The Society of London Theatre and UK Theatre

Response to proposed legislative changes to Part 15C (Theatrical Productions) of the Corporation Tax Act 2009

1) About Us

a) The Society of London Theatre (SOLT) and UK Theatre are employer bodies for those who are actively producing or presenting theatre and managing or owning theatres. Our memberships are made up of over 500 organisations and 1200 individual practitioners across the UK, predominantly presenting theatre in large and medium scale venues.

b) SOLT & UK Theatre are presenting a joint response to this consultation.

c) SOLT & UK Theatre's roles are to champion theatre and support our members to thrive, ensuring a dynamic, sustainable and world-class theatre sector in the UK.

d) As part of this mission, SOLT & UK Theatre work with our members and government to influence policy which has an impact on the UK theatre sector.

2) General Observations

a) SOLT & UK Theatre were not consulted on the proposed legislative language pre-publication on 18th July.

i) The draft legislation has already caused significant concern in the theatre sector: SOLT & UK Theatre are aware of productions in development that have been paused pending the outcome of this legislative process, as, if adopted, a number of the proposed changes will make those productions unviable.

(1) In particular, SOLT & UK Theatre are aware that leading producers of immersive and experiential work have ceased development of new productions until the proposed changes to clause 1217FA have been clarified or withdrawn.

(2) The uncertainties created by this draft legislation have already deterred investment into the theatre sector, even before any changes are adopted into law.

b) SOLT & UK Theatre have prepared this response with the support and input from accountants specialising in the theatre sector, who are expert in Theatre Tax Relief (TTR).

c) SOLT & UK Theatre welcome scrutiny and audit of the delivery of TTR – as a vital relief to the theatre sector, we are keen to ensure that the relief remains current and compliant.

d) SOLT & UK Theatre welcome the opportunity to respond on behalf of our members to this draft legislation and stand ready to work with HM Treasury (HMT) and HM Revenue & Customs (HMRC) to maintain effective delivery of TTR.

3) SOLT & UK Theatre – No Objections to New Legislative Language

a) After an analysis of the proposed legislative language, SOLT & UK Theatre does not object to:

i) Changes to Clause 1217GB – from EEA to UK expenditure.
ii) Changes to Clause 1217GC – incidental goods or services to the audience (e.g. providing audience with food and drink during the show)
iii) Changes to Clause 1217IC – capital expenditure exclusion (e.g. modifying land or buildings)

b) SOLT & UK Theatre support the policy objectives outlined in these clauses and stand ready to support HMT/HMRC in their implementation.

4) The Use of Special Purpose Vehicles in Theatre

a) Theatre Producers often use a Special Purpose Vehicle (SPV) to hold qualifying productions.
b) SPVs are used for a number of reasons; in general, these include:
i) Equity investment in the SPV can be managed separately from that of a top or holding company.
ii) Partnerships or Joint Enterprises with other producers (Co-Productions) can be managed at arm's length from the lead producer's primary operating company.
iii) Qualifying Costs for TTR, and production-specific assets, can be held in a separate corporate entity (the SPV), allowing for clearer accounting and facilitating easier calculation of TTR.
c) The use of SPVs in the theatre sector is commonplace and an approved (and indeed encouraged) practice by HMRC for the purposes of calculating and claiming TTR.
d) SOLT & UK Theatre have highlighted the use of SPVs for the purposes of this response because certain proposed changes to the legislation (in particular, changes to clauses 1217JA & 1217K) would appear to have significant adverse impact on this accepted business model.

5) SOLT & UK Theatre - Specific Objections – Impacts and Proposed Mitigations

a) SOLT & UK Theatre have identified a number of areas within the draft legislation which we believe will have an adverse impact on the success and delivery of TTR. In brief, areas of concern:
i) Introduce uncertainty and a lack of clarity into the administration of TTR.
ii) Create inefficiencies and unnecessary bureaucracy for both claimants and the HMRC delivery team.
iii) Allow for only marginal benefits in compliance, outweighed, we believe, vastly by the likely reduction in activity and investment this new language would lead to.
b) In each case, through this response, we want to clearly state our concern and the potential impact of each change, as well as propose mitigations and/or adaptations that, we believe, will maintain the policy intent of the change without adverse impact on the success of TTR.

i) 1217 FA – new clause 2(bb)

(1) The new clause reads as follows:

(a) it is reasonable to expect that the main purpose of the audience members will be to observe the performance (rather than, for example, to undertake tasks facilitated or accompanied by the performance)

(2) The accompanying technical note to the draft legislation defines the purpose of the revised legislation as to ”exclude productions from TTR where the main focus is not observing the performance.”

