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Specific Industry Credits

Federal Fraud Ruling on Louisiana Film Credits Raises Stakes for Compliance

Louisiana's film infrastructure tax credits are deemed property for the purposes of mail and wire fraud, the U.S. District Court for the Eastern District of Louisiana held. [*United States v. Hoffman*, 2014 BL 199573, E.D. La., 2:14-cr-00022-MLCF-DEK, 7/18/14]

"It's difficult to argue that credits—especially if they are transferable—are not property," Bruce P. Ely, a partner at Bradley Arant Boult Cummings LLP, who was involved in drafting and lobbying for Alabama's film incentives legislation, said via e-mail. However, the decision is "absolutely frightening to those tax advisers who work with . . . members of the film industry who are considering shooting a movie or TV show in Louisiana," he added.

"The key takeaway from this case is that parties can be subject to federal criminal prosecution for fraud involved in state tax credit transactions and structures," Megan C. Riess, a partner at Fishman Haygood LLP in New Orleans, said via e-mail. "Parties aren't just looking at IRS or [state] Department of Revenue audit risk," she added.

In addition, "parties need to take a hard look at any payments or transactions among affiliates in tax credit structures to eliminate any possible perception of fraud," Riess said.

In *Hoffman*, the defendants obtained tax credits under the Louisiana Motion Picture Incentive Act for renovating a New Orleans mansion and turning it into a post-production film editing facility. The defendants are charged with mail and wire fraud, among other charges, and accused of using false expense reports to obtain those credits. In order to constitute wire or mail fraud, the defendants had to obtain "money or property by means of false or fraudulent pretenses, representations or promises." The defendants argued that the film tax credits were not money or property, but the court disagreed.

Prior Cases. The court distinguished the situation in *Hoffman* from *United States v. Griffin*, 324 F.3d 330, 2003, where the U.S. Court of Appeals for the Fifth Circuit held that an attempt to falsely obtain federal low-income housing credits in Texas did not constitute mail or wire fraud, as the tax credits were not property.

"Of note, however, is that the court distinguished between tax credits actually issued and the situation in *Griffin*, where tax credits had not yet been certified and issued," Riess said. In *Hoffman*, the state issued tax credits to the defendants, which were then allegedly sold to local businesses and individuals for profit.

Moreover, in *Griffin*, the federal low-income tax credits were tied to the property and could not be transferred unless the property itself was transferred. In contrast, the Louisiana film infrastructure credits at issue in *Hoffman* could be freely sold to another party or back to the state.

"The reasoning for the [*Hoffman*] decision blurs the lines between whether the tax credit itself is the property for purposes of the federal law or whether the government's right to the tax revenue it would collect in the absence of the credits is the actual property at issue," Riess said.

In its arguments, the government relied on another wire fraud case, *Pasquantino v. United States*, 544 U.S. 349, 2005. In *Pasquantino*, the petitioners ordered liquor by telephone and smuggled it into Canada without paying excise tax. The court held that "Canada's right to uncollected excise taxes . . . is 'property' in its hands."

Future Impact. "There is some risk this decision could be interpreted in a broad manner to apply to future alleged artificial inflation of expenditures for purposes of obtaining tax credits," Riess said.

Overall, filmmakers "may be more cautious now about the expenses they'll claim as creditable," Ely said. "If I were a movie or TV show producer in the process of selecting a state to shoot my next movie or TV show, I'd certainly think twice about Louisiana, which in the past has had a strong track record with producers and has a robust incentives program," he added.

Full text of the *Hoffman* decision is available online at http://www.gpo.gov/fdsys/pkg/USCOURTS-laed-2_14-cr-00022/pdf/USCOURTS-laed-2_14-cr-00022-0.pdf.

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□ For a discussion of film credits in Louisiana, see *1460-2nd T.M., Credits and Incentives: ID Through MS, at 1460.12.G.*