply the tax incentives provided for in Provincial Regulation 11/2013 on Corporation Tax in Bizkaia and, as far as we are concerned here, the incentives for the promotion of culture provided for in Article 66 quater, the taxpayer in question (the producer or executive producer of the audiovisual work, or the promoter or organiser of the live performance of performing arts and music) must be subject to the regulations of Bizkaia.

And we must specify at this point that the deductions provided for in Article 66 quater of Provincial Regulation 11/2013 apply, not only when the taxpayer is an entity that pays Corporation Tax (and, therefore, pays tax under the Provincial Regulation in question), but can also be applied in the field of Personal Income Tax, when the incentivised activity (the activity that generates the deduction in Section One or Two) is carried out, not by an entity, but by a natural person carrying out an economic activity. In this regard, Article 88 of Provincial Regulation 13/2013, of 5 December, on Personal Income Tax, states that:

“Article 88 Deduction for investments and other activities

1. Taxpayers for this tax may apply the deductions to encourage investments in new non-current assets and the performance of certain activities provided for in Chapter III of Title V of the Provincial Corporation Tax Regulations, with equal percentages and deduction limits. (...)".

Chapter III of Title V of the Provincial Regulation on Corporation Tax includes, among others, Article 66 quater, which regulates the two deductions that are the object of analysis in this Instruction.

Having made this clarification, and returning to the scope of the entities, the first thing to point out is that, for an entity to be subject to the tax regulations of Bizkaia, there is no requirement related to minimum investments, personnel, etc. that must be met as such. Nor is there any minimum length of service requirement during which the company has had to be subject to Bizkaia's regulations in order to be able to qualify for its incentives. Nor does the incentive depend on issues such as where the production team is domiciled for tax purposes or the employment status of the production team.

Nor are there any requirements as to where it has to conduct its operations. In other words, once the entity is subject to Bizkaia's regulations, these will be applicable to all its operations, wherever they are carried out. And, within the exact scope of this incentive, the corresponding deduction will be available, regardless of where the audiovisual productions are produced (although where the corresponding expenses and investments are deemed to have been provided will directly influence the applicable deduction percentage) or live performing arts and music shows.

Therefore, the starting point for applying the incentives provided for in the new Article 66 quater of Provincial Regulation 11/2013 is for the taxpayer carrying out the incentivised activity to be subject to the provincial regulations of Bizkaia. The following elements will therefore be necessary:

- An entity subject to Corporation Tax, which is taxed under Provincial Regulation 11/2013.

- A natural person, subject to Personal Income Tax, who pays tax under Provincial Regulation 13/2013, of 5 December.

- A permanent establishment of a non-resident entity to which Provincial Regulation 12/2013, of 5 December, on Non-resident Personal Income Tax is applicable (although from a theoretical point of view it could also be a permanent establishment of a non-resident individual, we understand that, if such a case arises, these occurrences will be very limited).

It is important to specify at this point that the concept of a "permanent establishment" is only envisaged for non-resident entities or individuals, which operate, in this case, in Spanish territory through a fixed business establishment in which they carry out all or part of their activity (in short and in very simply put). This means that this permanent establishment is taxed, in this case in Spain (whether in the common or provincial territory, as appropriate), on the income attributable to it, or, in short, for the activity carried out by it. And it is taxed, as if it were a "separate entity" from the non-resident taxpayer it is linked to.

However, the legislation does not allow a person or entity resident in Spanish territory (e.g. in common territory) to have a permanent establishment in the same country in which it is based (e.g. in provincial territory). It is a concept provided for tax purposes and solely in an international context, in the relations between different countries, with a view to attributing powers to tax the income derived from the economic activities carried out by taxpayers to one country or another.

And when will an entity, an individual, or a permanent establishment be subject to the tax provisions of the Historical Territory of Bizkaia, specifically to Provincial Regulation 11/2013, Provincial Regulation 13/2013, or Provincial Regulation 12/2013, respectively? We will now look at the main rules to be taken into account in this regard.

1.2.1. Taxpayers of Corporation Tax.

The starting point for an entity to be subject to the Provincial Regulation on Corporation Tax of the Historical Territory of Bizkaia and, consequently, to be able to apply, as from 1 January 2023, the incentives for the promotion of culture provided for in said Regulation, is that it must have its tax domicile in Bizkaia.

However, in addition, and in summary, we must remember that for entities with a volume of operations in the previous financial year in excess of ten million euros, in addition to having their tax domicile in Bizkaia, it would also be necessary for them, in the same financial year prior to that which we are verifying, not to carry out more than 75% of their operations in common territory, and, even if they do not carry out 75% or more of their operations in common territory, not to carry out 100% of their operations in the Basque Country in Gipuzkoa or Álava (and therefore to not be carrying out any operations in Bizkaia). For the purposes of verifying this requirement, therefore, if we are analysing whether the entity is subject to the regulations of Bizkaia in 2023, we would have to analyse its volume of operations and where it has carried it out in the previous financial year, i.e. in 2022.

Therefore, in general terms, in order for an entity to be taxed under Provincial Regulation 11/2013:

- If it is an entity whose turnover in the previous financial year has not exceeded ten million euros, its tax domicile must be in the Historical Territory of Bizkaia. For these purposes, the total volume of operations carried out by the entity is taken into account, regardless of whether the operations are understood to be carried out in Spanish territory or abroad.

- If its volume of operations in the previous financial year exceeded ten million euros, in general, in addition to having its tax domicile in Bizkaia, it will be necessary for it not to carry out 75% or more of its operations in common territory, nor for 100% of its operations carried out in the Basque Country to be carried out in Álava or Gipuzkoa. In this case, however, in order to determine these percentages of the volume of operations carried out in the common or Basque territory, only operations located in Spanish territory are taken into consideration, without operations carried out abroad being relevant, as the Economic Agreement states that these are attributed to one or the other territory in the same proportion as the operations carried out in Spanish territory.

There would be other more specific cases in which Provincial Regulation 11/2013 could also apply. These other more specific cases would refer to those scenarios where: (i) having its tax domicile in common territory, it had carried out 75% or more of its volume of operations in the Basque Country in the previous financial year, and within this, a greater part had been carried out in Bizkaia than in Álava and Gipuzkoa, and (ii) having its tax domicile in Álava or Gipuzkoa, it had not carried out 75% or more of its operations in common territory, and of the total operations carried out in the Basque Country, it had carried out none (0%) in the territory of its tax domicile, and it had carried out more Bizkaia than in the other historical territory (in which it does not have its tax domicile). In both cases, this is provided that the volume of operations in the previous year exceeded ten million euros (otherwise, as mentioned above, the rules are determined solely by the tax domicile).

Taking into account that, for these purposes, volume of operations means the total amount of the consideration (excluding VAT) corresponding to the supplies of goods and services (as defined in the VAT legislation), whether regular or occasional, carried out by the taxpayer.

All of the above applies under the terms regulated in the Economic Agreement with the Autonomous Community of the Basque Country, approved by means of Law 12/2002, of 23 May (hereinafter, the Economic Agreement), and in the Provincial Regulation 11/2013 itself. In particular, it is necessary to take into account the rules on determining the location of operations carried out carried out in Spanish territory provided for in Article 16 of the Economic Agreement.

The special case of Economic Interest Groupings:

For the purpose of determining the rules of the EIGs, the Economic Agreement establishes in its Article 20 that “One. The tax regime for economic interest groupings and temporary joint ventures shall be that in force in the Basque Country when all the entities that form part of them are subject to provincial legislation”.

Whereas, for the purposes of determining the specific legislation applicable within the Basque Country (the so-called “intra-agreement” rules), Art. 2 of Provincial Regulation 11/2013 stipulates that: “4. The provisions of this Provincial Law shall apply to economic interest groupings and temporary joint ventures when all their members are subject to the provincial legislation of any of the Historical Territories and have their tax domicile in Bizkaia or, having their tax domicile in common territory, conduct a greater proportion of their volume of operations in Bizkaia than in each of the other Historical Territories.

Nevertheless, if the economic interest groupings or temporary joint ventures referred to in the preceding paragraph have their tax domicile in Álava or Gipuzkoa but do not carry out operations in that Historical Territory that must be taken into account in order to calculate their volume of operations, the provisions of this Provincial Law shall apply when they carry out a greater proportion of their volume of operations in Bizkaia than they do in the other Historical Territory. (...)”.

Therefore, in order for the EIG to be subject to Bizkaia company law, it will be necessary for all its members to be subject to Bizkaia provincial tax legislation on the date on which the tax accrues (in the tax period coinciding with the calendar year, 31-12), and that its tax domicile (that of the EIG) is in Bizkaia (unless, with this being in Gipuzkoa or Álava, it does not carry out in that territory, where it is domiciled, any operations that should be taken into account for the purposes of the volume of operations and that, of those carried out in the other two territories, Álava and Bizkaia, a greater proportion is located in Bizkaia).

In the event that any of the members were subject to state regulations, the EIG would be governed by those regulations (and therefore not by Provincial Regulation 11/2013).

For these purposes, only resident EIG members are taken into account (i.e. those who are subject to State or provincial law), but not non-resident members (so that if the EIG, for example, were owned 50/50 by a provincial and a non-resident member, the EIG would be subject to provincial law).

1.2.2. Taxpayers of Personal Income Tax.

In order to establish where Personal Income Tax taxpayers must pay tax, it is necessary to take into account the place where their habitual residence is located in the tax period in question, in accordance with the provisions of Article 43 of the Economic Agreement and Article 3 of Provincial Regulation 13/2013 on Personal Income Tax.

In accordance with the provisions of Article 43 of the Economic Agreement, in each tax period, a taxpayer who spends more than 183 days in Spanish territory shall be considered as a resident in the common or Basque territory, firstly, according to the number of days spent during the tax period in one or the other territory, taking into account temporary absences. In the event that the habitual residence is in either of the two territories (common or provincial), it will be in the location where the habitual residence will be presumed to be located.

If the habitual residence cannot be determined in accordance with the previous criterion (permanence criterion), the taxpayer will be deemed to be resident in the territory, whether common or provincial, in which they obtain most of their tax base for personal income tax, excluding income and capital gains derived from investment income and any tax bases allocated under tax transparency (except for professional income).

Lastly, if, according to this criterion regarding the main centre of economic interests, it is not possible to determine the habitual residence, the taxpayer would be considered to be resident in the territory where the last residence declared by them for Personal Income Tax purposes is located.

For taxpayers resident in Spanish territory who have not spent more than 183 days of the tax period in the aforementioned territory, they will be considered to be resident in the Basque Country when the main core or base of their business or professional activities or economic interests is located there.

Lastly, in the cases provided for in the previous paragraph in which it cannot be determined where said main core is located, when it is presumed that an individual is resident in Spanish territory because their spouse from whom they are not legally separated and their dependent minor children have their habitual residence in the Basque Country, they will be considered to have their habitual residence in the Basque Country.

A natural person resident for tax purposes in the Basque Country, in accordance with the aforementioned rules, will in turn have their habitual residence in Bizkaia, applying the following rules successively: (i) when staying in the Basque Country for a greater number of days during the tax period, the number of days spent in Bizkaia is greater than the number of days spent in each of the other two Historical Territories of the Basque Country; (ii) when their main centre of economic interests is in Bizkaia; (iii) when Bizkaia is the territory of their last declared residence for the purposes of this tax.

Once it has been determined that we are dealing with an individual who is taxed under the regulations of Bizkaia, they will be able to generate the deductions contained in Sections One and Two of Article 66 quater of Provincial Regulation 11/2013, if they carry out, on their own, the incentivised activities (obtaining the corresponding income from economic activities). In short, we are referring to the self-employed.

1.2.3. Non-resident Personal Income taxpayers operating through a permanent establishment.

The possibility for a non-resident person or entity to generate the incentives for the promotion of culture regulated in Article 66 quater of Provincial Regulation 11/2013 will be limited to cases in which they operate in Spanish territory through a permanent establishment to which the provincial legislation of Bizkaia is applicable.

We will not go into detail on the analysis of when a non-resident taxpayer is deemed to operate in Spanish territory through a permanent establishment, as this is a complex concept that may vary from one Double Taxation Avoidance Convention to another. However, in general, a natural person or entity may be deemed to operate through a permanent establishment when, in any capacity whatsoever, they have at their disposal, on a continuous or regular basis, premises or places of business of any kind, in which they carry out all or part of their activity, or act in that establishment through an agent authorised to act in the name and on behalf of the non-resident taxpayer, who habitually exercises those powers. To put it very simply, this would be the case where mainly a non-resident entity operates in Spanish territory through an office or a branch, for example.

Otherwise, i.e. if the non-resident does not have a permanent establishment in Spanish territory, the possibility of generating the incentive will be limited, and only for the deduction relating to investments and expenses incurred for audiovisual works, to the case in which the production is delegated to a resident executive producer, who will generate the deduction (based on their own regulations), for the part of the cost of the production they bear.

For the deduction for live performing arts and music shows in Section Two of Article 66 quater, if the person carrying out the incentivised activity is a non-resident who does not operate through a permanent establishment, it will not be possible to apply it, even if the performance takes place in Bizkaia (since, for the purposes of the deduction, where the performance takes place is not relevant, but rather the regulations to which the person carrying out the incentivised activity is subject).

For this purpose, in order to determine under which non-resident personal income tax regulations (provincial or common) a permanent establishment of a non-resident is taxed, it will be necessary to apply the rules we have already discussed for cases involving resident entities.

In short, and leaving aside more minor cases, in order for the permanent establishment to be taxed in accordance with Provincial Regulation 12/2013, of 5 December, on Non-resident Personal Income Tax in Bizkaia, it will be necessary:

- If its volume of operations (that attributable to the permanent establishment itself) in the previous financial year did not exceed ten million euros, for its tax domicile (that of the permanent establishment) to be in the Historical Territory of Bizkaia. For these purposes, the total volume of operations carried out by the entity is taken into account, regardless of whether the operations are understood to be carried out in Spanish territory or abroad.

- If its volume of operations (that of the permanent establishment) in the previous financial year exceeded ten million euros, in general, in addition to having its tax domicile in Bizkaia, for it not to carry out 75% or more of its operations in common territory, and for 100% of its operations carried out in the Basque Country not to be carried out in Álava or Gipuzkoa. In this case, however, in order to determine these percentages of the volume of operations carried out in the common or Basque territory, only operations located in Spanish territory are taken into consideration, without operations carried out abroad being relevant, as the Economic Agreement states that these are attributed to one or the other territory in the same proportion as the operations carried out in Spanish territory.

1.2.4. Determination of the tax domicile of entities.

Article 43.Four of the Economic Agreement establishes that: “For the purposes of this Economic Agreement, the following parties shall be deemed to have their tax domicile in the Basque Country: (...) b) Legal entities and other entities subject to Corporation Tax that have their registered office in the Basque Country, provided that their administrative management and the conducting of their business is effectively centralised there. Otherwise, when this conducting or administration is carried out in the Basque Country. (...)”. Therefore, regardless of where the entity's registered office is located, the place where its administrative management and the management of its business is effectively centralised must be taken into account in order to determine where its tax domicile is located (the conducting of the business is more important than the administrative management, which is understood as the place where the company's fundamental decisions are made).

In similar terms, Section Four adds, in letter c), that the permanent establishments of a non-resident shall be deemed to be domiciled for tax purposes in the Basque Country, "when their administrative management or the conducting of their business is carried out in the Basque Country. (...)”.

With regard to the tax domicile of companies, the Supreme Court has indicated that the expression “administrative management and conducting of the business” is a complex expression that is neither legally defined nor delimited, but has to be determined on a case-by-case basis, taking into account not only the specific objective circumstances of each case, but also, and fundamentally, the characteristics of the company in question, and the activity in which it engages (among others, judgments of the Labour Section of the Spanish Supreme Court of 12 February 2019, 27 January 2016, 19 December 2015, and 18 June 2015).

For this purpose, in general, in order to incorporate the concept of Corporation Tax, the Supreme Court usually refers to the provisions of Article 22 of the Corporation Tax Regulation approved by Royal Decree 2631/1982, dated 15 October (even though it is a provision applicable in common territory, not an Agreement, although it was included in the same terms in the provincial regulations, and which is now repealed). Accordingly, Article 22 of the aforementioned regulation stated that: “The place where the administrative management and conducting of business is centralised shall be understood to be the place where the following circumstances are met: a) There is an office or unit where the Entity's general procurement is normally carried out, notwithstanding procurement specific to and characteristic of branches and that which may be carried out in other places, given the nature of the activities carried out. b) That there, or in offices set up for this purpose in the territory in which the competence of the same Treasury Office applies, the main accounts are kept on an ongoing basis, with the necessary records, supporting documents, and background information to enable all corporate

transactions to be duly verified and assessed. c) That within the aforementioned territory there are an adequate number of directors or managers of the company with tax domicile so that the management of the corporate business may be duly exercised".

Consequently, in conflicting cases, the determination of tax domicile in one territory or another usually consists of providing as much evidence as possible to prove that the administrative management and the conducting of business is located in that territory. The aforementioned Royal Decree 2631/1982 referred to three fundamental elements (general procurement of the company, ongoing keeping of accounts with their supporting documents and records, and the domicile of directors or managers), although, in general, other additional aspects are also taken into consideration (registered office; domicile of proxies; the domicile of the directors and, where applicable, the place where meetings of the management body are held; the place where shareholders' meetings are held; for small companies, the domicile of the shareholders; the location of management committees; the place where bank accounts (branches) are held and the domicile of those authorised to operate them; the location of the teams that manage these online accounts; the addresses listed for the bank accounts; the internal verification of the accounts and, in general, the performance of administrative tasks; the keeping of the accounts, official books, and original invoices; the place from which invoices are issued and where paper invoices are received; the address stated on invoices issued and received; the carrying out of accounting audits; the place where the entity's ordinary correspondence is received; the place from which orders are placed; the place where contracts are entered into and submission to the jurisdiction of the courts and arbitration bodies takes place; the place or places where employment contracts are signed; the work centres; the place from which the entity's main activity is carried out, with the staff assigned to each work centre; the addresses and location of the contact telephone numbers listed on the company's websites, social media, etc.; the address registered with the General Treasury of the Social Security; the main social security contribution account; the notary offices where the entity's articles of incorporation are drawn up; the addresses listed in the entity's contracts, deeds, and other documentation; and, lastly, the location of the highest value of the fixed assets).

Therefore, determining the place where the administrative management and conducting of a company's business is effectively centralised is a matter for the tax authorities to verify, taking into account the specific circumstances and the facts, bearing in mind, in addition, what the Spanish Supreme Court has understood with regard to group companies. For example, by way of summary, the judgments of 4 February and 16 June 2010 state: "if the group company itself carries out its administrative and management functions, it will also maintain its separate identity for the purposes of locating the tax domicile; but this will not be the case if, upon its own initiative, these functions are carried out from the parent company's domicile, due to the autonomous nature of the tax domicile with regard to the company's registered office". Adding that "the tasks that could be carried out in the field by the Group's personnel were of a technical nature, as highlighted by the Arbitration Board and cannot be used to incorporate the criterion of the centralisation of administrative management and much less that relating to the conducting of business".

In relation to the issue of the groups summarised in the previous paragraph, and moving towards a more detailed analysis of this issue, we must pay special attention to what the Arbitration Board has been interpreting, and the Supreme Court has confirmed, in terms of groups, in the well-known Gamesa wind farms case. For example, if we consider the Spanish Supreme Court judgement of 18 June 2015, referred to above, we can extract the following aspects for the analysis of the specific case below:

- "(...) if the group company itself carries out its administrative and management functions, it will also maintain its separate identity for the purposes of locating the tax domicile; but this will not be the case if, upon its own initiative, these functions are carried out from the parent company's domicile, due to the autonomous nature of the tax domicile with regard to the company's registered office". In other words, if the Group company itself carries out its administrative and management functions, it will also maintain its separate identity for the purposes of locating the tax domicile; but this will not be the case if, upon its own initiative, these functions are carried out from the parent company's domicile, due to the autonomous nature of the tax domicile with regard to the company's registered office. (...)".