(a) SOLT & UK Theatre consider this purpose excessively broad – a number of different models of theatrical production exist, some of which involve a level of participation, for example, immersive or experiential theatre. Within this stated policy purpose, it could be argued that pantomime should be excluded as audiences are often invited to participate, either through call-or-response interaction with performers or individual audience members invited onto stage to participate in a scene.

(3) The clause is drafted in such a way as to give HMRC significant breadth in interpretation as to which productions may or may not qualify in regard to the level of participation of the audience. Whilst it is our expectation that HMRC will exercise judgment in assessing qualifying productions against this clause, strict interpretation could exclude immersive or experiential productions, which nonetheless meet all the remaining criteria for TTR contained in clause 1217 FA.

(4) The outcome is that, by applying broad language into primary legislation, the decision as to whether a production qualifies for TTR under this new clause would be subjective rather than evidence-based. SOLT & UK Theatre consider it unhelpful to the successful delivery of TTR to have subjective decision-making enshrined in primary legislation.

(5) Impact

(a) A strict interpretation of new clause 2(bb) could exclude productions from qualifying for TTR where:

(i) Members of the audience are passive participants:

1. Production Y is a production whose primary location is a courtroom.
2. When booking tickets to see Production Y, audience members are given the option of booking a limited number of ‘jury’ seats.
3. During the presentation of the performance, those audience members are invited to stand, and the ‘jury foreperson’ is invited to read out a verdict as part of the action of the production.

(ii) Members of the audience are active participants:

1. Production Z is an immersive theatrical experience designed for an audience of predominantly children.

2. As part of the production, the children are immersed in a narrative, which is a journey through a magical land.
3. Performers adopt roles and narrate the audience through a number of theatrical spaces. The performance is scripted. However, there is room left for 'ad-lib' interaction between the performers and the audience.
4. Each separate space presents a subplot to the main narrative.
5. As part of the narrative, the audience is encouraged to support the performers by advising on elements of the action, including suggestions of where the journey should take them next.
6. In this way, the audience is able to prompt the storyline of each individual performance of the production.

(iii) Members of the audience engage in 'call and response' or dialogue with performers, often artistic mechanisms engaged in traditional and contemporary pantomime.

(b) SOLT & UK Theatre would consider all of the above scenarios to meet the qualifying criteria as a bona fide theatrical production.

(6) SOLT & UK Theatre's Proposed Mitigations against Our Objections

(a) SOLT & UK Theatre's preferred mitigation would be for HMT/HMRC to remove clause 1217FA.2(bb) from the upcoming finance bill and for further discussions and consultation with theatre practitioners to be undertaken to clarify delivery guidance from HMRC, with the potential to provide updates and clear examples in HMRC's TTR Manual.

(i) SOLT & UK Theatre do not believe that the policy intent of this clause should be represented in primary legislation but addressed through guidance in the manual.

(b) If the clause must remain in primary legislation, SOLT & UK Theatre's preferred mitigation would be for the clause to be reworded to provide greater clarity as to the scope of the new clause:

(i) 1217FA.2(bb)

1. It is reasonable to expect that the main purpose of the audience members will be to observe the performance (rather than, for example, to **solely** undertake tasks facilitated or accompanied by the performance)

(c) This would match the current language in existing clause 1217FB (3) (the 'sexual nature' clause), which is well understood by theatre practitioners.

ii) 1217JA – changes to 2(c) onwards – Connected Parties

(1) As explained in Section 4, the SPV model operated by businesses in the theatre sector to hold qualifying costs means that, in practice, many of the interactions that SPVs have with other businesses in their trading life will be with connected parties.

(2) In communication with the Creative Industries Policy Team at HMRC, SOLT & UK Theatre were told that the policy intent of this change was 'to ensure that the relief is being paid on the actual costs rather than including profit elements or inflated intra-group costs.'

(3) Whilst SOLT & UK Theatre appreciate that a minority of bad actors within the creative industries may attempt to 'inflate' intra-group costs in order to secure a greater level of relief, we do not believe this practice to be prevalent within the theatre sector. Nor are we aware of any evidence of such practice in the theatre sector.

(4) Nor do we believe that a proportionate response to this compliance concern is to exclude all profit elements from connected party transactions, as this would likely have a significant adverse impact on the success and delivery of TTR to good actors whilst creating inequalities of treatment beyond the stated policy intent.