- ”(...) the tasks that could be carried out in the field by the Group's personnel were of a technical nature, as highlighted by the Arbitration Board and cannot be used to incorporate the criterion of the centralisation of administrative management and much less that relating to the conducting of business”. (...)”.

- “In the aforementioned decisions, which were confirmed by the Spanish Supreme Court, the Arbitration Board found that the tax domicile of the companies was not located at their declared registered office and tax domicile, since it was there that they carried out activities of an essentially technical nature, the design and construction of the wind farm, while the administrative management activities and the conducting of the company's business were carried out by the Gamesa Group companies located in Bizkaia (...)”.

- “(...) the accumulation of evidence provided by the appellant, functions, and place of meetings of the Executive Committee, places where the accounting or tax team is located, domicile of employees, proxies, and directors, etc. alone, without taking into account the business activity (...) are not sufficient to undermine the justification offered by the Arbitration Board (...)”.

- “Moreover, in the reading of the factual material contained in the decision, there is solid evidence that confirms the non-existence of the identity indicated by the appellant, such as the reference to the Basque and Navarre press in which, on transferring Gamesa’s tax domicile from Álava to Bizkaia, the change to Zamudio is justified because <>; or in the words of the Deputy General of Álava, when referring to the aforementioned change, he says, <>

For its part, the Arbitration Board specified, for example, in its Resolution 1/2016 of 27 January 2016:

- Referring to the so-called “Executive Committee of the Wind Farm Promotion and Sales Department”, it pointed out that "this Arbitration Board is not fully aware of the functions and position of this Committee, i.e. whether it is this body that makes the final decisions in relation to the wind farm(s) or, on the contrary, whether it is essentially a technical body, reporting to the higher bodies of the group.

- However, whatever the role of the aforementioned committee or that of other bodies located outside the Historical Territory of Bizkaia, as can be deduced from the case, such as those in charge of treasury or tax matters, this is not sufficient in order to rule out that the administrative management and running of the wind farm companies' business is essentially carried out by the central bodies of the Group GROUP OF COMPANIES 1, which make the main business decisions”.

- “In this regard, in our decision R11/2011, of 2 May 2011, joined cases 29/2008, 30/2008, 32/2008, 38/2008, 39/2008 and 40/2008, Legal Ground 13, we refused to attach decisive importance to the place where the meetings of the Governing Body and the General Shareholders' Meetings are held”.

- “(...) considering, lastly, that administrative management and conducting of business are not separable criteria, and that in the event of a discrepancy between the two, the latter should take precedence, as the place where the fundamental decisions of the company are made”.

These rulings, and many others along the same lines, are based on the Spanish Supreme Court ruling of 4 February 2010, corresponding to the contentious-administrative appeal 86/2009, in which it declared that:

“The pleading recognising the existence of companies without administrative management and management functions because they are carried out by another entity on their behalf (in this case, the parent company) cannot be accepted, with it being significant in this regard, as has just been stated, that in the pleadings submitted to the Arbitration Board it was acknowledged that GERSA, with tax domicile in Bizkaia, provides services to the various companies

incorporated for the promotion and operation of wind farms and that they do not have the material and/or human resources to carry them out on their own, adding that “for the provision of these services, which SEMOLE could have received from a company outside the Group, GERSA periodically invoices this company for ‘administration and management services’”.

On the contrary, the position held by the Arbitration Board, and which this Section ratifies, does not imply the admission of a change of artificial domicile, because, as the State Lawyer argues, the situation described is a real and legal modification of the tax domicile by virtue of the provisions of Article 43.Four of the Law on the Economic Agreement.

Nor is it acceptable that the determination of the tax domicile based on the location of the entity to which the overall administrative management has been subcontracted can be inconsistent with the criterion maintained by the Arbitration Board in its ruling that belonging to a group should be irrelevant, as it is clear the companies belonging to the group having their own separate identity is fully compatible with the fact that for general subcontracting of administrative and business management, the domicile should be located where these types of activities are carried out. In other words, if the Group company itself carries out its administrative and management functions, it will also maintain its individual identity for the purposes of locating the tax domicile; but this will not be the case if, upon its own initiative, these functions are carried out from the parent company's domicile, due to the autonomous nature of the tax domicile with regard to the company's registered office. The criteria for determining the tax domicile in Article 43(4) of the Agreement Law must therefore also be applied separately to each group company.

Lastly, in view of the above, the reasoning that SEMOLE does not have a permanent human and material resources structure in the Historical Territory of Bizkaia cannot be accepted either, since the administrative management is carried out on its behalf and at a price by GERSA.

With regard to the pleading that in 2004 the wind farms were developed and built and part of them were completed, and energy was invoiced to the clients, it should be pointed out that their administrative management was carried out from Bizkaia, as indicated above and stated in the Fourth Legal Ground of the contested Resolution. However, the tasks that could be carried out in the field by the Group's personnel were of a technical nature, as the Arbitration Board highlighted, and cannot be used to incorporate the criterion of the centralisation of administrative management, much less that relating to the conducting of business.

Lastly, the fact that the three persons appointed by GERSA to form part of the SEMOLE Board of Directors are domiciled in the Basque Country is also undisputed, a circumstance that must be added to those described above.

As for what is purely a decision making function, GERSA's status as sole shareholder of SEMOLE attributes this function to it, notwithstanding the fact that strategic decisions, such as those on the construction of a wind farm, are made by GAMESA ENERGIA, S.A.

In any case, the argument put forward by the representatives of the Bizkaia Provincial Council that a distinction should be made between the decisions attributed to the shareholders and the implementing decisions adopted in the common regime territory as the development and construction of the parks took place cannot be accepted, since those decisions, which are of a second level and technical nature, can never be considered the exercise of management functions”.

Therefore, particularly for entities that form part of groups made up of entities from different territories (regulatory), it will be necessary to analyse the extent to which the administrative management and conducting of the business, if any, is carried out from one territory or another. Mainly in case at some point the other tax authorities that could be affected could request verification of the tax domicile of the entity in question (that forms part of a group), and question whether it is actually located in Bizkaia, on the grounds that the greater weight in the administrative management and the conducting of the business is in its territory, special care should be taken with this last part. That is to say, with “the conducting of the business”, which should probably be given more weight (as opposed to “administrative management”, which will generally be easier to place effectively in one territory or another), and in relation to which it

would be necessary to compare and weigh up what is carried out in Bizkaia and what is carried out in the rest of the territories. All of the above, taking into account that, as the Supreme Court has stated, companies belonging to a group have their own separate identity is fully compatible with the fact that, for general subcontracting of administrative and managerial functions, the domicile is located where these activities are carried out.

2. Deduction for investments and expenses in productions of audiovisual works (Section One of Article 66 quater of the Provincial Corporation Tax Regulation).

2.1. Definitions.

Article 66 quater of Provincial Regulation 11/2013 does not include any definition of concepts, merely stating that, for the purposes of this deduction, the definitions provided in Article 4 of Law 55/2007 of 28 December on Cinema shall apply.

a) Types of audiovisual works to which the deduction applies:

Therefore, on the one hand, and in accordance with the definitions contained in the aforementioned law, and in particular in relation to the different types of audiovisual works to which the incentive refers, we must understand the following terms:

i) Cinematographic film: Any audiovisual work, on any medium or support, the creation, production, editing, and post-production work of which is defined and that is intended primarily for commercial exhibition in cinemas. Mere reproductions of events or performances of any kind are excluded from this definition.

More specifically, this would include:

- Feature film: A cinematographic film with a running time of 60 minutes or more, as well as that with a running time of over 45 minutes, produced on 70 mm film, with a minimum of eight perforations per image.

- Short film: A cinematographic film with a running time of less than 60 minutes, with the exception of the 70 mm films as referred to in the previous point.

ii) Other audiovisual works: Films which, fulfilling the requirements for cinematographic films, are not intended to be shown in cinemas, but are brought to the public through other media.

iii) Television film: A single audiovisual work of fiction, with creative characteristics similar to those of cinematographic films, with a duration of more than 60 minutes, with a final outcome and with the unique feature that its commercial exploitation is intended for broadcasting or transmission by television operators and does not initially include exhibition in cinemas.

iv) (Television) series: An audiovisual work consisting of a set of episodes of fiction, animation, or documentary, with or without a common generic title, intended to be broadcast or transmitted by (television) operators in a successive and continuous manner, where each episode may form a narrative whole or be continued in the following episode.

Based on the above definitions, we must understand that, when the Provincial Regulation refers to “films”, particularly when referring to complex works, it refers to those with a duration of 60 minutes or more, whether they are intended for commercial exploitation in cinemas or not.

In addition, although the Cinema Law does not define what is meant by “documentaries”, as indicated by the Directorate-General of the Treasury in consultation number 7040, we must understand that the term documentary refers to the genre based on the use of real, documented images to relate a story or plot. Documentaries seek to represent what is

observed in reality, portraying different themes and problems of the world around us, and although, on occasion, the concept of a documentary has been associated with films about nature, nowadays, this genre covers any area or aspect of reality, such as social issues, the environment, politics, entertainment, sports, history, the economy, society, daily life, travel, other places and cultures, etc. In any case, a documentary is an expression of any aspect of reality, presented in the form of audiovisual narration.

From these definitions and this description of the documentary genre, the following criteria for its classification can be given, although there may be exceptions:

1. It is essentially a narrative genre.

2. It is based on a project of exploration, research, or compilation of data or unique facts, relating to an aspect of reality, in which it explores in depth in order to generate knowledge, reflection, or understanding, which entails the carrying out of production activities that require the dedication of substantial time to the preparation and post-production of the product.

3. It attempts to express reality with originality and a personal perspective (either through its approach, structure, composition, aesthetics, design, or style). It is therefore a genre that is creative in nature.

4. It uses the filming of scenes or situations from real life, or from history, generally shot in the settings where the events occur (or occurred), to present them as a document with a somewhat timeless nature.

5. Audiovisual reports of a journalistic or informative nature, or the mere audiovisual reproduction of newsworthy events, are not considered to be documentaries.

b) Definition of producer and executive producer:

The producer is the person who provides the investment necessary for the production of the audiovisual work in question, and who, as such, holds the intellectual property rights over it, and must maintain this ownership for a period of at least three years, notwithstanding the right to exploit it commercially in relation to one or more third parties.

Therefore, this is the person who makes the investment, holds the rights to the work, and has the right to include it on the assets side of their balance sheet as well as the right to exploit it commercially.

Producers, as owners of the investment and intellectual property rights in audiovisual works, may themselves carry out the material tasks necessary to produce them, or they may entrust the execution of all or part of these tasks to a third party (an executive producer or service producer), generally through the signing of the corresponding production service contracts.

Therefore, for these purposes, the executive producer is defined as the person who is responsible for the execution of all or part of another person's audiovisual production, on behalf of the owner of the production, without holding any intellectual property rights over it.

For these purposes, it should be kept in mind that the mere provision of certain services, for example, post-production, does not make the person who provides them an executive producer (responsible for the execution of the production); rather, what that person or entity will be doing is providing an independent service, or several of them, but without acquiring the status of executive producer.

2.2. How the deduction works.

2.2.1. What does the deduction consist of? (Section 1 of Art. 66 quater. One of the Provincial Corporation Tax Regulation)

A deduction of between 35% and 60% (that can be increased by ten percentage points for works filmed entirely in Basque), on the amount of investments and expenses incurred for certain audiovisual productions, is provided for. The specific deduction percentage, as will be discussed later, will depend on the percentage of expenses and investments that are understood to have been incurred in the Historical Territory in which the tax domicile of the producer, or executive producer, where applicable, is located (i.e. in general, that they are understood to have been incurred in Bizkaia, if we are referring to a producer or executive producer subject to Provincial Regulation 11/2013).

Specifically, the audiovisual works eligible for the deduction are feature and short film productions and other audiovisual works, as well as fiction, animation, or documentary audiovisual series that allow the production of a physical medium prior to their industrial serialised production.

The first thing to note is that no distinction is made between domestic and foreign productions, unlike the previous incentive, which was only available for domestic productions. Therefore, under the current regulation on the deduction, in both cases the incentive will be available under equal conditions and, in particular, without establishing any type of limitation as to the expenses that may form part of the deduction base when the production is foreign, as opposed to a domestic production.

Furthermore, as mentioned in the introduction, in neither case, neither when it is a domestic nor when it is a foreign production, is the possibility of monetising the deduction provided for (there is no tax rebate or similar).

Although the rule refers to a “physical format”, we must understand that the format prior to industrial serialised production does not necessarily have to be physical, bearing in mind that the Cinema Law itself establishes that films, and audiovisual works in general, may be recorded on any “format or medium”.

As far as series are concerned, it should be noted that, for the purposes of the incentive, the production of fiction, animation, or documentary audiovisual series, and not only the production of television series, are eligible for the deduction, so that, for these purposes, the fact that the series are intended to be broadcast or transmitted by television operators, or that they will be brought to the public through other means (e.g. streaming platforms), is not relevant.

Lastly, and taking into account the type of audiovisual works expressly referred to in Provincial Regulation 11/2013, as those which may generate the incentive, and the definition of these works in the substantive legislation (Law 55/2007, of 28 December, on Cinema), it is understood that the following, in particular, are excluded from this incentive:

- Video games, notwithstanding the fact that, where applicable, they may be eligible for the deduction provided for in Articles 62 or 63 of Provincial Regulation 11/2013, relating to R&D and technological innovation activities.

- Promotional videos or video marketing, understood as being the use of video to promote a product or service in order to achieve objectives as part of a marketing strategy.

- In principle, and in general, entertainment programmes, understood as those programmes (television or otherwise) that serve, specifically, to entertain, and which base their content on four main concepts, such as surprise, humour, feelings, and emotion, and which generally feature the presence of a host; unless, due to their content, in a specific case, they could be classified as belonging to the documentary genre, for example.

2.2.2. Who generates the deduction? (Section 1 of Art. 66 quater.One of the Provincial Corporation Tax Regulation)

The deduction is generated by the producer, or, where applicable, the executive producer, if the producer is a non-resident in Spanish territory, who does not operate in Spanish territory

through a permanent establishment (such as, for example, a branch, an office, etc.), under the terms already mentioned.

In this regard, it should be kept in mind that, in accordance with the provisions of Article 67.6 of Provincial Regulation 11/2013, of 5 December, on Corporation Tax, the same expense or investment may not entitle more than one person or entity to a deduction, nor may multiple parties apply more than one deduction. This is why Article 66 quater of Provincial Regulation 11/2013 specifies that executive producers will only be entitled to the deduction regulated in it, in cases where the producers of audiovisual works are not resident in Spanish territory and do not operate in that territory through a permanent establishment. In other words, when producers cannot prove that they are entitled to the deduction (neither the provincial deduction nor the state deduction), as they are not subject to Corporation Tax in Spanish territory. Therefore, the deduction cannot be applied simultaneously by producers and executive producers, with the former group having priority over the latter group.

2.2.3. How is the deduction calculated?

2.2.3.1. Deduction base (Section 1 of Art. 66 quater.One of the Provincial Corporation Tax Regulation).

The deduction base is comprised of the producer's advertising and promotion expenses, expenses for obtaining copies, and production costs. We must bear in mind that, for a co-production, the deduction base will be determined for each co-producer based on their respective participation percentage.

It should be noted at this point that the regulation does not make any distinction in this regard, depending on whether we are talking about a domestic or foreign production. In particular, the provision sets no limits as to the expenses that may form part of the deduction base for foreign productions (neither in terms of concept nor in terms of amount).

However, when the deduction is applied by the executive producer, the deduction base shall consist solely of the production cost borne by the taxpayer exclusively, and what is stipulated in Article 67(5) of this Provincial Law will not apply, which establishes that: "5. Non-current assets or capital assets subject to the deductions set forth in this chapter must remain in operation in the business of the same taxpayer, used, where appropriate, for the purposes provided for in preceding articles, for a minimum period of five years, or three years for movable property, unless their useful life is shorter, without being transferred, leased, or assigned to third parties for their use, except for justified losses. (...)". In this regard, Paragraph 3 of Section 1 of Article 66 quater.One states that: The permanence requirement of the capital assets stipulated in Article 67(5) of this Provincial Law shall be understood to be fulfilled insomuch as the producer holds the same percentage of ownership over the project for a period of three years, notwithstanding their right to commercialise all or some of the use rights derived from this to one or more third party.

Therefore, the regulation does establish certain differences depending on whether the deduction is generated by the producer or the executive producer.

In this way, the producers, as owners of the investments, of the intellectual property over the works, and of the right to exploit them commercially, apply the deduction on the investments they make both in the production phase and in the distribution and promotion phase. That is to say, on the production costs and on the expenses for obtaining copies and for advertising and promotion at their own expense, and are obliged to retain ownership of the works for a period of at least three years (unless their useful life is shorter, and unless there are justified losses), notwithstanding their right to sell, in whole or in part, the exploitation rights arising from them to one or more third parties.

Executive producers, meanwhile, as entrepreneurs working on behalf of the producers, to whom they provide their services, apply the deduction only on the production costs they bear (i.e. on the expenses they incur to provide their executive production services), without, logically, being obliged to maintain any percentage of ownership of the audiovisual works for at least three

years, unlike what is required of producers, since they (and not the executive producers) are the holders of the intellectual property over those works. For the same reason, where the commercial exploitation rights of audiovisual works belong to the producers, and not to the executive producers, the deduction base for the executive producers does not include the costs of obtaining copies, advertising, and promotion, since these are costs relating to the distribution and promotion phase of the audiovisual works (typically incurred by the producers, as holders of the exploitation rights of the works) and not to the production phase (in which, where applicable, the executive producers are involved).

In any case, it is important to note that the deduction base is made up of all production expenses, as well as those for obtaining copies and advertising and promotion (with the special feature mentioned above for executive producers) that are incurred anywhere in the world. In other words, there is no geographical location requirement, so the incentive applies to expenses incurred in Bizkaia, in the rest of the Basque Country, in the rest of Spain, and abroad. This does not mean that, for the same expenses or investments, the provincial and state incentives can be applied simultaneously, since the company, wherever it carries out its activity, applies only one Corporation Tax regulation, and it applies it to all its productions (wherever it carries them out).

In particular, and if we consider, for example, the hiring of personnel, the regulation does not establish any limitation that prevents the cost of personnel resident for tax purposes abroad from being included in the deduction base, as long as they are, logically, involved in production. It should be emphasised at this point that the geographical location of the expenditure is not established as a requirement for access to the incentive, nor as a limitation on the expenditure to be included in the deduction base, but only for the purpose of determining the applicable deduction rate (that may be higher or lower, depending on the circumstances of each case).

There is also no limit on the maximum amount of the various costs that can form part of the deduction base.

Therefore, with regard to the cost of production, all costs which, from an accounting point of view, form part of that cost, shall also be included in the deduction base for their full amount. And, for these purposes, it is necessary to take into account what is established in the sixth provision of the Resolution of 28 May 2013 of the Spanish Accounting and Auditing Institute, laying down rules for the recording, valuation, and disclosure of intangible fixed assets, which states, with regard to the production cost of audiovisual works, that: “(...) 4. If the projects are carried out using own resources, they shall be valued at production cost, which shall include all directly attributable costs necessary to create, produce, and prepare the asset for its intended use, including the following items in particular:

a) Costs of personnel directly involved in the production.

b) Costs of raw materials, consumables, and services used directly in the audiovisual work.

c) Depreciation and amortisation of fixed assets directly related to the audiovisual work.

d) The part of indirect costs that reasonably affect the audiovisual work, provided that they are logically allocated.

e) The cost of registration and formalisation of the audiovisual work under the same circumstances as those required for industrial property.

5. In no case shall marketing costs, such as advertising and promotion, and the general structure of the company be allocated to the audiovisual work. (...)”.

The Spanish Accounting and Auditing Institute expressed a similar opinion in its consultation number two of its Official Bulletin (BOICAC) 80 of December 2009.

In addition, as we mentioned above, the expenses for obtaining copies and for advertising and promotion are also part of the deduction base, in the event that the producer (and not the

executive producer) is the one who generates the deduction. And, in this regard, Article 66 quater of Provincial Regulation 11/2013 does not provide for any limitation on the maximum amount of these types of expenses that may form part of the deduction base. In particular, they are not limited to 40% of the cost of making the film, unlike under the previous deduction regime.

Therefore, for the purposes of determining the deduction base, the provisions of Order ECD/2784/2015 of 18 December, which regulates the recognition of the cost of a film and the producer's investment, are particularly irrelevant.

In any case, it should be kept in mind that Article 67 of Provincial Regulation 11/2013, relating to the common provisions on deductions, states that: "3. The full consideration agreed upon shall be part of the deduction base, excluding the interest, indirect taxes and their surcharges, construction margins, and technical tender expenses, which shall not be calculated for it, regardless of their consideration for the purpose of appraising the assets or, if applicable, the expenses. (...) The deduction base calculated in this way may not be higher than the price that would have been agreed upon in normal market conditions between independent parties. (...) All amounts forming part of the deduction base regulated in this chapter must be accounted for as fixed assets or, where appropriate, as expenses, under the provisions of the General Accounting Plan.

It is clear from this, as we have pointed out in our consultation 6935 of 18 February 2015, that interest, indirect taxes, and surcharges are specifically excluded from the deduction base. In addition, the deduction base may not be higher than the price that would have been agreed under normal market conditions between independent parties.

2.2.3.2. Deduction percentage (Section 2 of Art. 66 quater.One of the Provincial Corporation Tax Regulation).

As noted above, there is no expenditure requirement in terms of geographical location in order to be eligible for the incentive. The starting point for applying the deduction in accordance with Provincial Regulation 11/2013 is for the producer, or, where applicable, the executive producer, to be subject to the regulations of Bizkaia (in addition, logically, to carrying out the incentivised activity, under the terms set out in the regulations). This being so, it makes no difference where the cost of the work (in any of its phases) is understood to have been incurred in order to have a right to the deduction, for this cost (wherever it has been incurred) to form part of the deduction base.

Another aspect worth noting is that, in order to determine the applicable deduction percentage, where the expense is understood to have been incurred shall be taken into account. Since, as can be seen below, the higher the percentage of investments and expenses deemed to have been made in the Historical Territory in which the taxpayer's tax domicile is located (generally speaking, therefore, in Bizkaia), the higher the percentage of deduction to which the taxpayer will be entitled.

The deduction percentage will therefore be:

a) 60%, for productions where the sum of investment and expenditure that form part of the deduction base carried out in the Historical Territory where the taxpayer has their legal residence for tax purposes surpasses 50% of the total sum of said investment and expenditure.

b) 50%, for productions where the sum of investment and expenditure that form part of the deduction base carried out in the Historical Territory where the taxpayer has their legal residence for tax purposes represents between 35% and 50% of the total sum of said investment and expenditure.

c) 40%, for productions where the sum of investment and expenditure that form part of the deduction base carried out in the Historical Territory where the taxpayer has their legal

residence for tax purposes surpasses 20% of the total sum of said investment and expenditure and does not reach 35% of this amount.

d) 35%, in all other cases.

If projects are filmed entirely in the Basque language, the deduction percentages applicable based on the provisions of this section will be increased by ten percentage points.

In order to apply the increased deduction percentage of ten percentage points, this scenario must involve, as the provision itself indicates, works filmed “entirely” in Basque, meaning that, should the work include some phrases in other languages, this must be a completely minimal use of those languages.

It should be kept in mind that the percentage of expenses in Bizkaia is taken into account over the total of those forming part of the deduction base, with the result that, pursuant to Section 1 of Article 66. quater of Provincial Regulation 11/2013, the deduction base is made up of the cost of the production, as well as the expenses for obtaining copies and the advertising and promotion expenses payable by the producer. An exception to this would be producers not resident in Spanish territory when the deduction is applied by the executive producer, in which case the advertising and promotion expenses do not form part of the deduction base, and that this is over that set of expenses on which the percentage must be calculated (and not only on part of them, such as, for example, those incurred for filming).

At this point, we must specify that, in the event that it is the executive producer (and not the producer) who generates the deduction, we must examine the amount of the investments and the expenses that in particular make up the deduction base for that executive producer (i.e. we do not consider the expenses that make up the total cost of the production, but only those that the executive producer from Bizkaia bears in particular, and on which the deduction is generated) and where they are understood to be incurred in order to determine the percentage of deduction that is applicable to that producer. So, for example, for the 60% deduction percentage to be applicable, more than 50% of the specific expenses incurred by the executive producer must be deemed to have been incurred in Bizkaia (in addition to not being affected, of course, by the general 50% intensity limit, which we will refer to later).

Therefore, it would not be sufficient, for example, for a non-resident producer to enter into a contract with an executive producer from Bizkaia, and for said executive producer to bear more than 50% of the total production budget, in order to be eligible for the 60% deduction.

It will be necessary to determine where this production cost borne by the executive producer (also known in the sector as the local service) is understood to be incurred, based on the location criteria developed below.

For co-productions, it is understood that each producer assumes the corresponding percentage of each and every one of the expenses that make up the total budget of the work. Therefore, if we have a 50/50 co-production between a co-producer from Bizkaia and a non-resident, in which the total budget is 100, of which 50 are expenses incurred in Bizkaia and 50 abroad, we understand that each of the co-producers assumes or contributes 50% of the expenses, so that each one assumes 25% of the expenses in Bizkaia and 25% of the expenses abroad. It cannot be understood, therefore, that the co-producer from Bizkaia is entitled to the full 50% from Bizkaia, and the non-resident is also entitled to the full 50% incurred abroad).

The intensity limit referred to below would apply to each co-producer's share of the overall budget, in proportion to its involvement in the audiovisual production.

2.2.3.3. Provisional determination of the deduction percentage (Section 2 of art. 66 quater.One of the Provincial Corporation Tax Regulation).

The provision establishes that the determination of the percentage of the investments and expenses that make up the deduction base for work undertaken in the Historical Territory where

the taxpayer maintains their tax domicile (generally in Bizkaia) will be determined overall for all tax periods during which the deduction is applied.

For this purpose, the taxpayer must provide an estimated percentage of the investment and expenditure included in deduction base during the first tax period where the deduction applies. When it is established that the percentage of the investments and expenses that make up the deduction base made in the Historical Territory where the taxpayer has their tax domicile out of the total of said investments and expenses is lower or higher than that declared in the financial year in which the deduction was first applied, the deduction must be rectified in the last financial year in which it was applied, by applying the corresponding definitive deduction percentage.

Why does the provision state this?

The deduction that is the subject of this document is understood to be generated and is applied in the tax periods in which the corresponding payments are made, and for the amount of these payments, in accordance with a special VAT payment regimen, so that it will be relatively common for the deduction derived from each audiovisual work to be applied over two or more different financial years. This is the case when the production of the audiovisual work lasts more than 12 months, or when it lasts less than 12 months but starts in one financial year and ends in a different one.

The deduction rate is unique for each project, and depends on the percentage of the investments and expenses that form the deduction base incurred in the Historical Territory in which the taxpayer has their tax domicile with regard to the total, calculated as a whole for each audiovisual work (and not for each tax year). Therefore, in cases in which the deduction is generated in different tax years (for productions lasting more than 12 months, or which begin in one tax period and end in another), it may be the case that, in the first year of application, the taxpayer does not yet know with certainty the percentage of investment and expenditure incurred in each territory, but has only the data relating to investment and expenditure for that first year, and only an estimate, or a budget, of the investment and expenditure to be incurred in the subsequent tax periods during which production will continue.

Consequently, when the deduction is applicable in more than one tax period, and in the first of these the definitive data corresponding to the total production is not yet known, the taxpayer must provisionally apply the percentage derived from the investments and expenses making up the deduction base that they estimate they are going to incur in the Historical Territory where they have their tax domicile throughout the entire production, with regard to the total.

For the provisional determination of the percentage of the deduction on the basis of the amounts initially estimated (in the first year of applying the deduction on the production in question), the taxpayer must adjust the deduction amount in the last year in which it is applicable, by applying the definitive deduction percentage that applies in each case, based on the actual data for the production as a whole, increasing the deduction amount in that year, or reducing it, with a refund, where applicable, of the amounts previously deducted in excess.

2.2.3.4. Criteria for establishing the location where expenditure is incurred.

In terms of the type of expenses that may form part of the deduction base, the criteria for determining where they are to be understood to have been incurred are as follows:

a) Filming-related expenses:

   All expenses related to filming shall be deemed to have been incurred at the place where the filming takes place.

   So, for example, if we are dealing with the cost of hiring an actor, it makes no difference where the actor is resident for tax purposes, because the relevant factor is where the filming takes place. Therefore, if the actor is from Bizkaia, but the filming takes place in common territory, the cost of hiring this person will not count as expenditure incurred in Bizkaia for the purposes of determining the deduction percentage to which the person is entitled. On

the contrary, the cost of hiring an actor resident for tax purposes in Spain, or abroad, if the filming takes place in Bizkaia, will qualify as a greater expenditure incurred in Bizkaia for these purposes. In the same vein, the nationality of the persons involved in the filming is also irrelevant.

If the filming is carried out in different territories, in principle, a proportion of the time in which it has been carried out in Bizkaia will have to be calculated depending on the number of days of filming took place in this territory in relation to the total number of days of filming of the audiovisual work. The total of filming-related expenses will be understood to have been incurred in Bizkaia, in that proportion.

Therefore, in these cases, the filming expenses that will be understood to have been incurred in Bizkaia will be, in general:

Number of days of filming in Bizkaia / Total number of days of filming X total expenses related to filming

However, if there are expenses that are clearly attributable to part of the filming (and not all of it), it should be taken into account where that part of the filming takes place (for example, if there were personnel/machinery expenses, etc. exclusive to a part of the filming that takes place in London, we would not apply this proportional rule, except for the expenses that were part of the whole filming process).

In short, therefore, a proportional rule will apply, under the terms indicated, unless the expenses are specifically attributable to only part of the filming, in which case, they would be understood to have been incurred in the place where that part of the filming was actually carried out.

By way of example, expenses related to filming include, but are not limited to, the following:

- Artistic personnel (protagonists, main characters, secondary characters, extras, specialists, etc.).

- Technical staff (direction, production, photography, decoration, tailoring, make-up, hairdressing, special effects and sound effects, sound, editing, electricians and machinists, additional staff, second unit, etc.).

- Scenography (sets and scenery, setting, costumes, vehicles and carriages, hairdressing, make-up, etc.).

- Filming studios (rental of sets, filming on location, studio electricity, rental of outdoor locations, complementary facilities, etc.).

- Machinery and elements of filming (cameras, lenses, accessories, lighting equipment, cranes, platforms, power generators, fuel, helicopters, aeroplanes, etc., sound equipment, etc.).

- Transport (production cars, van hire camera, lights, production, wardrobe, etc., car, truck, bus, and taxi hire, invoicing, customs and freight, petrol, motorways and tolls, etc., all on filming dates).

- Miscellaneous production costs (copies of scripts, photocopies during filming, telephones on filming dates, rental of dressing rooms, trailers and offices, various storage facilities, garages on filming dates, filming production material, cleaning, etc. of filming locations, booking of spaces, security and surveillance services, etc.).

- Raw film (negative, positive, magnetic, photographic material, hard disks, and other materials, all provided that they are necessary for filming).

- Travel, hotels, and meals on filming dates.

- Insurance, if it is directly linked to filming (such as that covering negatives, filming materials, civil liability, accidents, the interruption of filming).

In the specific case of animated works, where there is no filming as such (understood as the moment when the process of capturing images and/or sound begins), it will be necessary to take into account the place from which each of the activities necessary to produce the animated work are carried out (for example, the place where the studios are located, for everything that is physically carried out there).

The specific case of providing the audiovisual work with special effects, as an activity that is part of the filming phase, but which does not actually involve filming under the terms described above, would be treated in the same way as animated works. So the criteria to be followed would be the same.

b) Expenses not related to filming:

These shall be deemed to be incurred in the place from which the service is rendered or the specific operation that generates the expenditure or investment is carried out, or, for supplies of goods, in the place from which these are made; in principle, the location rules foreseen in the Economic Agreement may be used as a reference for these purposes.

In particular, therefore, and as a general rule, the place where the provider of the service or transaction in question, which generates the expenditure and/or investment, has its domicile for tax purposes, will not be taken into account.

These expenses include, but are not limited to, the following:

- Pre-production and post-production costs:
  - Script (copyright, original storyline, script, additional dialogue, translations, etc.).
  - Music (copyright of music and songs, composer of background music, arranger, conductor, teachers, singers, choirs, etc.).
  - Casting of actors.
  - Selection of the creative and technical team.
  - Selection of locations and sets.
  - Editing and sound (editing room, projection room, dubbing room, sound effects room, recording and editing mixes, transfer from magnetic tape, transfer of sound to film, song and music recording room, musical instrument rental, sound effects, image editing, sound post-production, etc.).
  - Dubbing.
  - Laboratory (developing, printing, and other).
- Costs of obtaining copies and of publicity and promotion:
  - CRI and copies (DCP and master copy, copies, ISAN registration, Spanish Institute of Cinematography and Audiovisual Arts rating, and nationality, etc.).
  - Publicity (advertising, graphic design and posters, marketing plan, website, trailer, film stills, making of, marketing strategy, promotional materials, promotional prints, pre-release expenses, distribution, etc.).

- Other costs associated with the production of the audiovisual work:

  - Insurance directly linked to production, but not specifically to filming (such as completion bonds).

  - Legal and tax advice directly linked to the production of the audiovisual work in question.

  - The part of indirect costs that reasonably affect the audiovisual work, provided that they are logically allocated, without taking into account, as the Spanish Accounting and Auditing Institute (ICAC) points out, the company's general structural costs.

Here, it is necessary to clarify a point in relation to the cost of personnel involved in the production of the audiovisual work. In this regard, it shall be understood that all personnel costs linked to filming, wherever it takes place, shall be understood to have been incurred, even if there are personnel working remotely.

With regard to personnel costs not linked to filming, it will be necessary to analyse the type of service or work involved, in order to assess from where it will be understood to be carried out. We must bear in mind that, in this case, if the work is carried out remotely, it will be understood to be carried out from the territory of the work centre where the worker is assigned.

Lastly, it should also be made clear that in cases where intellectual property rights are being acquired that are not expressly granted for the audiovisual work in which they are being used and are not directly related to filming (for example, when rights are paid for the use of music not specifically composed for the work), we would consider this to be expenditure incurred in the territory from which these rights are acquired. For these purposes, it will be understood that they are acquired from the territory in which the production company (or executive producer, if applicable) that acquires them for use in the production of the audiovisual work has its tax domicile. Therefore, it will be considered an expense arising in Bizkaia, if we are talking about a production company, or executive producer, subject to Provincial Regulation 11/2013 that has its tax domicile in Bizkaia. All of the above takes into account the difficulty that it would entail for the production company, or for the executive producer, if applicable, to know from where, at the time, and by its supplier or producer, the performances or the activity in particular that gave rise to the intellectual property rights in question were carried out.

If, on the contrary, the services are hired and performed directly for the audiovisual work in question (for example, composing music for the work itself), the general rule will be followed (from where the service or work is provided or performed; or, if it is directly linked to filming, where the filming takes place) to determine where the expenditure in question is to be understood to have been incurred.

These rules would also apply, for example, to the payment of licensing fees for software used in the production of animated works, or for providing special effects for the work. So the first thing to determine is (i) whether it is an expense directly linked to the filming, in which case it would follow the rule for these expenses, and (ii) if it is not, whether it is a specific expense (understood to be software developed directly and specifically for the work in question), or not. If this is not the case, it will be an expense incurred in Bizkaia, if the production company or, if applicable, the executive production company has its tax domicile in this territory.

The payment for a cloud storage solution would be equivalent to the above, so that, since it is a generic service, not carried out specifically for the work, it will be considered (if it is not an expense directly related to filming) as an expense incurred in the territory where the service is acquired under the terms indicated (therefore, in principle, at the tax domicile of the production company, or executive production company).

2.3. When does the deduction apply? (Section 1 of Art. 66 quater.One of the Provincial Corporation Tax Regulation)

The deduction is understood to be produced and applied in the periods where payments are made, and for their corresponding amount.

Therefore, and given that the incentive is applied as and when “payments are made, and for their corresponding amount”, we must understand that Article 66 quater of Provincial Regulation 11/2013 contains a specific criterion for determining eligibility for the deduction, separately, in particular, from what is stated in general terms in Art. 67.3 and Art. 4 of the same Provincial Regulation.

Therefore, it should always be taken into account at the time of payment, in accordance with the VAT payment schedule, and it should not be established as an option for the taxpayer. For example, for works for which production is spread over several years, it is not possible to choose between generating the deduction in this way, or at the end, for example after the work has been classified.

Consequently, if there is unpaid expenditure incurred, no deduction would be generated in the year that the expenditure is accrued, but in the year in which the payment is made. And for an advance payment for an expense not yet accrued, in principle it would also be necessary to take into account what is established in the provision, and therefore the time at which the payments are made.

2.4. Are there limits to the application of the deduction? (Sections 3 and 5 of Art. 66 quater.One of the Provincial Corporation Tax Regulation)

There is no limit on the maximum amount of deduction a taxpayer can generate, beyond the aid intensity limit that we will now discuss.

It is true that Section Two of Article 66 quater, when regulating the deduction for live performing arts and music shows, does establish a maximum annual deduction amount per taxpayer of one million euros. But Section One does not introduce any limitation in this respect (for any amount).

In this regard, the fact that the European Commission has indicated in its decision of 30 June 2022 on “Case SA.102040 (2022/N), Spain - Tax deduction for audiovisual productions and live shows of performance and music arts in Biscay – modification.” that “the Spanish authorities estimate that the average annual budget of the measure will amount to EUR 5,000,000”, does not in any way imply that either the Bizkaia Provincial Council or the European Commission itself has set a maximum aid limit of five million euros, either individually or jointly.

This amount of 5,000,000 is merely an estimate of what the Bizkaia Provincial Council calculated the average annual cost of the measure, based on past information (i.e. information on a very different incentive from the one now regulated as of 1 January 2023). There is no limit, as we said, neither for individuals nor for all taxpayers. Otherwise, if there were a joint limit of five million euros, it would not have been necessary to communicate and check the compliance of the new incentive with EU rules, since the General Block Exemption Regulation applicable to aid schemes for audiovisual works, which provides for up to 50 million euros per scheme and per year, would have been applicable.

Therefore, in short, the annual deduction to be generated by a taxpayer could exceed five million euros, if, taking into account the deduction base and the applicable deduction rate, this amount is exceeded.

Aid intensity limit:

What the provision does establish, with some exceptions, is that the deduction amount, together with the rest of the aid received by the taxpayer for each audiovisual work, may not exceed a certain percentage of the “overall production budget”. This is known as the aid intensity limit.

It should be made clear that the intensity limit has to be analysed based on the part of the budget borne by each taxpayer. Therefore, for a co-production, or where it is the executive producer who generates the deduction, the intensity limit will be verified for each of them, only on that part of the overall production budget that concerns them or that they bear.

And what is taken into account and what is not within the "rest of the aid received by the taxpayer"?