(5) There already exist accepted models of fair and reasonable charging at market rates.

(6) Impact

(a) Potential risks to operations of the new language on companies acting in good faith include:

(i) Producing houses internal chargebacks – e.g. set building fees on SPV productions. TTR would not be claimable on the element of the chargeback that is above cost.

(ii) Production SPV & presenting venue owned by the same top company – the Production SPV would need to ask the venue operator to calculate the value of the charge that is profit as this would no longer be claimable. This would require breaking financial firewalls that exist for best practice between these connected party companies.

(iii) General Management fees – producers charging Production SPVs to manage the production – profit on these charges would no longer be claimable.

1. General Management profits are also often amortised over a number of productions and over an extended time frame, to the extent that "profit" on a single production may well be amortised as cost over a trading period for the general manager.

(iv) Individual creatives owning/part owning Production SPVs – e.g. if a director invests in/operates a production SPV, none of their fee or royalty would be claimable.

(v) IP owners licensing IP to Production SPVs they are connected to – licensing costs to the SPV may not be claimable.

(b) For illustration, below are some scenarios developing the impact of the new connected parties' language on qualifying productions:

(i) Scenario A – Qualifying Production Company/SPV is connected with a Venue Owner

1. If company “A Ltd”, which also owns and operates theatre venues (“A-Venues Ltd”), produces a show in a third-party theatre that A-Venues Ltd does not operate pre-production charges from the third-party theatre (such as i. theatre modifications, ii. get-in/fit up rent, iii. other theatre contra costs,) are all a qualifying cost for TTR purposes, however
2. If A Ltd produces the same show in a theatre that A-Venues Ltd owns, the exact same pre-production charges would be subject to the proposed new connected parties legislation.
3. Therefore, under the new legislation, should A Ltd choose to place its own production into a connected party venue, A Ltd would be unable to claim TTR on an element of that qualifying cost.
4. There is, therefore, an inequality in treatment because A Ltd is connected to A-Venues Ltd, which owns the theatre at which their production is playing. If a third-party producer were to place a production into the same venue owned by A-Venues Ltd, they would be able to make a full TTR claim against qualifying costs associated with the venue.

(ii) Scenario B – Qualifying Production Company operates in-house services

1. Company “B Ltd” operates a full range of pre-production services in-house, such as; (i) casting, (ii) technical services, and (iii) general production administration services.
2. When B Ltd produces a new show, as is typical, an SPV “SPV-B” is established as a subsidiary of B Ltd to hold the qualifying production costs and to operate the production.
3. When B Ltd produces a new show, these in-house services are recharged to SPV-B at market rates; i.e. at the same rate that would be charged by an independent third party providing the exact same services.
4. If a third-party producer bought those same in-house services at the same price from B Ltd, the transaction would not be affected by the new legislation, and the third-party producer could continue to claim the whole portion of qualifying costs for the purposes of TTR on the services provided.

5. However, because B Ltd and SPV-B are connected parties, SPV-B would no longer be able to claim TTR on any element of these charges above cost.
6. There is, therefore, an inequality in treatment because SPV-B and B Ltd are connected parties.

(iii) Scenario C – Licence Fees

1. Licence fees (often related to creative Intellectual Property (IP)) paid to an unconnected third party for the rights to mount a new production are a claimable expense for TTR purposes under both the existing and new proposed rules.
2. Licence fees paid to a connected party for rights to mount a new production are a claimable expense for TTR purposes under the existing rules.
3. However, under the proposed new legislative rules, licence fees paid to a connected party for the rights to mount a production will likely be excluded from the TTR claim, as the whole fee would amount to a “profit” rather than cost if the IP was developed in-house.
4. Therefore, the proposed change would result in an inequality of treatment towards a company if that company also owns the IP connected with the production.

(iv) Scenario D – Individual Creative owns a Production Company

1. Mr D is an internationally acclaimed Olivier and Tony award-winning theatre director.
2. He also has his own production company, D Ltd, which has produced numerous plays for the West End and Broadway, some of which Mr D directs himself (but not exclusively).
3. As is typical, an SPV (“SPV-D”) is established, as a subsidiary of D Ltd, to produce a play, raising investment in the usual industry manner from private investors.
4. SPV-D will engage, amongst others, with Mr D personally to direct the play, and D Ltd to provide producer and general management services. The proposed changes would impact this structure in two ways:
5. Under current legislation, the consideration (fees and royalties) payable to Mr D for his services as a director qualify for TTR.
6. Under the proposed legislation, they would be deemed payments to a connected party, and consequently, TTR would be denied for the element which represents “connected party profit”.