- Firstly, the aid to be considered for the purposes of the maximum percentage limit will not be the non-specific aid or transfers that may be received, but only the direct and specific aid received for the actual carrying out of the investments giving right to the deduction, as it is a limit related to the "aid intensity" laid down in Article 54 of Commission Regulation (EU) No 651/2014 of 17 June 2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (Text with EEA relevance), and in the Communication from the Commission on State aid for films and other audiovisual works (that concern aid schemes to support scriptwriting and the development, production, distribution, and promotion of audiovisual works).

- Moreover, it should be noted that the funding received by the producer (or, if applicable, executive producer) from a financier through the mechanism provided for in Article 66 quinquies of Provincial Regulation 11/2013 does not count as aid for these purposes (i.e. this funding is not taken into account for the purposes of determining whether or not the deduction, which logically is taken into account, together with the other aid received, exceeds the intensity limit applicable in each case, although for accounting purposes it is treated in the same way as subsidies, as will be discussed later).

Therefore, by way of example, if we have a production of three million euros, with a subsidy from the Spanish Institute of Cinematography and Audiovisual Arts (ICAA) amounting to 400,000 euros, and with the right to a deduction of 35% (therefore, a deduction of 1.05 million euros), in which 875,000 euros are contributed via a funding contract, for the purposes of the intensity limit we will take into account 1.05 of deduction and 0.4 of subsidy, in total 1.45 million (we do not include the 875,000 euros of funding received). So, if the intensity limit is the general one of 50%, the deduction together with the rest of the aid received should not exceed 1.5 million euros, as is the case (as they add up to 1.45 million). If the subsidy amounted to 1,000,000, it would be necessary to reduce the deduction amount to 500,000 euros so that the sum of the two amounts does not exceed 50% of the three million.

In general, the intensity limit referred to above will be 50%. Therefore, the deduction amount together with the rest of the aid received by the taxpayer for each audiovisual work may not exceed 50% of the overall production budget.

However, this limit is increased for cross-border productions funded by more than one EU Member State and involving producers from more than one EU Member State, in which case the deduction, together with other aid, may not exceed 60% of the overall production budget.

It is important to note that, for this increased intensity limit to be applicable, both of the above circumstances (and not just one of them) must fulfilled, that is to say: (i) the production must be funded by more than one Member State, and (ii) producers from more than one Member State must be involved in the production.

For these purposes, a cross-border production shall be understood as being funded by more than one EU Member State, also when in that other country (or countries) the production has access to tax incentives for carrying out that particular activity (of producing the audiovisual work in question).

As for when we are dealing with a co-production, Royal Decree 1084/2015, of 4 December, which implements Law 55/2007, of 28 December, on Cinema, establishes that cinematographic films and other audiovisual works that are produced in co-production with foreign companies shall be governed by the corresponding multilateral or bilateral international agreements and, in

the absence of them or in the absence of express provisions under them, by the provisions of that same Regulation.

Therefore, in order to determine when we are dealing with a co-production, and in particular with regard to the contribution that each party must make to the production, it will be necessary to refer in the first instance to the provisions of the international co-production agreement that may be applicable.

And, failing that (i.e., when there is no international co-production agreement that applies, or if there is one, it does not mention anything in this regard), it will be necessary to comply with the provisions of Royal Decree 1084/2015, which requires, among other aspects, that the proportion in which the countries contribute must be between 20 and 80% of the budget of the cinematographic film or other audiovisual work. Furthermore, for multi-partner co-productions, the smaller share may not be less than 10% and the larger share may not exceed 70% of the budget.

It should be kept in mind that this is a requirement deriving from EU law, and that the reason why the European Commission, in the "Communication from the Commission on State aid for films and other audiovisual works" (2013/C 332/01) authorises a higher aid intensity limit (of 60%) for co-productions funded by several Member States, in which, in addition, producers from different Member States participate, is because "the likelihood that a European film is released in several Member States is higher in the case of co-productions involving producers from several countries", which obviously requires this involvement to be of some significance.

Therefore, the intensity limit, as we said, is 50%, which can be increased to 60% in certain cases. However, there are certain cases in which no intensity limit will apply, and in which the deduction amount, together with the other aid received, may therefore be up to 100% of the overall production budget. These cases, as provided for in Provincial Regulation 11/2013, are fully in line with those established for the same purposes by the European Commission in the aforementioned Communication on Cinema. In particular:

1. For co-productions involving countries on the list of the Development Assistance Committee of the Organisation for Economic Co-operation and Development.

   As the Commission states in the aforementioned Communication, "the DAC list shows all countries and territories eligible to receive official development assistance. These consist of all low and middle-income countries based on gross national income (GNI) per capita as published by the World Bank, with the exception of G8 members, EU members, and countries with a firm date for entry into the EU. The list also includes all of the Least Developed Countries (LDCs) as defined by the United Nations".

   It would be sufficient for one of the co-producers to be on the list of the Development Assistance Committee of the Organisation for Economic Co-operation and Development to be eligible.

   Nevertheless, it has to be a co-production in the terms outlined above. So, for the purposes of determining when we are dealing with a co-production and when we are not, we would refer to the substantive regulations that apply (either an international convention that is applicable or, failing that, the Cinema Law and its Regulations).

2. For audiovisual works considered difficult, with the following being established as such:

   a) Short films.

   b) Films that are the director's first or second projects.

   c) Projects whose original version is in the Basque language.

   d) Low-budget projects, understood to be those with a production cost that does not exceed 1,000,000 euros.

e) Projects that face difficulty reaching the market due to their subject matter or other issues inherent to the production.

As far as the scenario referred to in point b) is concerned, we understand that when the provision speaks of “films”, it refers to feature films (cinematographic or otherwise), and that it must be the first or second work, within this category, that is to say, of the films that the director in question has directed. Therefore, it would not be detrimental for these purposes to have produced other types of works (that are not considered as films) such as, for example, short films or series. In the particular case of documentaries, as they are a specific genre and not a specific type of audiovisual work, having previously made them would only be detrimental in terms of this point b), if they would have been classified as a film, since they are longer than 60 minutes.

For the same purposes provided for in point b), only films that have already obtained the classification of the work either by the Spanish Institute of Cinematography and Audiovisual Arts (ICAA) or by an equivalent body shall be considered to be previous films.

In the case provided for in point e), the work must have encountered difficulties in entering the market, and these difficulties must derive either from its subject matter or from any other issue inherent to the production itself.

Creative criteria such as the work having a risky aesthetic/formal approach, the subject matter of the script itself, the festival aspirations of the work in a non-commercial circuit, the director's career, or the fact that the work is structured solely on the basis of several linked sequence shots, or the fact that it is a film that is not going to be audience-friendly, would be issues inherent to the production itself or, where appropriate, deriving from its subject matter, which could be taken into account for these purposes, provided that it is justified that these circumstances (or any of them) effectively make it more difficult to market the work.

In this regard, the taxpayer will be responsible for demonstrating the difficulties that the project faces reaching the market, in the manner indicated, and must request its classification as a difficult project from the tax authorities before the end of the first tax period in which the taxpayer certifies their right to the deduction.

Therefore, the classification of difficult work referred to in this point e) will require the submission of a request to the tax authorities, which must be made through the electronic office of the Bizkaia Provincial Council before the end of the first tax period in which the taxpayer certifies their right to the deduction.

The procedure for obtaining the status of difficult work shall be processed in accordance with the general procedure established in Article 45 of this Regulation, with the special features that may be applicable, where appropriate.

An example of a case covered by this point e) is works directed by women, as determined by the Directorate-General of the Treasury in binding consultations number 9225 and 9243, both dated 7 December 2022. Therefore, the provisions of Section 3 of Article 38 quater of the Tax Regulation are applicable in this case, which establishes that: “it shall not be necessary to submit the request referred to in this point when the tax authorities have published, by means of administrative criteria or written tax consultations, specific guidelines determining the classification of the work as difficult in relation to which the deduction referred to in Article 66 quater of the Provincial Tax Regulation is to apply”.

Lastly, it should be kept in mind that the provision on difficult works contained in Provincial Regulation 11/2013 does not coincide with what is stated in this regard in the regulations in force in common territory. In particular, there is neither a match on the list of what is in principle considered to be a difficult work, nor for the intensity limit established for such cases. The Provincial Regulation, as has been demonstrated, establishes that no intensity limit applies in such cases, whereas the substantive State legislation sets limits of over 50% and 60%, but does not go so far as to disregard them (i.e. it would not allow aid to be received, together with the deduction, of up to 100% of the total budget).

In this regard, the question arises as to what happens if a work receives aid, for example, from the Ministry of Culture and can also generate the deduction in accordance with Provincial Regulation 11/2013. In these cases, what would be the intensity limit to be applied if, under one set of regulations, the substantive, and the other, the fiscal, there are differences? For the purposes of the deduction, it should be understood that the last check to be made on the applicable intensity limit is at the tax level. Therefore, if we are talking about a taxpayer from Bizkaia, when declaring the corresponding Corporation Tax deduction, we will also have to take into account the intensity limit of Provincial Regulation 11/2013, which will also be taken into consideration by the Bizkaia Provincial Treasury when verifying the origin of the creditable deduction. This is irrespective of what the Spanish Institute of Cinematography and Audiovisual Arts (ICAA) may do in this regard and irrespective of the fact that, where appropriate, it may reduce the amount of other aid in the first instance on the grounds that the tax credit would exceed its intensity limit, in relation to which this Directorate-General is not competent to give an opinion.

Therefore, when we are talking about a taxpayer subject to Provincial Regulation 11/2013, when verifying how much the tax deduction can ultimately amount to, the intensity limit applicable in accordance with this regulation must be taken into account in any case. This is irrespective of any intensity limit that may have been taken into account for other purposes (e.g. by the ICAA for the granting of aid).

2.5. What are the requirements for generating the deduction? (Section 4 of Art. 66 quater.One of the Provincial Corporation Tax Regulation and Art. 38 quater of the Tax Regulation)

To apply the deduction, the following requirements must be fulfilled:

a) The production must have a certificate that accredits the cultural nature of its content, its link to cultural aspects, or its contribution to enriching cultural diversity, which is issued by the ICAA, an organisation from the Autonomous Community with authority over the matter, or an equivalent organisation located in another member State of the European Union or European Economic Area.

These competent bodies include, in particular, the department with competence in matters of culture of the Bizkaia Provincial Council, which may issue the corresponding certificate for both domestic and foreign productions.

A certificate issued by one of these bodies would be sufficient (no more is needed), as long as it demonstrates the cultural nature of the work. However, the fact that the production is submitted to the ICAA for classification at the end of the production and obtains the corresponding certificate does not mean that another certificate cannot have been previously requested, for example, from the department with competence in cultural matters of the Bizkaia Provincial Council, in the event that it needed to demonstrate the cultural nature of the production at some previous point in time.

For these purposes, the cultural nature of the work shall be determined by the fact that it contributes to the promotion of culture and the conservation of European heritage. Among other aspects, the language or place where the work is set, its historical or cultural relevance and its contribution to cultural, social, religious, ethnic, philosophical, or anthropological diversity may be taken into account.

In the particular case that the certificate is requested from the Department of Culture of the Bizkaia Provincial Council, the request must be submitted using the form available at the following link:

https://ataria.ebizkaia.eus/es/catalogo-de-tramites-y-servicios?electronico=S&simple=S&textolibre=incentivos+para+el+fomento+de+la+cultura&_EWSJ001CSimple_WAR_EWSJ001C_%3Aform1%3AbtnBuscadorAvanzado=Buscar

This requires the taxpayer to justify that the work contributes to the promotion of culture and the preservation of European heritage, under the terms indicated.

No provision has been established in the legislation as to when the cultural certificate has to be applied for. The only thing it establishes is that, for the purposes of the provisions of Article 66 quinquies of the same Provincial Regulation 11/2013, in relation to the formalisation of the funding contract, the cultural certificate must be provided together with the tax return for the last tax period in which the deduction is applicable, in relation to the work or performance in question.

b) The production must provide a new, mint-condition copy to the Basque Film Archive, or the institutions or organisations competent to collect, catalogue, preserve, restore, or make audiovisual works available to the public. Said submission must be provided in the format used for screening.

   This requirement will not apply when the deduction is applied by the executive producer, or when it is not a Spanish project.

   Nor does the provision set any specific time limit in which this requirement must be fulfilled.

c) The production company must include in the final credit titles:

   - A specific reference to having benefited from the tax incentive set forth in the Provincial Regulation on Corporation Tax of the Historical Territory of Bizkaia made in the same language as the credits.

   - The logo of Bizkaia Provincial Council.

d) The holders of the rights must authorise the use of the title of the work and of the graphic and audiovisual press material that expressly includes specific locations of the filming or any other production process carried out in the Historical Territory of Bizkaia, exclusively for the carrying out of activities and the preparation of materials for the promotion of the territory that may be carried out by the public sector entities with competences in matters of culture, tourism, and/or the economy.

As is clear from this, the requirements for generating the deduction do not include the production obtaining the corresponding nationality certificate, not even for domestic productions.

Nor is it established, for the purposes of generating and applying the incentive, that the ICAA must in any way approve the costs incurred in the production or, logically, of where they have been incurred. Nor that any reserve should be provided.

2.6. What other issues are established for the purpose of generating and applying the deduction?

- Taxpayers that certify their right to apply the deduction provide their consent to distribute data corresponding to the deduction established in accordance with number seven of Section 52 of the Communication from the Commission on State aid for films and other audiovisual works (2013/C 332/01), as has been amended by the Communication from the Commission amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments, and on Guidelines on State aid to airports and airlines (2014/C 198/02). For this purpose, the Bizkaia Provincial Council will publish the information established in the aforementioned Communication according to the conditions it requires.

  When the deduction is generated by the financier through the mechanism provided for in Article 66 quinquies of the Provincial Regulation, the taxpayer to be identified will be the producer (or, if applicable, the executive producer) whose activity generates the deduction,

and not the financier, even if this party is the one who ultimately includes it in their self-assessment of the tax.

- Article 67(5) of Provincial Regulation 11/2013, concerning the common provisions on the application of deductions, stipulates that: “5. Non-current assets or capital assets subject to the deductions set forth in this chapter must remain in operation in the business of the same taxpayer, used, where appropriate, for the purposes provided for in preceding articles, for a minimum period of five years, or three years for movable property, unless their useful life is shorter, without being transferred, leased, or assigned to third parties for their use, except for justified losses. The withdrawal, transfer, lease, or assignment of these elements, or their withdrawal for the purposes established before the end of the aforementioned period will result in the obligation to pay the amounts not settled at the time for the deductions made, with the corresponding late-payment interest, which must be added to the amount resulting from the self-assessment of the financial year in which this circumstance occurs. (...)”.

In particular, this requirement shall be understood to be fulfilled provided that the producer holds the same percentage of ownership over the project for a period of three years, notwithstanding their right to commercialise all or some of the use rights derived from this to one or more third parties.

This last clause, expressly provided for in the regulation, is intended to cover situations in which producers (owners of the intangible asset) produce content for TV or for platforms dedicated to the broadcasting of this content, where it is difficult to determine when the contracts they sign with these platforms are merely a temporary transfer of the intellectual property rights (an operating lease), or when they exhaust the entire economic life of the production (and should be treated as a financial lease, i.e. for accounting purposes, as a sale). In this regard, it is a matter of accepting that it would be sufficient for the producer to keep the intangible asset on the assets side of their accounts, and retain ownership of it.

However, this should be distinguished from those cases in which it is clear from the clauses of the contract itself that it is the platform/TV broadcaster, etc. that actually holds the status of producer, which has the initiative, assumes the responsibility, and provides the necessary investment for the production of the audiovisual work, and which, as such, holds the intellectual property rights over it. In other words, the party that effectively directs and controls the work or the production, and the transfer of the rights over it (the work) takes place. So that it is the TV broadcaster/platform, etc. which, for all purposes, also from an accounting and legal point of view, is the producer and owner of the work. In which case, it seems that we might be dealing with more of an executive producer vs. producer scenario.

What obviously cannot happen in any case is for the same production to entitle two different taxpayers to a deduction for the same amounts, even if the taxpayers are from different territories (common or provincial).

2.7. What happens with unsuccessful works?

As to whether the deduction under Article 66 quater One of Provincial Regulation 11/2013 is also available for unsuccessful works, it is our understanding that the incentive is regulated in such a way that it cannot always be assumed that, in the case of an uncompleted work, the deduction could still be generated on the basis of the costs incurred up to that point. The various requirements established by the provision are based, in most cases, on the actual completion of the work (for example, the requirement to deposit a new copy at the Basque Film Archive or other similar entities, which would not affect the executive producer, and also the requirement relating to the final credits, as well as the requirement for authorisation by the holders of the rights for promotional purposes in the territory - both of which also apply when the executive producer is the one generating the deduction).

In any case, it is true that the current wording of the incentive does not explicitly cover it, despite the fact that the 15th Additional Provision of the Provincial Corporation Tax Regulation, which until 31-12-2022 regulated the deduction, explicitly established that: “In cases where the

decision has been made to apply the deduction as and when payments are made in accordance with the provisions of the two preceding paragraphs, if production is not completed, the entity shall pay the amounts not paid at the time for the deductions made, with the corresponding late-payment interest, which shall be added to the amount resulting from the self-assessment for the year in which production is abandoned without being completed".

The current regulation, however, states that: "3. Failure to comply with the requirements for the implementation of any of the deductions referred to in this article that must be met in a financial year after the one in which the deduction is applied will result in an obligation to pay the instalments not paid at the time due to deductions applied, including the corresponding late-payment interest, which must be added to the resulting self-assessment instalment for the financial year in which non-compliance occurred".

If the production is not completed, two possible scenarios can arise. Firstly, despite the production not having been completed or not being marketed, the producer or executive producer complies with the requirements we have mentioned (deposit, credit instruments, authorisation for use for promotional purposes of the territory), in which case there is no restriction on the application of the deduction. In the second scenario, the aforementioned requirements are not met, and therefore, the provisions of this section will apply, since one or more of the requirements of the regulations to be able to apply the deduction will not have been met.

3. Deduction for live performing arts and music shows (Section Two of Art 66 quater of the Provincial Corporation Tax Regulation).

3.1. What does the deduction consist of? (Section 1 of Art. 66 quater.Two of the Provincial Corporation Tax Regulation)

A new deduction is regulated for expenses incurred in the production and exhibition of live performing arts and music shows. Specifically, it establishes an entitlement to a deduction of 30% of the net tax liability, or 40% when the show is in Basque.

Along the same lines as stated for the deduction for audiovisual works, this deduction is equally applicable regardless of where the production and exhibition of the live performance takes place. In other words, there is no geographical location requirement here either, so the incentive applies to expenses incurred in Bizkaia, in the rest of the Basque Country, in the rest of Spain, and abroad.

Therefore, the deduction can be credited for expenses incurred in the production and exhibition of live performing arts and music shows. Both concepts, production and exhibition, must go hand in hand, so that in order for the deduction to be creditable, the production of the show alone is not sufficient, but the show must actually take place (exhibition).

And this must involve, as the deduction itself indicates, "live" performances, and therefore the deduction does not apply, for example, for performances produced and exhibited via digital platforms.

It is understood that, by way of example, DJ sessions can also be included in the deduction as live music shows.

For mixed performances (in Basque and another language, e.g. Spanish), the deduction percentage will be 30%. The same applies to performances without dialogue (e.g. music, sound only), i.e. the deduction rate in these cases will also be 30%.

However, if the show is initially produced and exhibited in one language, for example, in Spanish, and later adapted for exhibition in Basque, it would be understood, in principle, that these are two different projects. The former would therefore be entitled to a deduction of 30% on the basis of the production and exhibition costs incurred in these activities. The latter shall be eligible for the 40% deduction, on the basis of the costs incurred, as if it were a new release.

Logically, the incentive cannot be applied to the same expenses that have already benefited from it (even at a different deduction rate).

3.2. Who is entitled to generate the deduction? (Section 1 of Art. 66 quater.Two of the Provincial Corporation Tax Regulation)

The deduction is established in relation to expenditure incurred in the production and exhibition of live performing arts and music shows. Therefore, as we said above, both activities, production and exhibition, must coincide in order to generate the deduction (production alone is not enough; there must be an actual exhibition of the show).

In this regard, it is the organiser or promoter of the live performance who has, in principle, the right to generate the deduction, with this status corresponding to the taxpayer who assumes the risk and venture of the production and its exhibition, generating the right to the deduction both for the production itself and for the exhibition of the performance. This shall always depend, of course, on the costs assumed by them, and which may form part of the deduction base, in line with what will be explained below.

However, in the field of performing arts and theatres, a problem arises when we encounter, on the one hand, an entity or theatre company that produces the show and organises a tour of different theatres and, on the other hand, theatres or entities that are in charge of organising the corresponding performances or exhibitions, and which assume the costs inherent to the organisation of the performance itself (that may or may not be the owners of these theatres or venues).

The question arises in these cases as to who generates the deduction. In other words, if only one of the two parties is involved, which party, the theatre company, the theatre itself, or the theatre manager? Or whether, on the contrary, we should allow all parties to generate the deduction, each of them for their part of the activity carried out.

In the first case, if we understand that the deduction is generated by the party that organises the performance itself, we are leaving the theatre companies out of the incentive, which are the ones that actually produce the play, probably bear most of the costs (certainly those of production), and often assume the greatest risk. But also the theatres (or those who manage them) assume the costs of organising the performance (of the exhibition), and a risk, especially when they pay a fee to the theatre company (as they have a fixed cost, probably the main one of the total they assume, which they may or may not recover depending on what they get at the box office).

In cases where there is no fee payment, the theatre (or whichever party manages it) does not assume as much risk, nor as much cost, as it does not have to pay the fee. In this case, it seems that we could be dealing more with an assignment of the space to the theatre company so that it can exhibit its work, although in many cases the theatre will also assume certain costs for the exhibition or organisation of the performance (for example, promotion, publicity, etc.).

Therefore, in these particular cases, the most reasonable option is to opt for the second approach. It is therefore understood that, on the one hand, the theatre company generates the incentive considering the costs it directly assumes in relation to both the production of the play and the touring. And that, on the other hand, the theatre or the entity in charge of the organisation of the performance itself will generate it on the basis of the specific expenses it incurs in order to carry out such a performance. This means that each entity involved in the incentivised activity as a whole will generate the right to the deduction for the part effectively carried out, and on the direct technical, artistic, and promotional costs it directly incurs. It would therefore represent a sort of co-participation in the overall incentivised activity, which includes both the production and the exhibition of live shows. Section 3.6.1.c) describes, in the last paragraph, how to proceed in these cases with regard to the cultural certificate.

In no case should the same expense give rise to more than one deduction, nor to the same deduction for more than one taxpayer.

And, precisely for this last reason, in cases in which the organiser of the show pays fees to the performing arts company, it seems most logical that this particular cost should not form part of the deduction base for the organiser, since, in the last instance, for the performing arts company, this entails the recovery of part of the cost incurred by it. Therefore, if we were to also admit its inclusion in the organiser's deduction base, we would be giving a double deduction for the organiser, which, as we said, we understand should not occur in any case.

In the event that the payment to the performing arts company is made through its share of the box office receipts, this part will logically not be considered as a cost for the organising entity either, regardless of how it is recorded in the accounts.

Hereinafter, and for the sake of simplicity, we will use the generic reference to the promoter or organiser of the event as the party who generates the right to this deduction, although this should be interpreted in the way described above.

Having made the above clarification, in general, the activity of direct promotion of musical and theatrical performances by an entity, directly organising and promoting concerts and musical and theatrical shows, assuming the risk and venture of the performance (with the clarifications specifically mentioned), generates the right to this deduction.

Therefore, if an entity is subcontracted for the performance of certain services for the organisation of a live show by another company that organises the entire event, it is the second company that will generate the deduction, provided that it is the latter that assumes the risk of the production and exhibition of the show.

That entity subcontracting to another entity, on the other hand, will not be entitled to the deduction if, in contrast, it is neither assuming the risk of the development of the activity in question, nor intends to operate it as an independent show, the end of which may result in profit or loss for itself, (for example, because it is hired to promote a certain place), with the subcontracted entity carrying it out, which will be the one that, where appropriate, will generate the right to the deduction, if the requirements for this are fulfilled.

In any case, it should be kept in mind that when an entity simply assigns (hires out) a certain space to third parties (an auditorium, a theatre, etc.) for the staging of musical cycles, theatrical performances, etc., this entity (the one that hires out the space) will not be entitled to the deduction.

Among other cases, an entity whose corporate purpose is the operation of nightclubs and which, as part of this activity, hires DJs to perform during different sessions will be considered as an organiser or promoter, when this involves the staging of live performances, in which these individuals perform their own original adaptations of musical tracks. The performance will also include a simultaneous show with animation, lights, and sound. Also taking into account that for the carrying out of these performances it is necessary to have the appropriate technical lighting and sound elements, with the corresponding expenses for the entity linked to the technical equipment and apparatus. And that, likewise, these activities require prior commercial and promotional work that involves a number of expenses for the entity, in terms of advertising, posters, and specific personnel dedicated to public relations.

A self-employed person who has a bar in which they organise live music performances also falls under the concept of an event organiser or promoter. In these cases, if the self-employed person is the organiser of the show (of the live music), assumes the risk, etc., they may in principle claim the deduction for the expenses incurred in organising the show.

It is worth mentioning here what happens when the organiser or promoter of the event is a public administration, a public entity, an entity taxed under the regime of Provincial Regulation 4/2019, of 20 March, on the Tax Regime for Non-Profit Organisations and Tax Incentives for Patronage, or an entity taxed under Corporation Tax as a partially exempt entity.

In such cases, it is necessary to look at the tax regime to which the entities carrying out the activities are subject that could, in principle, fall within the scope of the deduction in question.

Consequently, if we are talking about a public company that pays Corporation Tax (that is not exempt, even partially) and meets the requirements of Article 66 quater of Provincial Regulation 11/2013, it can generate the corresponding deduction and, where appropriate, obtain funding through the mechanism established under Article 66 quinquies of said Regulation.

If, conversely, the entity carrying out the activity to be incentivised is exempt from Corporation Tax (as would be the case, for example, for territorial public administrations, as well as autonomous bodies and public law entities or similar bodies), it would not be able to generate any deduction.

For an entity that is partially exempt from Corporation Tax (for example, non-profit organisations and institutions that do not meet the requirements to benefit from the tax regime established in the Provincial Regulation on the tax regime for non-profit organisations and tax incentives for patronage), it will be necessary to determine whether or not the income they may obtain from those activities that the deduction incentivises (for example, as an organiser of live music and performing arts shows) is taxable or not. If, for that particular activity, the entity pays Corporation Tax (it is not exempt), then it may generate the corresponding deduction; if, conversely, that particular activity is exempt, then it may not generate any deduction.

In relation to the above, it should be pointed out that if the person carrying out the incentivised activity does not generate the right to the deduction under the terms indicated (for example, because it is a tax-exempt entity), logically it will not be able to generate and apply this deduction under the provisions of Article 66 quinquies of Provincial Regulation 11/2013.

3.3. What is the deduction base? (Section 1 of Art. 66 quater.Two of the Provincial Corporation Tax Regulation)

The deduction base will be made up of the direct artistic, technical, and promotional costs incurred by the activities in question, regardless of where they are deemed to be incurred.

For the purposes of determining the concept of expenditure, the definition of which is not included in the regulations governing the incentive, Article 15.3 of Provincial Regulation 11/2013 establishes that: “Under the direct assessment system, the tax base shall be calculated by correcting the accounting result determined in accordance with the provisions of the Commercial Code, by applying the precepts established in this Provincial Law, in the other laws relating to this determination, and in the provisions issued in development of the aforementioned provisions”.

Therefore, in order to determine the expenses that give rise to the right to deduct in each tax period, it will be necessary to look at those expenses that are classified as such from an accounting point of view in those periods.

The following are examples of what are considered to be direct artistic, technical, and promotional costs incurred in these activities, and what are not:

a) These include, among others:

- Expenses related to production and direction of the show, music, artistic team, technical team, scenery, costumes, casting, rehearsals.

- Costs of acquiring the intangible assets necessary to be able to carry out the show, in its capacity as organiser or promoter of the event (e.g. payment to the Spanish Society of Authors and Publishers, licence for the use of a trademark, etc.).

- Expenditure related to technical lighting and sound equipment and apparatus used provided it is directly associated with the performances in question (including DJs).

- Artistic, technical, and organisational personnel costs related to the development of the show.

- Security-related costs, including those relating to medical services, necessary for the organisation and running of the event.

- Insurance costs necessary for the organisation of the event.

- Costs related to the assembly of the infrastructures necessary for the exhibition of the show (stages and structures, crowd control systems, electrical installations, etc.).

- Transport of items and technical staff.

- Advertising, posters, and public relations expenses, provided that they are directly related to the promotion of the activities for which the deduction is generated.

- The intermediary costs necessary for the promotion of the show and the costs of accommodation, transport, and meals for the artists provided that they are included in the contracts signed with the artists and represent remuneration for them.

- The cost of recording a music video in which the show itself is being promoted may form part of the deduction base.

b) These do not include, among others:

- For live musical performances, it should in principle be understood that costs incurred in the production of CDs, DVDs, or music videos, would not be direct costs related to the production and exhibition of live performances.

  It is another matter, as mentioned above, if this involves, for example, a music video in which the show itself is being promoted. In this case, the cost incurred by the event organiser to record the promotional music video could form part of the deduction base.

- Structural costs (offices, administrative, accounting and legal services, etc.).

- Expenditure related to food and beverage services for bar sales at the show (infrastructure, set-up, personnel, etc.) as well as merchandising items.

- The costs of setting up the EIG if this structure is used.

When we have a taxpayer who is the promoter or organiser of the event, assuming the risk and venture of the event, and this party subcontracts the technical executive production of the show to another entity, the costs incurred by this second entity, which are re-invoiced by it to the promoter or organiser of the show, being assumed or borne by the promoter or organiser, may form part of the organiser's deduction base, provided that they are direct costs of an artistic, technical, and promotional nature incurred in the course of the aforementioned activities.

3.4. When does the right to the deduction arise? (Section 1 of Art. 66 quater.Two of the Provincial Corporation Tax Regulation)

The provision refers to "expenses incurred" which means that a payment criterion is established, as for the deduction for audiovisual productions.

Therefore, the deduction is in any case applied as the expenditure is incurred (as is the deduction under Article 66 quater One), without having to wait until the last performance or the certificate is obtained, although it is necessary to obtain the certificate, even in a later year, in order to consolidate the deduction previously made. In other words, as the required certificate must certify both the cultural nature and the actual performance of the show, the deduction in a previous year will be subject to the subsequent obtaining of such a certificate.

3.5. Is there a limit to the maximum deduction to be generated? (Section 1 of Art. 66 quater.Two of the Provincial Corporation Tax Regulation)

The deduction generated for each tax period may not surpass a sum of 1,000,000 euros per taxpayer.

It is also established that the deduction amount, together with the subsidies received by the taxpayer, may not exceed 80% of said expenditure.

The limit of 1,000,000 euros is a limit per year and per taxpayer, so that if the same taxpayer promotes several shows, a maximum deduction amount of 1,000,000 euros may be generated for the total of the projects.

With regard to the possible organisation of projects through single project companies, there will be no objection to doing so, and the limit of 1,000,000 euros per taxpayer per year will apply to each of these companies individually considered, provided that the incorporation and existence of these companies are based on valid economic reasons. In short, as long as these companies have an economic purpose, and the projects in question are actually carried out through them, and they are not mere “shells” set up for the sole purpose of taking advantage of a greater tax incentive.

Regarding the possibility of organising projects through different EIGs, it should be kept in mind that the limit of 1,000,000 euros per year must be respected by the entity itself that generates the right to apply the deduction, i.e. by the EIG, which will distribute this limit among its members in proportion to their holding in it. In addition, however, the member themselves will also have their own annual limit of 1,000,000 euros.

For generating the incentive through the mechanism contemplated in Article 66 quinquies of Provincial Regulation 11/2013 (funding contract), taxpayers funding this type of project would also have the limit of 1,000,000 euros of deduction per financial year.

3.6. What are the requirements for applying the deduction? (Section 2 of Art. 66 quater.Two of the Provincial Corporation Tax Regulation)

3.6.1. A certificate attesting to the cultural nature of the show, and its actual performance.

a) Purpose of the certificate.

Firstly, to apply this deduction it is necessary for the taxpayer to have obtained a certificate, the purpose of which will be to demonstrate two aspects:

- Firstly, the cultural nature of the live performance in relation to which this deduction applies.

- And, secondly, that the show has actually been held.

b) The body competent for issuing it.

The certificates issued by the corresponding State or Autonomous Community body with competence in the matter, or by an equivalent body located in a Member State of the European Union or of the European Economic Area, with an identical or similar purpose to that indicated in point a) above, shall be valid. In other words, it must prove both the cultural nature of the live performance and its actual performance. If only one of these two aspects is demonstrated, the certificate that is necessary in each case must be requested separately so that both aspects are demonstrated.

Specifically, the department responsible for culture in the Bizkaia Provincial Council is responsible for issuing this certificate.

c) Application for the certificate to the department responsible for culture in the Bizkaia Provincial Council.

When the certificate is requested from the department responsible for culture of the Bizkaia Provincial Council, it will be necessary to make the request via its electronic office, through the following link:

https://ataria.ebizkaia.eus/es/catalogo-de-tramites-y-servicios?electronico=S&simple=S&textolibre=incentivos+para+el+fomento+de+la+cultura&_EWSJ001CSimple_WAR_EWSJ001C_%3Aform1%3AbtnBuscadorAvanzado=Buscar

Said request must contain the following data:

a) Title of the production, name of the festival or of the stage.

b) Total number of events performed.

c) First and last date of performance.

d) For each performance, festival or stage programme listed, the following documentation shall be attached in which the entity applying for the certificate is explicitly listed as the organiser of the event:

- Legal instrument through which the representation is agreed, such as agreements, contracts, or a document certifying that the corresponding royalties have been paid.

- Promotional documents, such as: advertisements, press inserts, programmes, posters, newsletters, etc.

e) Justification that the performance in relation to which the cultural incentives apply contributes to the promotion of culture and the conservation of European heritage.

For these purposes, the language or place of setting of the performance, its historical or cultural relevance, and its contribution to cultural, social, religious, ethnic, philosophical, or anthropological diversity, among other aspects, may be taken into account.

In relation to point d), in order to prove that the applicant for the certificate is the organiser of the event, it will be necessary to provide proof both matters, i.e. the legal entitlement to representation on the one hand and the promotional documents on the other. However, in order to demonstrate each of these two aspects, the Regulation provides a number of examples of what documentation could be valid for this purpose. This is not to say that all the documents listed must be provided; as mentioned above, they are examples of the documentation that could serve as evidence for this purpose.

It should be pointed out that the Department of Culture of the Bizkaia Provincial Council will not assess the suitability of the budgets or expenses which may, where appropriate, form part of the deduction base. Nor will it question whether the applicant for the certificate is an entity eligible for the deduction. Subsequent verification of these matters will be the remit of the tax authorities and/or inspection bodies.

In any case, in addition to the cultural nature of the live performance, as well as its actual performance, and taking into account the information and/or documentation that must be provided to obtain it, the certificate will also be evidence that the person or entity in whose name the certificate is issued is the event organiser, although this will also be a matter to be verified by the tax authorities and/or inspection bodies, taking into account the facts at hand. In this regard, it should be noted that the Regulation establishes that, in the application for the certificate, “the following documentation shall be attached in which the entity applying for the certificate is explicitly listed as the organiser of the event”.

In relation to all of this, when we encounter these particular cases in which, as we mentioned, a sort of participation in the overall incentivised activity arises, particularly on the part of the performing arts entity or company, as well as the entity in charge of organising the exhibition itself, we understand that for the purpose of applying for the cultural certificate, each party will have to submit the corresponding application, even if they both relate to the same work.

d) When to apply for the certificate.

As the certificate must certify not only the cultural nature of the live performance, but also its actual performance, it must be applied for at the end of the performance (i.e. after the last performance date).

However, with a view to obtaining funding through the provisions of Article 66 quinquies of Provincial Regulation 11/2013 (funding contract), it may also be requested in advance, with the sole purpose of certifying the cultural nature of the show (i.e. this prior certification will logically not demonstrate the actual performance of the show, as it will not yet be possible to do so).

If such a prior certificate is requested, the application shall contain only the justification that the performance in relation to which the cultural incentives apply contributes to the promotion of culture and the conservation of European heritage, as well as the justification that the applicant is the one who will organise the exhibition of the live performance of performing arts or music for which the application is being made.

And, in the specific case mentioned above, in which we encounter these particular instances that involve, as we mentioned, a kind of participation in the overall incentivised activity, it will be necessary for each party to prove that it is the one who effectively carries out each corresponding part of the incentivised activity.

When this prior certificate accrediting the cultural nature of the show has been obtained, the final application to be made once the show has finished must contain only the information required to demonstrate that the show has actually been held.

In other words, when this prior certificate is requested, once the performance has taken place, it will be necessary to request that the other part, i.e. the actual performance of the performance, be accredited. It is therefore possible that each part has to be certified at different times, the cultural nature at the beginning and the actual carrying out of the show at the end.

e) Number of certificates to be applied for.

In principle, a single cultural certificate shall be requested for each performance, irrespective of the number of performances or exhibitions held, and the number of years during which these are held.

However, taking into account the special features of the performing arts and music sector, as the exhibition of a specific show may be prolonged, and can vary significantly from one case to another, and it is complicated to initially estimate with any sort of reliability both the number of years during which the show will be exhibited (that may be longer or shorter, depending on the circumstances, including the show's varying degree of success). This also applies to estimations regarding the total number of shows to be performed and the budget of the cost to be incurred over those years. Therefore, it seems reasonable, in these cases in which all these variables are unknown, for it to be possible to arrive at a kind of accrual by financial year.

Therefore, both for the purposes of applying for the cultural certificate and, where applicable, for the implementation of the mechanism provided for in Article 66 quinquies of Provincial Regulation 11/2013, the first and last performance of the show, within each of the

years, considered individually, during which its exhibition is prolonged, would be taken as a reference.

To do otherwise would create legal uncertainty for the taxpayer with regard to obtaining the certificate necessary to correctly apply the deduction, in particular with regard to the part relating to demonstrating the actual performance of the show. It would also make it virtually impossible to obtain funding for the show through the mechanism provided for in Article 66 quinquies of Provincial Regulation 11/2013, given the existing deadlines for the formalisation of the funding contract and its content.

3.6.2. Destination of the profits obtained in carrying out these activities.

The provision requires that the taxpayer dedicates at least 50% of the profits earned from these activities to activities that provide a right to apply the deduction stipulated in this section during the financial year in which the right to a deduction occurs. The period in which to fulfil this obligation shall be that running from the beginning of the financial year in which the aforementioned profits were earned to four years after the end of said financial year.

Therefore, the aim of this requirement is for half of the profits obtained as a result of the production and exhibition activities of live performing arts and music shows to be reinvested in this type of activity, in particular, covering the artistic, technical, and promotional costs inherent to them.