7. In this instance, the consideration is all “profit” – there is no associated cost to the services provided by Mr D; he is simply providing his time and intellectual know-how.
8. Hence the consideration that currently attracts TTR would effectively be excluded under the proposed legislation.
9. If the production instead engaged another director, unconnected to the production company, the consideration would continue to qualify for TTR.
10. There is, therefore, an inequality in treatment, and ultimately, this impacts on the viability of the production as the TTR is reduced and hence risk increased.
11. The producer and general management fees payable to D Ltd will again be deemed payments to a connected party, and consequently, the allowable element would be reduced to eliminate “connected party profit”.
12. In practice, this would be very difficult to ascertain. The services provided by D Ltd would encompass several elements, including primarily personnel and office space, and the cost of these to D Ltd would need to be calculated by reference to, for example, payroll cost apportioned by employee time spent on that particular production, and office rent/rates/insurance/utilities apportioned based on desk space for that particular production.
13. In short, it would require a complicated and largely subjective calculation solely in order to strip out the “profit” element of the fees.
14. If the production instead engaged another general manager, unconnected to the production company, the full fee would continue to qualify for TTR.
15. Therefore, there is an inequality in treatment, penalising SPV-D for using the general management services of D Ltd by disallowing a portion of that qualifying cost for TTR, rather than if SPV-D were to take on the services of a third-party general manager, in which case the full portion of the qualifying cost for TTR would be claimable.

(7) SOLT & UK Theatre Proposed Mitigations to our Concerns

(a) Given the significant impact on the operability of TTR outlined in the scenarios above and our belief that the practice of inflated charges is not common with the theatre sector, SOLT & UK Theatre’s preferred mitigation would be that new changes to 1217JA – changes to 2(c) onwards are removed from the upcoming finance bill and current clause 1217JA is maintained, with clear guidance on just, equitable and fair connected party market rate charging included in HMRC’s TTR manual.

(b) If this is not possible, SOLT & UK Theatre's secondary mitigation would be that new language is included to exclude common scenarios, such as those listed above. This would match concessions already drafted for the film & tv sectors in clause 1179DU (5):

(i) Subsection (2) does not apply to expenditure incurred on renting, hiring or otherwise securing the use of premises or land as a location for the principal photography of the film or television programme in question.

(c) SOLT & UK Theatre would welcome the opportunity to discuss with HMT and HMRC what connected party transactions should be excluded from the new clause. However, we remain concerned that a static list of exemptions will not match the dynamic nature of the relief provided to a fast-developing industry.

(d) In all cases, SOLT & UK Theatre proposes that:

(i) when claiming for TTR, production companies should clearly identify connected party transactions within their claim return:

1. Claimants would then provide a brief explanation of the connected party transaction – e.g.
   a. explain why the transaction is required to be arms-length and/or
   b. Confirm that they believe services have been charged for at a just/fair market rate.
2. SOLT & UK Theatre believe this will provide HMRC with the evidence needed to assess the legitimacy of connected party claims.
3. Further, SOLT & UK Theatre and HMRC could then over time build up a data pool of average market rates allowing them to make decisions even more quickly allowing for HMRC to further interrogate those qualifying costs.

iii) New Clause 1217KD – Restriction of Relief to Going Concerns

(1) SOLT & UK have not been provided with a detailed policy intent of this new clause.

(2) The Policy Paper "Administrative changes to the creative industry tax reliefs," released alongside the draft legislation, provides only limited context:

(a) "A rule will be introduced to restrict credit payments to companies that are not 'going concerns'. This will be introduced to AVEC, VGEC, and the cultural reliefs.[1]"

(3) The Explanatory note, released alongside the draft legislation, provides this explanation of the new clause:

[1] https://www.gov.uk/government/publications/creative-industry-tax-reliefs-administrative-changes/administrative-changes-to-the-creative-industry-tax-reliefs#:~:text=A%20rule%20will%20be%20introduced%20to%20restrict%20credit%20payments%20to%20companies%20that%20are%20not%20%E2%80%98going%20concerns%E2%80%99.%20This%20will%20be%20introduced%20to%20AVEC%2C%20VGEC%2C%20and%20the%20cultural%20reliefs.