For the purpose of determining the amount of profit to be reinvested, earnings derived from activities other than production and exhibition, such as ancillary commercial activities (the sale of beverages, products related to commercial promotion, merchandising, etc.), shall not be taken into account. In other words, the profits eligible for reinvestment must be made up of the income directly related to the production and exhibition of the live performance, which, in general, will essentially be those derived from ticket sales to the performance or, in specific cases, the fee received. As far as expenses are concerned, both those eligible for deduction and the proportional part of indirect costs that can be deducted would be taken into account.

The profit is calculated for each year in which the right to deduct arises.

This requirement shall not apply if the earnings of the production and exhibition activities of the show are negative.

4. Aspects common to both deductions.

4.1. Application of the deduction: minimum taxation and tax liability limit.

Article 59.3 of Provincial Regulation 11/2013, in relation to minimum Corporation Tax, states the following: “3. The implementation of deductions on the net tax liability to determine the effective liability of the taxpayers who obtain positive taxable amounts, with exception of the deductions referred to by Articles 62 to 64 and 65 and 66 quater of this Provincial Law, may not lead to the effective liability being less, in general, than 17% of the amount of the tax base. (...). However, the reduction of the net tax liability due to the implementation of the aforementioned deductions may not lead to the effective liability being less than the percentage indicated in the following scenarios: a) For small or micro-enterprises, 15% of their tax base. (...).4. The percentages established in the above section shall be 15%, (...), 13%, (...) respectively if the company maintains or increases their average number of indefinite-term employees compared to the preceding year”.

Article 67 of the same Provincial Regulation on the common provisions on the application of deductions stipulates that: “1. The sum of the deductions provided for in this chapter may not together exceed the 35% of the net tax liability, except for the following deductions: a) Those provided for in Articles 62 to 64 above, the limit of which shall be 70% of the net tax liability. b) Those provided for in Articles 65 and 66 quater, the limit of which shall be 50% of the net tax liability. (...)”.

Consequently, the application of the deductions provided for in Article 66 quater of Provincial Regulation 11/2013 is not affected by the minimum taxation rule contained in Article 59.3 of that Regulation (and, therefore, their application may result in minimum taxation for the entity, below the percentage on the amount of the corresponding tax base in each case).

It is also established that the deductions provided for in the aforementioned Article 66 quater will be applied with a limit of 50% of the net tax liability (instead of the 35% provided for in general).

4.2. Effect of subsidies received on the deduction base.

The deduction base will be reduced by the sum of the subsidies received to fund investment and/or expenditure that granted the right to the deductions stipulated in Article 66 quater of Provincial Regulation 11/2013.

As far as the deductions regulated in Article 66 quater are concerned, therefore, the provisions of Section 3 of Article 67.3 of said Regulation do not apply, according to which: “Likewise, the aforementioned base shall be reduced, where applicable, by the amount derived from applying the percentage resulting from the difference between 100 and the tax rate applicable to the entity to the capital and operating subsidies received for the investments or the promotion of the activities referred to in the three previous chapters”.

Therefore, in terms of deductions under Article 66 quater, the deduction base is reduced by 100% of the amount of the subsidy received.

Financing received from the financier through the mechanism provided for in Article 66 quinquies of Provincial Regulation 11/2013 is not considered to be a subsidy for these purposes (notwithstanding the accounting treatment applicable to any such amounts).

4.3. Other common provisions on deductions.

Article 67 of Provincial Regulation 11/2013 establishes as a basic rule that the same expenditure or investment may not give rise to the application of the deduction for more than one entity nor may it give rise to the application of different deductions for the same entity.

Therefore, what can never happen is for the same production or show to entitle two different taxpayers to a deduction for the same amounts, even if the taxpayers are from different territories (common or provincial).

This is why, in particular for the deduction for audiovisual works, the only way for the executive producer to apply the deduction is if the producer is a non-resident in Spanish territory.

It is possible, however, that an audiovisual work, or a live performance of performing arts and music, may initially be produced under certain conditions and subsequently undergo a series of modifications that give rise to a different work (for example, a feature film that becomes a series, or vice versa; or a theatrical performance that is initially produced and shown in Spanish and is subsequently adapted for exhibition in Basque). In these cases, for the purposes of the deduction, we would have two different audiovisual works or shows, each of which would qualify for the deduction that corresponds to it, depending on what has already been analysed.

However, this may in no case lead to the same expenses being included twice in the deduction base; in the first instance, for the first work or performance, and in the second instance, for the subsequent work or adaptation. Along the same lines as indicated in point 3.2, for these particular cases of co-participation in the overall incentivised activity.

4.4. Corporation Tax Declarations.

The deduction is recorded by the producer (or, if applicable, executive producer) or by the organiser or promoter of the show in the Corporation Tax return itself, without it being necessary to issue any kind of prior notification and/or reservation in order to be able to apply the deduction.

Together with the self-assessment of the tax in which the taxpayer makes use of the deductions provided for in Sections One and Two of Article 66 quater, the taxpayer shall submit a list of the other public aid or subsidies received in order to assess compliance with the maximum deduction intensities applicable in each case.

Therefore, the taxpayer will directly provide proof of the deduction amount generated in their Corporation Tax return, which may be subject to subsequent verification or checking by the management and/or inspection bodies of the Bizkaia Provincial Tax Authority.

No request for a prior report or pre-validation or subsequent valuation is required or foreseen in order to obtain the right to the deduction.

However, taxpayers may make use of the different prior administrative binding procedures provided for in Provincial Regulation 2/2005, of 10 March, on General Taxation of the Historical Territory of Bizkaia, in order to obtain the necessary legal certainty prior to the accreditation and application of the corresponding deductions, specifically, written tax consultations (for questions on criteria), and prior taxation proposals (through which, in addition to questions on criteria, the deduction amount to be generated will be calculated in advance, based logically on prior estimates or budgets). In particular, as far as preliminary proposals for taxation are concerned, these may be filed, among other cases and as far as is relevant here, in the following cases: "Transactions that generate the right to apply deductions or allowances in Personal Income Tax, Corporation Tax, or Non-resident Personal Income Tax, when the deduction amount or allowance exceeds 250,000 euros".

All of this is notwithstanding, logically, the subsequent verifications that may be carried out by the management and/or inspection bodies in accordance with the facts at hand and circumstances that have actually occurred.

4.5. Effects of non-compliance with requirements.

Failure to comply with the requirements for the implementation of the deductions analysed that must be met in a financial year after the one in which the deduction is applied will result in an obligation to pay the instalments not paid at the time due to deductions applied, including the corresponding late-payment interest, which must be added to the resulting self-assessment instalment for the financial year in which non-compliance occurred.

5. Mechanisms for the generation and implementation of incentives by financiers.

As mentioned in the introduction, the new regulation provides for two ways of generating and applying the deductions analysed: (i) by the producer (or, as the case may be, executive producer) or promoter/organiser who carries out the incentivised activity, under the terms analysed above; and (ii) by a third party who provides funding to carry out the activity, in which case the Provincial Regulation stipulates that the right to generate the deduction does not correspond, in whole or in part, to the producer or executive producer, but that the deduction is generated ex lege directly in the self-assessment of the financier or investor. As will be discussed in more detail below, this regime has its own additional requirements and limits (in particular with regard to the maximum return that can be obtained by the financier of 1.2 times the amount of the contributions provided).

As also mentioned in the introduction, it is important to note that Provincial Regulation 11/2013 does not include any possibility of monetising the deduction (there is no tax rebate, not even for foreign productions), but rather it establishes the aforementioned possibility of generating the deduction ex lege for financiers, so that it is they, and not the person carrying out the incentivised activity, who take advantage of it in their Corporation Tax returns, in exchange for providing funding.

In addition, the traditional EIG scheme is also valid, with the consequent transfer of the credit through the allocation of the deduction bases to their resident members. Therefore, and in particular as far as audiovisual works are concerned, we cannot ignore the fact that the substantive legislation itself encourages the use of these structures. Specifically, Article 21.2 of

Law 55/2007, of 28 December, on Cinema, states that: “2. In order to make better use of the tax incentives provided for in tax legislation, in particular those regulated in Articles 34.1 and 38.2 of the revised text of the Corporation Tax Law, approved by Royal Legislative Decree 4/2004, of 5 March, the Spanish Institute of Cinematography and Audiovisual Arts will promote:

a) The incorporation of economic interest groupings in accordance with the provisions of Law 12/1991, of 29 December, on Economic Interest Groupings, to which the tax regime established in Articles 48 and 49 of the aforementioned revised text and other implementing regulations shall apply. (...)”.

Therefore, if the EIG is effectively incorporated as the producer of the audiovisual work, or as the promoter or organiser of the show, there will be no issue with the EIG being the party that generates the right to the deduction in question.

We must bear in mind, however, that in order for the EIG scheme to function fully with the incentive provided for in Provincial Regulation 11/2013, it is necessary: 1) for the EIG to be subject to the regulations of Bizkaia, meaning that, in short, all its resident members must be subject to provincial regulations, and the EIG must have its tax domicile in Bizkaia; and 2) as we shall see, what EIGs do is allocate the deduction base to their resident members, who then calculate the corresponding deduction in accordance with their regulations, and these provincial members must in turn be subject to the regulations of Bizkaia.

In short, both mechanisms for the generation and application of incentives by financiers are perfectly valid. From that point on, there are no cases where an EIG has to be set up, or vice versa. Whether to choose one mechanism or another is a matter to be assessed on a case-by-case basis by taxpayers. For the purposes of this choice, the main differences between the two schemes must be taken into account, as will be detailed in the following points: (i) the rules relating to minimum taxation and tax liability limits applicable in both cases (in short, stricter for the funding contract than for the EIG scheme), and (ii) the possibility for individuals to participate in these schemes (who may be members of EIGs, and the corresponding deduction bases may be allocated to them, if they obtain income from economic activities in their personal income tax; but under the current regulation, they may provide towards funding through the mechanism provided for in Article 66 quinquies of the Provincial Regulation).

It should also be noted that it is possible to combine both schemes. Therefore, in EIG structures, it is possible for funding to also be provided through the funding contract (i.e. through the provisions of Article 66 quinquies of Provincial Regulation 11/2013).

Logically, in these cases, that part of the deduction in relation to which the financier has the right to generate and apply it, through the funding contract of Article 66 quinquies of Provincial Regulation 11/2013, would reduce the deduction base to be attributed by the EIG to the resident members (or, as the case may be, that which remains for the EIG itself if there are non-resident members). So there will only be a deduction base attributable to resident members if the EIG has generated more deduction base than has been generated under Article 66 quinquies of Provincial Regulation 11/2013, and only for the excess.

These two ways in which incentives are generated and applied by existing financiers are analysed in detail below.

5.1. Participation in the funding of audiovisual works and live performing arts and music shows (Article 66 quinquies of Provincial Regulation 11/2013).

5.1.1. Object and scope of application.

a) What is this mechanism for the generation and implementation of incentives by financiers?

This mechanism allows a third-party taxpayer to contribute to the funding of the production of audiovisual works or the production and exhibition of live performing arts and music shows performed by other taxpayers who meet the requirements to generate the right to the

deductions established in sections One and Two of Article 66 quater of Provincial Regulation 11/2013, being able to make a deduction from the net tax liability under the conditions and with the requirements that will be explained in the following points.

Therefore, in short, and explained in very simple terms, what this mechanism allows is for the producer (or executive producer) of the audiovisual work, or the promoter or organiser of the live performance, to waive, in whole or in part, the right to the deduction generated as a result of carrying out these activities (for the expenses and investments incurred in these activities), and this right is generated ex lege by a third party, who generates it precisely as a result of having contributed to providing the necessary funding to be able to carry out these activities.

This mechanism is established by referring to each audiovisual work or live performance of performing arts and music; in particular in relation to said performances, whatever their number, and over how many financial years, notwithstanding the clarifications set out below.

b) When does a taxpayer contribute to the funding of an audiovisual work or live performance?

It is understood that a taxpayer contributes to the funding of the production of these audiovisual works, or of the production and exhibition of live performing arts and music shows, when they contribute non-refundable amounts to cover all or part of the costs of the production or exhibition (that form the corresponding deduction base), without the taxpayer who carries out the aforementioned productions or exhibitions being required to repay them.

c) Who can contribute as a financier under this mechanism?

Taxpayers liable to Corporation Tax or Non-resident Personal Income Tax who operate through a permanent establishment (in simple terms, when they operate through an office, branch, etc. in Spanish territory) are eligible to be financiers.

Therefore, for these purposes, the financier cannot be a natural person (even if they obtain income from economic activities).

It must in any case be an entity subject to Corporation Tax, or a non-resident operating through a permanent establishment in Spain. Therefore, a non-resident (foreigner) shall not be able to benefit from the deduction through the mechanism of Article 66 quinquies, unless they have a permanent establishment (office, branch, etc.) in Spanish territory to which the funding contract is connected.

Article 67.9 of Provincial Regulation 11/2013 states that: “9. The deductions regulated in this chapter shall not be applicable to the asset holding companies referred to in Article 14 of this Provincial Law”. Therefore, an asset holding company will not be eligible for deductions for the promotion of culture even under the provisions of this Article 66 quinquies.

With regard to the legislation to which the financier must be subject, this Directorate-General of the Treasury understands that this mechanism can also operate between the producer (or executive producer) or the promoter or organiser of the show and the financier subject to legislation in different territories (that logically provide for both an equivalent deduction and the possibility of transferring it in exchange for funding). In any event, this would be limited to the part of the incentive that is common to both sets of legislation concerned (which results in the lowest deduction deriving from them). However, this Directorate-General of the Treasury is not competent to comment on how other authorities that have the same regulations may handle these situations.

d) So, if this mechanism is applied, who generates and who applies the deduction, and under what conditions?

Article 66 quinquies of Provincial Regulation 11/2013 provides for a mechanism for generating the tax incentive at the financier's place of business (of the deduction for investments and expenses incurred for audiovisual works, and in live performing arts and

music shows), through which, instead of the producer (or, where appropriate, executive producer) or the promoter or organiser of the performance applying the deduction, it will be applied by a financier who provides funding to the project, in exchange for the funding being provided.

In such cases, therefore, the deduction applied by the financier will be wholly or partially incompatible with the deductions to which those other taxpayers would be entitled under Article 66 quater (i.e. for carrying out the activities giving rise to both deductions).

Accordingly, when opting to apply the provisions of Article 66 quinquies, taxpayers who carry out the incentivised activities (i.e. the production of audiovisual works or the production and exhibition of live performing arts and music shows) will not be entitled to the application of the total or partial deduction amount provided for in Article 66 quater, Sections One and Two. As we have already said, instead, the taxpayer contributing to the funding shall be entitled to include in their self-assessment the deduction provided for in this article, with its amount being determined under the same conditions as those applied to the taxpayers who have generated the right to apply the deductions provided for in Sections One and Two of the aforementioned article.

Logically, the "total or partial" impossibility referred to in the previous paragraph of generating and applying the deduction by the taxpayer carrying out the incentivised activity refers exclusively to the amount for which the financier may generate and apply it instead. In other words, if for the total costs incurred, which form part of the corresponding deduction, a deduction of 200 could be generated, and the financier, through the funding contract, has the right to generate and apply 150. The remaining 50 of the deduction may be generated and applied, where appropriate, by the taxpayer carrying out the incentivised activity.

This is why, in particular with regard to the deduction for live shows and performing arts, taxpayers who fund this type of project would also have the limit of 1,000,000 euros of deduction per year, as Section 5 of Article 66 quinquies states, as indicated above, that the deduction amount corresponding to the financier is determined “under the same conditions as those applied to the taxpayers who had generated the right to apply” the deduction provided for in Section Two of Article 66 quater.

The taxpayer contributing to the funding shall apply the deduction established in Article 66 quinquies on an annual basis, depending on the contributions paid in each tax period, as well as the deduction claimed in each tax period by the producer (or executive producer), or by the organiser or promoter.

If the taxpayer contributing to the funding contributes amounts in the tax period that would have allowed a higher deduction than that claimed in that year by the producer (or executive producer), or by the organiser or promoter, the excess may be carried forward to subsequent tax periods.

There are, however, differences that arise when the deduction is applied by the financier, instead of the taxpayer who would have generated the right to the deduction, if the provisions of Article 66 quinquies of Provincial Regulation 11/2013 had not been applied.

Unlike what happens when the taxpayer who is entitled to these deductions is the taxpayer who carries out the incentivised activity, when it is the financier who applies the deduction, the application of these deductions is affected by the minimum taxation rule contained in Article 59.3 of said Provincial Regulation. Therefore, the application of this deduction from the net tax liability to obtain the effective liability cannot result in the entity's effective liability falling below 17% or 15%, as appropriate, of the amount of the tax base, due to the application of this deduction or of the other deductions to which the minimum taxation rule applies.

Furthermore, if it is the financier who is entitled to apply these deductions, they will do so with a limit of 35% of the net tax liability (and not 50%, as is the case when the party that generates the deduction is the taxpayer who carries out the incentivised activity).

e) Is there a limit to the maximum deduction that can be claimed by the financier?

The taxpayer contributing to the funding may not apply a deduction greater than the corresponding amount, in terms of liability, resulting from multiplying the amount of the sums they paid for the funding by 1.20. The excess deduction, if any, may be applied by the taxpayers who generate the right to apply the corresponding deductions.

This limit shall be applied overall for all tax periods during which the production of feature films and short films and other audiovisual works is carried out, as well as fiction, animation, or documentary audiovisual series that allow the production of a physical medium prior to their serialised industrial production or during which the production and exhibition of live performing arts and music shows is ongoing.

In cases where, in a given tax period, there are amounts pending application as a result of the limitation referred to above, these amounts may be applied in subsequent tax periods, respecting the aforementioned limitation in all cases.

f) Is there a maximum amount, in quantitative or percentage terms, up to which the audiovisual work or performance can be funded through the 66 quinquies mechanism?

The provision does not provide for any limit in this regard.

However, as the deduction is a maximum percentage of the deduction base (in any case not 100%), and the financier(s) can generate a deduction of a maximum of 1.20 of the amounts contributed through the funding contract, it is clear that it will not be possible to cover 100% of the budget of the audiovisual work or of the production and exhibition of the show solely with the funding of the investor(s) provided under the funding contract.

In this regard, it should be kept in mind that, given a total budget of 100, and if we consider, for example, the maximum deduction of 70% provided for audiovisual works (60% + ten percentage points for works entirely filmed in Basque), the total deduction that would be generated would be 70. The financier can obtain a maximum financial/fiscal return of 0.2 times through this mechanism for generating the deduction at the financier's premises. In other words, the financier can claim a deduction of a maximum of 1.2 times of the amounts provided through the funding contract. Consequently, in order to qualify for this deduction of 70, the financier will have to provide funding of 58.3.

A different matter is in which situations the deduction, together with the other aid received by the taxpayer for the work in question, can reach 100% of the overall production budget, when there is no applicable intensity limit. Here we would be talking solely about the deduction for audiovisual works classified as difficult or for co-productions with countries on the list of the Development Assistance Committee of the Organisation for Economic Co-operation and Development; in no case the deduction for live performances, for which in any case an intensity limit of 80% is established.

g) What are the tax consequences of using this mechanism, both for the taxpayer receiving the funding and for the financier?

The taxpayer receiving the funding will have to account for the amount received as a grant, as indicated by the Spanish Institute of Cinematography and Audiovisual Arts (ICAC) in its Consultation of 29 May 2017, in relation to R&D&I and Article 64 bis of the same Provincial Regulation: “The company carrying out the project and receiving the funds from the other taxpayer shall account for the operation by applying similarly the criteria for the recognition of subsidies established in the recording and valuation provision 18 “subsidies, donations, and legacies received” of the General Accounting Plan, approved by Royal Decree 1514/2007, of 16 November, since it seems clear that the ultimate aim of the Administration in the case in question is to fund the activities (...), using a form different from the direct transfer of its funds and also different from the application of a deduction in the tax liability, i.e. that a third party provides the funding in cash, in exchange for reducing the current tax by the amount provided plus a return”.

Therefore, and given that the regulations require a non-refundable delivery of these resources for the project funding, the accounting criterion is adopted for tax purposes, and it is considered (for the financier receiving the funding in question) to be income to be accrued and that will be taken to the profit and loss account, and therefore to the tax base, as the expenses funded with these contributions are accounted for. Therefore, the criterion is neutral from an accounting and tax point of view (income = expenses) and entails the application of the provisions of Article 15.3 of the Provincial Regulation on Provincial Corporation Tax. In this regard, it should be noted that there is no legal basis for negatively adjusting this accounting income to avoid it being included in the tax base.

Nevertheless, two points should be made in this regard:

1. For the purposes of the provisions of Article 66 quater.Four, Section 1 of Provincial Regulation 11/2013 (which establishes that: “Notwithstanding that stipulated in Article 67 of this Provincial Law, the deduction base will be reduced by the sum of the subsidies received to fund investment and/or expenditure that granted the right to the deductions stipulated in this article”), the amount paid by the financier should not be deducted from the deduction base. This is because, irrespective of how it is accounted for, it is not a public subsidy.

2. Nor should these amounts be taken into account for the purposes of the relevant aid intensity limit, depending on whether we are talking about the deduction under Article 66 quater One or Two.

Furthermore, and from the financier's point of view, Article 39(9), of Provincial Regulation 11/2013 states that: “9. When the deductions applied as a consequence of the provisions of Articles 64 bis or 66 quinquies of this Provincial Law exceed the amounts invested by the taxpayer in the research, development, and technological innovation projects, in the production of feature films and short films and other audiovisual works, as well as fiction, animation, or documentary audiovisual series, which allow the production of a physical medium prior to their serialised industrial production or in the production and exhibition of live performing arts and music, as referred to in the aforementioned articles, the positive difference between the deductions applied and the amounts paid out to fund the aforementioned projects or productions shall be included in their tax base”.

As a result, the financier's financial/fiscal return (for that maximum 0.20 of the amounts contributed) will also be included in the tax base for their Corporation Tax (or, if applicable, for Non-resident Personal Income Tax for those who operate through a permanent establishment).

Article 39.9 of the Provincial Regulation mentions the difference between the deductions applied and the amounts disbursed. Therefore, the income will be included in the tax base when the deduction is applied, in the year in which it is applied. So, if the deduction accrues to the financier for subsequent years, the revenue is recognised when it is actually applied.

h) What happens if the final deduction base differs from the one initially foreseen, upwards or downwards?

As long as the producer (or executive producer) or the organiser or promoter of the event continues to generate a sufficient deduction amount, the financier shall maintain the deduction generated through the funding contract. Variations will therefore affect, to the extent possible, the deduction that the producer (or executive producer) or the organiser/promoter of the live performance can retain. In particular, for downward variations, only where it is not possible to apply them to the producer's or organiser's deduction, shall they affect the financier's deduction.

Logically, if the producer (or executive producer) or the promoter or organiser does not generate a sufficient deduction (as a result of these downward variations) to reach the deduction amount that the financier is entitled to generate in accordance with the formalised funding contract, this will be reduced, given that in no case will it be possible to provide the

financier with a greater tax credit than that which the person carrying out the incentivised activity could have effectively generated, based on the expenses actually incurred.

i) What if the producer (or executive producer) or the organiser/promoter do not apply the deduction in the same financial year?

Article 66 quinquies states in Section 5 that “the taxpayer who contributes to the funding shall be entitled to credit in their self-assessment the deduction provided for in this article, with the amount being determined under the same conditions as those applied to the taxpayers who have generated the right to apply the deductions provided for in the aforementioned Sections One and Two”. Therefore, in any case, the effective deduction generated by the producer (or executive producer) or the organiser or promoter in their tax period (in which they receive the funding) must be taken as a starting point, which will be the deduction for which the financier will be responsible for generating and applying it, and who will include it in their own tax period (that of the financier) in which they make the contribution.

In so far as, once the mechanism of Article 66 quinquies comes into play, it is not the producer (or executive producer) or the organiser or promoter who enters the corresponding deduction in their self-assessment but the financier who enters it directly in their self-assessment, it will not be necessary for the producer (or executive producer) or the organiser or promoter to have filed their self-assessment in order for the financier to be able to include in their self-assessment the deduction corresponding to them through the application of Article 66 quinquies, bearing in mind that the generation of the deduction at the financier's headquarters is directly imposed by the Provincial Regulation. In this regard, provided that the tax period of the producer (or executive producer) or of the promoter or organiser has ended and, therefore, the tax has accrued, if the financier's tax return period ends before theirs, the corresponding deduction may be claimed in that self-assessment. We must always bear in mind that by that time, the communication obligation referred to in Section 8 of Article 66 quinquies of Provincial Regulation 11/2013 must have been fulfilled in any case.

j) What is required to be able to apply this mechanism?

The main requirement for the application of the provisions of Article 66 quinquies is the signing of a funding contract, which must be disclosed to the tax authorities, under the terms set out below.

Likewise, it will be necessary to provide the tax authorities with the cultural certificate to which we have already referred when discussing both deductions, under the terms and deadlines indicated below.

5.1.2. On the funding contract.

a) What should the funding contract contain?

Firstly, it should be pointed out that there is no model funding contract provided for this purpose. However, the Provincial Regulation does tell us what information the funding contract must contain. In particular:

a) The identity of the contributors participating in the production of the audiovisual work or live performance of performing arts and music.

b) The description of the audiovisual work or live performance of performing arts and music.

c) The budget for the production or live performance of performing arts and music, with a detailed description of the expenses and, in particular, of those to be incurred in the Historical Territory where the taxpayer has its tax domicile, as well as their temporary allocation.

d) The method of funding, specifying separately the amounts contributed by the taxpayer who produces the audiovisual work or live performance of performing arts and music, those provided by the taxpayer who contributes to its funding, and those corresponding to loans from financial institutions, subsidies, and other support measures.

In this regard, the funding contract must contain a firm commitment on the part of the financier to provide the amounts committed to. Therefore, if production is to continue for more than one financial year, it would not be valid, for example, to provide for the amounts that the financier undertakes to contribute in the first financial year, and leave open the possibility that additional amounts may or may not be contributed in subsequent years, at the financier's discretion.

e) Other matters established by the corresponding regulations.

The mechanism referred to in Article 66 quinquies is established through a reference to each audiovisual work or live performance of performing arts and music.

Nevertheless, and mainly in view of the specific nature of the performing and musical arts sector, there is nothing to prevent a single funding contract being formalised for different shows for which the production and exhibition is being carried out by the organiser of the shows (or only their exhibition, provided that the production was carried out in a previous financial year, taking into account what is stated below for the purposes of the term for formalising the funding contract, or if we encounter those particular cases of co-participation in the incentivised activity). This is provided that all the shows, in relation to which the provisions of Article 66 quinquies shall apply and, therefore, for which the financier(s) shall be the ones to apply the deduction corresponding to those activities, are clearly identified in the aforementioned funding contract.

b) Is there a deadline for formalisation?

The funding contract must be formalised before the start of the production phase or, for live performing arts and music shows, before the first event takes place, although it may also be formalised within the first six months from the start of the production or from the time the first event takes place.

For this purpose, the beginning of the production phase is understood to be the moment when the process of capturing images and/or sound begins. In the specific case of animated works, where there is no filming as such (understood as the moment at which the process of capturing images and/or sound begins), in principle, for the purposes of calculating the maximum period foreseen for formalising the funding contract, the moment at which the movement of the characters begins must be taken into account.

It should be noted that the provision does not prevent the formalisation of several contracts, either with the same financiers or with various financiers. In this regard, from the beginning of pre-production (or even before), and until six months from the beginning of the production phase (filming) or from the first performance of the show, it is possible to formalise as many funding contracts as desired.

In any case, and along similar lines to what is stated for the deduction for expenses for live performing arts and music shows and the application for the certificate referred to in the regulation (accrediting both the cultural nature of the show and its effective performance), and given the special nature of the sector, as the exhibition of a specific show may be prolonged, and can vary significantly from one case to another, it is difficult to estimate initially with any great certainty both the number of years during which the show will be shown (that may be longer or shorter, depending on the circumstances, including the show's varying degree of success). This also applies to estimations regarding the total number of shows to be performed and the budget of the cost to be incurred over those years. Therefore, it seems reasonable, in these cases in which all these variables are unknown, for it to be possible to arrive at a kind of accrual by financial year.

Therefore, as we said, both for the purposes of applying for the cultural certificate and for the application of the provisions of Article 66 quinquies of Provincial Regulation 11/2013, the first and last performance of the show within each financial year during which it continues to be exhibited will be taken as a reference.

To do the opposite would create a situation of legal uncertainty for the taxpayer with regard to obtaining the certificate necessary to correctly apply the deduction, in particular in its verification of the point relating to the accreditation of the actual performance of the show. It would also make it virtually impossible to obtain financiers for the show through the mechanism provided for in Article 66 quinquies of the Provincial Regulation, given the existing deadlines for the formalisation of the funding contract and its content.

Therefore, in these cases, the date to be taken as a reference for the formalisation of the funding contract will be the date of the first performance within each financial year.

c) Once the funding contract has been formalised, is there a time constraint on when the funds must be transferred by the financier?

The idea is that the producer of the audiovisual work (or the executive producer) or the promoter or organiser of the event funds the costs directly through the financier's funds. It is therefore necessary for the financier to transfer the funds to the producer (or executive producer, as the case may be) or the organiser/promoter of the live performance before the expenditure to be funded is incurred.

As a result, when the financier provides the amounts committed to, at least the same amounts of expenditure must still be incurred (actually paid), either in the same financial year or in subsequent financial years.

However, this does not mean that the financier cannot acquire the right to generate the deduction also on other expenses not funded by them, because otherwise a deduction of 1.20 times of the amounts contributed could never be applied (as the cost funded with these amounts will generate a maximum deduction of 70% for audiovisual works, or 40% for live performing arts and music shows). Therefore, in order for the financier to be able to claim a deduction of 1.2 times the funding provided, part of this deduction must have been generated by expenses other than those actually funded by the financier. And these other costs may have been incurred by the producer (or executive producer), or by the promoter or organiser, also before the funding in question was received.

In short, if the financier provides 100% funding and assumes a deduction rate of 70%, then only a deduction of 70% will be generated with this 100%. Consequently, up to 1.2 of the amounts provided, i.e. up to 120%, there will be an additional deduction of 50% that can be applied by the financier, which will have been generated by additional expenses of 71.43%, which the producer will have incurred within the year, before or after the financier has provided the funding.

Moreover, the fact that the expenses funded by the financier are incurred in the tax period following that in which the funding is provided does not prevent the financier from being able to apply, in the same tax period in which the funding is provided, the deduction corresponding to 1.2 of the amounts contributed, provided that, logically, in that tax period the producer (or executive producer), or the promoter or organiser of the event, has generated the right to deduct a sufficient amount (to reach that figure of 1.2 times the amounts contributed by the financier).

However, in any case, as we mentioned, it is necessary for the financier to provide the funding when expenses of at least the same amount as the amount being funded are still to be incurred (whether they are to be incurred in the same financial year in which the funding is provided or in subsequent financial years). It would not be valid for this purpose, for example, for the amounts provided by the financier to remain on account with the balance pledged in favour of the contributor, provided that the producer (or the executive producer, if applicable) or the organiser would not have access to these funds until a later time (e.g.

until an audit of the expenses actually incurred) for the payment of the corresponding expenses, so that they would have to advance the funds or resort to other forms of funding.

It may also be the case that the financier agrees in the funding contract to provide the funds at a later point in time, for example, once the producer (or the executive producer, promoter, or organiser) has actually incurred the costs, and a bank is contacted prior to this point in time to discount the funding contract in order to obtain the funding from the outset. Where such a funding contract would involve the bank advancing the funds to the producer (or executive producer) or the promoter or organiser, with the financier subsequently providing the funds (and returning them to the bank), it would be invalid.

However, in the field of musical performances, there may be particular situations where a type of auction takes place, with corresponding bids, in order to determine who will be the promoter of a particular event or performance. In such cases, it is common to require the promoter to deposit an advance payment of the budget (usually 50%) within a very short period of time (usually 48 hours). Apart from this specific case, and also within the field of musical performances, it is relatively common for advance payments (for expenses not yet accrued) to be made, for example to secure/reserve the stage or space where the event will take place, or the hotel where the technical and artistic staff, or others, will stay. Therefore, if we were to strictly apply the aforementioned criterion in these particular cases, it would be impossible to access the mechanism provided for in Article 66 quinquies of Provincial Regulation 11/2013.

Consequently, in cases such as those mentioned in the previous paragraph, the prior disbursement of these advances by the promoter or organiser (corresponding to expenses not yet accrued) would not prevent the application of the provisions of Article 66 quinquies, provided that the funds from the financier, which are to be applied to cover the advance, are received before the maximum period of six months foreseen for the formalisation of the funding contract has elapsed and the actual accrual of the advance has taken place.

d) Can the funding contract be amended at a later stage?

In general, subrogation in the position of the contributor contributing to the project funding shall not be allowed, except in cases of universal succession.

However, when there are exceptional circumstances related to the solvency of the financier, authorisation may be requested from the tax authorities to subrogate the position of the taxpayer participating in contracts already formalised for the funding of the production of feature films and short films and other audiovisual works, as well as fiction, animation, or documentary audiovisual series that allow the production of a physical medium prior to their serialised industrial production or the production and exhibition of live performing arts and music shows.

The possibility to request subrogation in the position of the financier is only foreseen for “exceptional cases related to the solvency of the financier”. And, in this regard, the fact that the financier is not going to have a sufficient tax base to obtain a sufficient net tax liability to allow them to apply the deduction “acquired” through the funding contract would not fall under the cases in which subrogation could be requested. Having tax losses, in itself, is not a problem in terms of the financier's solvency. In these circumstances, the financier may apply the deduction in subsequent financial years.

In any case, it should be kept in mind that economic circumstances affecting the economy as a whole systemically may also be taken into account when it can be generally concluded that there is a widespread effect, in all or some of the economic sectors, affecting the solvency of companies. This has been determined by the legislator as a result of the effects on the economy of the decisions made by the health authorities in relation to the COVID-19 pandemic (Regulatory Decree 4/2020 of 5 May, Regulatory Decree 11/2020 of 1 December, or Regulatory Decree 2/2022, of 5 April) and this has also been noted by this Directorate-General of the Treasury in situations such as those arising as a result of the war in Ukraine

and systemic economic difficulties, particularly in relation to energy prices and supplies of certain raw materials).

In addition, the possibility of subrogation would not be allowed for an amount greater than that initially foreseen in the funding contract (to allow this would, to a certain extent, circumvent the deadlines for the formalisation of the funding contract foreseen in the provision). In contrast, subrogation for a lower amount than that committed to by the initial financier could be accepted, provided that the aim of this possibility is that the producer or promoter does not lose the funding available to them, which may be essential for the viability of the audiovisual work or show. In this regard, it would also be acceptable for the position of the initial financier to be taken over by several financiers (provided that the total amount does not exceed the initial commitment assumed, as mentioned above). Likewise, together with the possibility of subrogating the financier's position, it would also be possible to request a change in the deadlines for providing the funding (always bearing in mind that it will always be necessary that at the time of providing the funding, also for those who subrogate the position of the initial financier, for expenses of at least the amount of the funding received to still be incurred, either in that financial year or in the following ones).

It also allows taxpayers to request authorisation from the tax authorities when supervening technical or economic circumstances arise, so that the funding contracts that are in progress may be modified to readjust the schedule of payments and expenditure and investments in accordance with these circumstances.

The aforementioned applications for authorisation shall be processed in accordance with the procedure laid down in Article 45 of the Corporation Tax Regulations, and must be submitted within three months of the occurrence of the circumstances referred to in the preceding paragraphs. The procedure shall be terminated by a decision of the Director-General of the Treasury.

e) Is it an issue to include a clause in the funding contract stating that in the event of default the financier will be repaid?

The inclusion in the funding contract of a clause whereby the producer (or executive producer), or the organiser or promoter, undertakes to repay the financier the amount contributed in the event of non-compliance on their part (for example, because the final expenses and investments are lower than those budgeted, so that no sufficient deduction is generated; because the funded activity is not carried out; or due to any breach of the conditions required to generate the deduction) shall not prevent the application of the provisions of Article 66 quinquies of Provincial Regulation 11/2013.

Nor is this prevented by the fact that such a clause may provide that, in this case, the producer (or executive producer), or the organiser or promoter, will have to compensate the financier, for example, in the amount of the expected return of 20%. More specifically, it would be treated as non-compliance with the requirements of a subsidy for the part provided and as compensation for the excess.

f) Under what terms must the tax authorities be notified of the formalisation of the funding contract?

Taxpayers claiming the deduction under this article (i.e. financiers) must submit the funding contract in a communication to the tax authorities, signed by all parties to the contract, before the end of the tax period in which the deduction arises.

This notification shall be made by filling in the form made available to the taxpayer for this purpose (attaching the funding contract) through the electronic office of the Bizkaia Provincial Council.

g) When does the cultural certificate have to be provided?

The certificate accrediting the cultural nature of the work or live performance must be provided, or, when they have not yet been granted, documentation accrediting the application, together with the declaration corresponding to the last tax period in which the deduction referred to in Article 66 quinquies of the Provincial Regulation on Taxation is applicable, in relation to the work or performance in question.

In other words, the cultural certificate does not have to be submitted together with the initial communication (including the funding contract) to the tax authorities, but must be submitted together with the tax return corresponding to the last tax period in which the deduction for the work or performance in question is applied. And, if at that time it is not yet available, it will be necessary to provide the documentation proving that it has been requested (and, once it is obtained, to provide it to the tax authorities). This does not mean that it cannot be requested at an earlier point in time, especially within the scope of the relations between the taxpayers who carry out the activity that generates the right to the deduction and those who undertake to fund it, in the spirit of legal certainty that governs the regulation of this instrument.

5.1.3. Other requirements and conditions for the application of this mechanism for the generation and application of incentives by financiers.

This deduction shall not be applicable when the taxpayer contributing to the funding of the production or show is related, under the terms of Article 42 of Provincial Regulation 11/2013, to the taxpayer carrying out the incentivised activity.

Specifically, the following are considered to be related persons or entities:

a) An entity and its shareholders or members.

b) An entity and its directors or administrators, except for the remuneration for the exercise of their functions.

c) An entity and the spouses or common law partners constituted under the provisions of Law 2/2003, of May 7, or persons linked by kinship, in direct or collateral line, by consanguinity, affinity, or by the relationship resulting from the constitution of said entity, up to the third degree of the shareholders or members, directors, or administrators.

d) Two entities belonging to a group.

e) An entity and the directors or administrators of another entity, when both entities belong to a group.

f) An entity and another investee entity in which the former has an indirect shareholding of at least 25% of the share capital or equity.

g) Two entities in which the same shareholders, members, or their spouses or common law partners, incorporated under the provisions of Law 2/2003, of 7 May, or persons united by kinship, in direct or collateral line, by consanguinity, affinity, or by the relationship resulting from the incorporation of said entity, up to the third degree, have a direct or indirect holding in at least 25% of the share capital or equity.

h) An entity resident in Spanish territory and its permanent establishments abroad.

i) A non-resident entity in Spanish territory and its permanent establishments in the aforementioned territory.

j) Two entities forming part of a group taxed under the system for groups of groups of corporations.

In those cases in which the relationship is defined according to the relationship of the shareholders or members with the entity, the holding must be equal to or greater than 25%. The reference to directors includes both de jure and de facto directors.