(a) "Paragraph 33 inserts new section 1217KD ('no claim if company not going concern'). A company may only claim relief when it is a going concern. A company is a going concern if it prepares its financial accounts on a going concern basis, unless the going concern basis is used only to remain eligible for relief. A company that is in administration or liquidation cannot make a claim. A company which does not prepare its accounts on a going concern basis can still claim relief if the only reason that the accounts are not prepared in that way is because the company transfers the separate theatrical trade to a fellow group company."[2]

(4) Impact

(a) Restricting relief to a company that 'prepares its financial accounts on a going concern basis' will have significant adverse impact on the operation and success of TTR.

(b) The Financial Reporting Council's FRS 102 (the Financial Reporting Standards applicable in the UK and Republic of Ireland) state that:

(i) "When preparing financial statements, the management of an entity using this FRS shall make an assessment of the entity's ability to continue as a going concern. An entity is a going concern unless management either intends to liquidate the entity or to **cease trading**, or has no realistic alternative but to do so. In assessing whether the going concern assumption is appropriate, management takes into account all available information about the future, which is at least, but is not limited to, 12 months from the date when the financial statements are authorised for issue."[3] (SOLT & UK Theatre Bold).

(c) A decision to close a production sitting in an SPV will generally constitute a decision to cease to trade.

(i) This will lead to the preparation of the accounts of the SPV on a basis "other than that of a going concern".

1. This decision is, in most cases, not taken as a result of the insolvency of the production company.

(d) Potential risks to operations of the new language include:

(i) SPVs that do not have a full year of accounts (i.e. productions that open and close within a year) may not be able to claim under the going concern basis.

(ii) SPVs that are making claims in their final year of trading (i.e. for closing costs) may not be able to claim under the going concern basis.

---

[2] https://www.gov.uk/government/publications/creative-industry-tax-reliefs-administrative-changes/explanatory-note-accessible-version#:~:text=Paragraph%2033%20inserts,fellow%20group%20company.

[3] https://www.frc.org.uk/getattachment/0fba8b6a-ff2b-46e2-8c3f-adfc174d300b/FRS-102-(January-2022)(2).pdf

(iii) SPVs that are abandoned may not be able to claim under the going concern basis.

(e) In practice, this new clause would appear to allow only productions that run for more than one year and do not intend to claim for closing costs to claim for TTR.

(f) For illustration, below is a scenario developing the impact of the going concern language on qualifying productions:

(i) Productions Claiming in Their Final Year of Run

1. Producer "E Ltd" is currently finalising two sets of company accounts (one West End Production and one UK touring production) with a 31 March 2023 year end;
2. Both these productions played very successfully until their closure in early 2023.
3. A TTR claim is being prepared and submitted to HMRC for both these productions.
4. However, because the productions are no longer running, the SPVs holding these productions are no longer actively trading.
5. Under UK accounting rules, the accounts are prepared on a basis "other than that of a going concern".
6. The new clause would not allow these productions to claim TTR, notwithstanding that:
   a. Neither SPV is in administration.
   b. Neither SPV is in liquidation.

(5) SOLT & UK Theatre Proposed Mitigations to Our Concerns

(a) SOLT & UK Theatre agrees that claims by companies that are either in administration or liquidation should not be permitted.

(b) SOLT & UK Theatre's preferred mitigation is that:

(i) New Clause 1217KD (1) and (2) are deleted and

(ii) 1217KD (3) is re-worded:

1. "A company may not make a claim under section 1217H or section 1217K if it is in administration or liquidation."

(iii) 1217KD (4) and (5) are maintained as per the draft legislation.

(iv) 1217KD (6) through (8) are deleted.

6) Anonymisation of Scenarios

a) SOLT & UK Theatre are grateful to SOLT & UK Theatre members who provided "live" scenarios in response to the concerns listed above.

i) As this document will be publicly available, we have anonymised all scenarios, even in cases where members indicated that they would be happy to be identified, for the purposes of consistency in presentation.

(1) If HMT or HMRC would like further details on “live” scenarios, SOLT & UK Theatre will be able to provide those.

7) Contact

a) This response was prepared on behalf of:

i) Society of London Theatre, Company Number 527227

ii) UK Theatre Association (operating as ‘UK Theatre’), Company Number 323204

b) Both of:

i) 32 Rose Street, London. WC2E 9ET.

c) By

i) David Leigh-Pemberton, Head of Policy & Public Affairs, Society of London Theatre & UK Theatre.

d) Any queries related to this response should be directed to:

i) david@soltukt.co.uk