- Taxpayers contributing to the funding may not acquire intellectual property rights or any other rights in relation to the results of the production or performance.

- The application of the deduction corresponding to the taxpayer who contributes to the funding of audiovisual works and live performing arts and music shows shall be taken into consideration for the purposes of the provisions of Article 59(3) of Provincial Regulation 11/2013, and its amount shall be taken into account for the purposes of applying the joint limit of 35% established in Article 67(1) of the same Provincial Regulation.

5.2. Use of Economic Interest Grouping (EIG) structures.

5.2.1. General taxation of EIGs for Corporation Tax.

a) How are EIGs taxed?

Without wishing to analyse in detail the taxation of EIGs in terms of Corporation Tax, it should be noted that Article 73 of Provincial Regulation 11/2013 establishes that these entities, regulated by Law 12/1991, of 29 April, on Economic Interest Groupings, "shall be subject to the general rules of this Corporation Tax with the following special features:

a) They shall not pay corporation tax on the part of the tax base attributable to shareholders resident in Spanish territory. (...)

b) They shall be allocated to their shareholders resident in Spanish territory:

a') Net financial expenses which, under Article 25.bis of this Provincial Regulation, have not been deductible in these entities in the tax period. Net financial expenses attributed to their shareholders shall not be deductible by the entity.

b') Tax bases, whether positive or negative, obtained by these entities. Tax losses attributed to their shareholders cannot be offset by the entity that obtained them.

c') Deductions from the tax liability to which the entity is entitled. The deduction bases shall be included in the settlement of the members, reducing the tax liability in accordance with the provisions of this tax or of Personal Income Tax. (...)

d') Withholdings and prepayments corresponding to the entity.

However, in cases where member contributions to economic interest groupings must be classified as equity instruments with special characteristics in accordance with accounting criteria, the allocation of net financial expenses, tax losses, and deductions from tax liability may not exceed the corresponding amount, in terms of tax liability, resulting from multiplying by 1.20 the amount of the contributions paid in by the member to the capital of the grouping. The excess may not be charged to the members under any circumstances (...)".

Therefore, in relation to EIGs: (i) the general Corporation Tax rules apply to them, with certain special features set out in Article 73, partially transcribed, and (ii) they are taxed, in summary, according to the following scheme:

- The EIG itself pays Corporation Tax on the part of the tax base attributable to its non-resident members (for this part, therefore, the EIG is taxed like any other entity subject to Corporation Tax).

- Conversely, for the part of the tax base attributable to its resident shareholders, it is not the EIG that is taxed, but its members, in their personal taxation (in their Corporation Tax, or in their Personal Income Tax, depending on the nature of the member, entity, legal entity, or natural person).

For these purposes, the EIG will allocate the following items to its resident members:

a) Net financial expenses which, under Article 25.bis of Provincial Law 11/2013, have not been deductible for these entities in the tax period.

b) Tax bases, whether positive or negative, obtained by these entities.

c) The base for any deductions to which the entity is entitled.

d) Withholdings and prepayments corresponding to the entity.

Therefore, it will be they, and not the EIG itself, who will apply these concepts and amounts in their corresponding tax returns or self-assessments (for Corporation Tax or Personal Income Tax, as appropriate), and in particular the deductions to which the EIG itself generates the right.

b) Under what conditions is this allocation made to resident members?

Focusing on the allocation of the deduction bases by the EIG to resident members:

- Calculation of the deduction base to be allocated to resident members:

  As indicated above, in order for the EIG to be subject to provincial legislation, it is necessary for all its members resident in Spanish territory to be residents of the province of Bizkaia (also, in order for Bizkaia's legislation to apply to it, its tax domicile must be in Bizkaia). Therefore, if any of the members are subject to common territory regulations, the EIG would not be able to apply Provincial Regulation 11/2013, in which case, the tax bases would be calculated and allocated in accordance with the provisions of the Corporation Tax Law, although the deduction rates would be those in force in Bizkaia (i.e. those provided for in Article 66 quater of Provincial Regulation 11/2013) for the EIG members who apply those regulations.

  Therefore, in order for the EIG to calculate the deduction base to be allocated to its resident members in accordance with Provincial Regulation 11/2013, it is necessary for the EIG to be subject to this regulation, under the terms indicated.

- Calculation of the deduction amount at the member's registered office:

  As indicated in consultation number 5692 of this Bizkaia Provincial Tax Authority, dated 16 February 2011, it should be kept in mind that: “Under the special regime for EIGs, the members resident in Spanish territory are not allocated the amount of the deductions that the Group can effectively apply, nor those that they can apply directly in their self-assessments, but the bases of the aforementioned deductions. To these deduction bases, each member must apply the regulations corresponding to their personal taxation (Personal Income Tax or Corporation Tax), in order to obtain the deduction amount that can reduce their tax liability. Therefore, the deduction limits provided for in Article 46 of the Provincial Corporation Tax Regulation must be understood as referring to the net tax liability of each of the members of the EIG who are taxable for Corporation Tax purposes. Therefore, the legal entity members of the EIG may apply the deduction provided for in Article 57 of the Provincial Corporation Tax Regulation up to a limit of 45% of their own net tax liability, under the conditions laid down in the aforementioned provisions”.

  Consequently, the deduction base generated by the EIG, and calculated in accordance with the applicable regulations, will be allocated to the resident persons or entities that

are members of the EIG on the date on which the tax accrues. The amount corresponding to the deduction corresponding to each of them will be calculated according to the registered offices of these members, on the basis the corresponding regulations in force there. In this regard, consultation 7313 of this Provincial Treasury, dated 15 June 2016, stated that: "Consequently, in Bizkaia, the rate, conditions, and deduction limits regulated in Article 67 and in the 15th Additional Provision of the Provincial Corporation Tax Regulation apply (including the limit on the maximum amount of aid that may be received for each production, which may not exceed, as a whole, 50% or 60% of its cost, of the cost of production, as the case may be)".

In order for the EIG scheme to function fully with the incentive provided for in the Provincial Regulation on Taxation, it is therefore necessary: 1) for the EIG to be subject to the regulations of Bizkaia, meaning that, in short, all its resident members must be subject to provincial regulations, and the EIG must have its tax domicile in Bizkaia; and 2) as we shall see, what EIGs do is allocate the deduction base to their resident members, who then calculate the corresponding deduction in accordance with the regulations that correspond to it, these provincial members must in turn be subject to the regulations in force in Bizkaia.

Therefore, even if we are dealing with an EIG under the regulations of Bizkaia (i.e. there are no members subject to the regulations of the common territory and its tax domicile is in Bizkaia), if it also has members from outside Bizkaia, and the deduction base (and not the deduction itself) is allocated to them, they will have to calculate the corresponding deduction in accordance with their own regulations (those of the members from outside Bizkaia, and not those of the EIG).

- Possibility for the members of the EIGs to be natural persons:

  Natural persons resident in Bizkaia who carry out economic activities (even if their activity is different from that of the EIG) may apply the deduction provided for in Article 66 quater of Provincial Regulation 11/2013 through the allocation of the corresponding deduction base by the EIG.

  Natural persons who are members of the EIG and who do not obtain income from economic activities, on the other hand, cannot apply these deductions.

  In any event, it should be kept in mind that, as the possibility provided for individuals who are members of EIGs to apply the deductions allocated by the EIG (under the terms set out above) derives from what is established in Article 88 of the Provincial Regulation on Personal Income Tax: "1. Taxpayers for this tax may apply the deductions to encourage investments in new non-current assets and the performance of certain activities provided for in Chapter III of Title V of the Provincial Corporation Tax Regulations, with equal percentages and deduction limits"; the provisions of its Section 2 shall also be applicable, according to which: "2. The limits established in the Provincial Corporation Tax Regulation for the application of these deductions will be applied to the total tax liability corresponding to the part of the general taxable base comprising the income from business activities".

c) Is there any limit to the maximum return that resident members of the EIG can earn?

As we have seen in the partial transcription of Article 73 of Provincial Regulation 11/2013, it states that: "in cases where member contributions to economic interest groupings must be classified as equity instruments with special characteristics in accordance with accounting criteria, the allocation of net financial expenses, tax losses, and deductions from tax liability may not exceed the corresponding amount, in terms of tax liability, resulting from multiplying by 1.20 the amount of the contributions paid up by the member to the capital of the grouping. The excess may not be charged to the members under any circumstances (...)".

For accounting purposes, the holding in the EIG must be recorded for accounting purposes as an equity instrument with special characteristics, i.e. when the holding in the EIG serves

as a financial investment, the profitability of which derives primarily from the allocation to the investor of tax losses and deductions accredited by the entity.

In addition, the investment in the EIG is not classified as such if the investment in the EIG is not made solely and exclusively to achieve a financial/fiscal return, but to achieve a business return, directly related to the activities of the members.

We therefore need to differentiate between:

- Cases in which the holding in the EIG qualifies as an equity instrument with special characteristics for the resident member's accounting purposes.

  In this case, the maximum financial/fiscal return that the member may obtain, measured in terms of tax liability, as a result of the allocation of the aforementioned items (net financial expenses, tax losses, and tax base), may not exceed 20% of the amount of the contributions paid in to the capital of the EIG (taking into account only the contributions to the capital of the EIG, and not other contributions in the form of share premiums or similar).

- Cases in which the holding in the EIG does not qualify as an equity instrument with special characteristics for the member's accounting purposes.

In this second case, there will be no limit (in terms of the member's liability) on the amounts to be allocated by the EIG to that resident member for the items mentioned (net financial expenses, tax losses, and deduction bases), in the proportion that corresponds to them in accordance with their holding within the EIG.

For these purposes, it should be kept in mind that the accounting classification of the holding in the EIG is analysed at the level of each member, depending on that member's circumstances. Therefore, the same EIG may have members for whom its holding is considered from an accounting point of view as an equity instrument with special characteristics and others for whom it does not have such a status. Accordingly, the first group will be allocated the aforementioned items in the proportion that corresponds to them, taking into account the maximum financial/fiscal profitability (in terms of its share) of 20%, while the second group may be allocated these items, also logically in the proportion that corresponds to them, but without any limitation whatsoever (and, therefore, being able to exceed this 20%).

d) What does the achievement of such a financial/fiscal return mean for the resident member in terms of direct taxation?

   For the member, under terms equivalent to those indicated for the financier when the mechanism of Article 66 quinquies is applied, financial income to be included in their tax base will be generated by the financial/fiscal return obtained, as derived from the aforementioned Article 73. 3, last paragraph, of the Provincial Regulation on Taxation.

   In other words, the difference between the amounts contributed to the capital of the EIG and the effect on the tax liability of the allocation of the aforementioned items (net financial expenses, tax losses, and deduction bases); i.e. that maximum financial tax yield of 20% that we mentioned.

5.2.2. The EIG as an entity that generates the right to the deduction referred to in Article 66 quater, One and Two, of Provincial Regulation 11/2013.

5.2.2.1. The EIG as a producer of an audiovisual work.

The substantive film regulations refer to Economic Interest Groupings whose corporate purpose, according to their registration in the Mercantile Register, is the carrying out of film production, distribution, exhibition, or related technical industries, putting them on an equal footing with the rest of the companies that carry out such an activity, in particular, for the purposes of being

beneficiaries of the corresponding aid (Article 24 of Royal Decree 1084/2015, of 4 December, which implements Law 55/2007, of 28 December, on Cinema).

In particular, in order for the EIG to have the status of producer of an audiovisual recording, it must have the initiative and take responsibility for it.

For these purposes, producers are considered to take the initiative and responsibility for the work and to hold the rights deriving from ownership of the audiovisual works produced in the proportion they are entitled to. In order for an EIG to be deemed as acting as a producer through its investment, it must not only have ownership of the rights, but that ownership must also be due to the fact that it has taken some initiative and responsibility for the work.

An EIG that joins a film as a co-producer at an unspecified point in the film's development will be considered a producer for the purposes of this article, provided that it joins before the end of the production process and that the other requirements established for this purpose are met.

Therefore, with regard to the EIGs, in order for them to have the status of producers and, therefore, to be able to demonstrate they have the right to the deduction, it is necessary that they join the production before the end of filming.

Specifically, the 126th Additional Provision of Law 3/2017, of 27 June, on the General State Budget for 2017, states that: “For the purposes of the provisions of Article 120.2 of Royal Legislative Decree 1/1996, of 12 April, approving the Revised Text of the Intellectual Property Law, Economic Interest Groupings shall be understood to have the status of producer provided that they are incorporated as an independent production company, by complying with the requirements established in Article 4.n) of Law 55/2007, of 28 December, joining the production prior to the date of completion of filming and designating the executive producer responsible for taking on the initiative of the project”.

There is no limit as to when members can join the EIG. In other words, once the EIG is effectively incorporated as a producer, under the terms set out, from that point onwards the members may change, and the allocation of the items indicated, including the deduction base, will be carried out according to whoever holds that status on the date of accrual, based, of course, on the deduction generated in that year. In this regard, if the production has a term of more than 12 months, as the deduction is generated as payments are made, depending on the year in which the members are joining the EIG, they could lose the deduction. Beyond that, as

5.2.2.2. The EIG as the organiser of a live performance of performing arts and music.

As has been explained in the section on the analysis of this deduction, the party entitled to generate the deduction is the organiser or promoter of the live performance, with this status corresponding to the taxpayer who assumes the risk and venture of the production and exhibition of the performance.

Therefore, in the particular case of the EIG, it may be the organiser of the event, and therefore generate the deduction, provided that it effectively carries out the activities in line with its corporate purpose which, in this particular case, consists of the promotion and staging of live shows, even if its members do not carry out activities directly related to those of the EIG.

In this scenario, when an EIG is the organiser of the event (assuming the risk and venture of the event), and the EIG outsources the technical executive production of the show to a third party, the costs incurred by this second party, which are re-invoiced by it to the EIG before the show is held, being assumed or borne by the EIG, may form part of the deduction base for the EIG, provided that they are direct costs of an artistic, technical, and promotional nature incurred in relation to the aforementioned activities.

If applicable, the specific nature indicated in Section 3.2 should be taken into account for the special cases of co-participation in the overall incentivised activity, in the event that one of the parties, a performing arts company, or whichever party organises the performance or exhibition of the work itself, is an EIG.

5.2.3. Specific issues regarding the application of the deductions provided for in Sections One and Two of Article 66 quater, in the event that the deduction is generated by an EIG.

5.2.3.1. Deduction for expenses and investments in audiovisual works.

a) How is the maximum aid intensity limit applied?

We analyse the maximum aid intensity per taxpayer generating the deduction, in this case, the EIG. So it is the EIG itself that has to respect this limit (50%, 60%, or with no intensity limit, as the case may be), and if this is respected, it allocates the base for the corresponding deduction to its members, in the proportion corresponding to each one of them. This limit does not subsequently affect the member directly.

b) Who is obliged to comply with the requirements established to generate the right to the deduction?

When the producer is an EIG, compliance with the requirements established to generate the right to the deduction, under the terms analysed, must be met by this party (i.e. by the EIG itself).

5.2.3.2. Deduction for live performing arts and music shows.

a) How does the limit affect the application of the deduction?

As indicated in the aforementioned consultation of the Bizkaia Provincial Tax Authority, number 5692: “Under the special regime for EIGs, the members resident in Spanish territory are not allocated the amount of the deductions that the Group can effectively apply, nor those that they can apply directly in their self-assessments, but the bases of the aforementioned deductions. To these deduction bases, each member must apply the regulations corresponding to their personal taxation (Personal Income Tax or Corporation Tax), in order to obtain the deduction amount that can reduce their tax liability. Therefore, the deduction limits provided for in Article 46 of the Provincial Corporation Tax Regulation must be understood as referring to the net tax liability of each of the members of the EIG who are taxable for Corporation Tax purposes. Therefore, the legal entity members of the EIG may apply the deduction provided for in Article 57 of the Provincial Corporation Tax Regulation up to a limit of 45% of their own net tax liability, under the conditions laid down in the aforementioned provisions”.

Therefore, on the one hand, the limit of 1,000,000 euros per year will have to be respected by the entity that generates the right to apply the deduction, i.e. by the EIG, which will distribute this limit among its members in proportion to their holding in it. In addition, and if what the EIG allocated to the members are the deduction bases (calculated in accordance with the regulations applicable to the EIG), the deduction amount being calculated depending on the member's registered office, in accordance with its own regulations, the member will also have its own limit per year of 1,000,000 euros (for all the projects and/or EIGs in which it may have a holding).

Therefore, the limit (of 1,000,000 euros per taxpayer) will continue to apply to EIG members.

However, the maximum aid intensity of 80% is analysed for each taxpayer that generates the deduction, in this case, the EIG. Therefore, the EIG itself has to respect this limit, and if this is respected, it allocates the corresponding deduction base to its members, in the proportion corresponding to each one. This limit does not subsequently affect the member directly.

b) Who must obtain the certificate demonstrating the cultural nature of the performance and its actual performance?

If the organiser of the show is an EIG, the obligation to obtain the certificate is incumbent on the this party (i.e. the EIG itself).

5.2.3.3. Issues common to both deductions: minimum taxation and tax liability limit.

As indicated when discussing the provisions common to the deductions regulated in sections One and Two of Article 66 quater of Provincial Regulation 11/2013, their application is not affected by the minimum taxation rule contained in its Article 59.3 (and, therefore, applying this deduction from the net tax liability to obtain the effective tax liability may mean that the entity's effective tax liability remains below 17% or 15%, as the case may be, of the amount of the tax base).

It is also established that the deductions provided for in the aforementioned Article 66 quater will be applied with a limit of 50% of the net tax liability (instead of the 35% provided for in general).

It should be kept in mind that both provisions (i.e. that its application is not affected by the minimum taxation and that it is applied with a limit of 50%, instead of the general limit of 35%), are also applicable when the EIG scheme is used, since the members who pay tax under Provincial Regulation 11/2013 are applying the deduction of Article 66 quater, in accordance with the rules laid down for its application, albeit through the allocation via the EIG.

5.2.4. What happens when the EIG is subject to regulations other than those of Bizkaia, and has members who are taxed under regulations in force in Bizkaia?

If the EIG is subject to State legislation, the first thing to bear in mind is that the deduction base to be allocated to its resident shareholders (whether they are state or provincial) will be determined by applying the State legislation, and with the limitations provided for in that legislation, in particular with regard to concepts and amounts, where applicable.

Once the deduction base has been calculated in this way, the EIG will allocate it to its resident members (whether provincial or state), in proportion to their respective holding percentages in the EIG (and, in particular, without the EIG subsequently having to recalculate the deduction base in accordance with its own regulations).

Resident members, on the other hand, will calculate, based on the allocated deduction, the deduction amount that corresponds to them in accordance with their own regulations.

Therefore, if the EIG has a provincial member, that member will calculate the deduction amount (in accordance with the base allocated by the EIG, which has been calculated in accordance with state regulations) using the regulations that apply to them (the EIG member themselves). So, if this person is taxed under their personal taxation according to the regulations in force in Bizkaia, they will have to calculate the deduction amount according to Article 66 quater of Provincial Regulation 11/2013. And, in particular, in order to determine the applicable deduction percentage, it will be necessary to take into account the expenses that have effectively formed part of the deduction base (in accordance with state regulations) and that are deemed to be located in the Historical Territory in which the EIG itself has its tax domicile (in this case, in Bizkaia). The deduction percentage determined in this way is to be applied to the deduction base allocated to them by the EIG.

And, for these purposes, in order to determine where the expenses in question are understood to have been incurred, and in particular, to determine whether they qualify as expenditure in Bizkaia, we should not take into account issues such as where the EIG has its tax domicile, for example. In other words, even if the EIG has its tax domicile in Bizkaia, this will not mean that the expenses will be understood to have been incurred in Bizkaia, but rather that we will abide by the rules set out in Section 2.2.3.4.