



Neutral Citation: [2022] UKFTT 240 (TC)

Case Number: TC08560

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: London, Taylor House

Appeal reference: TC/2021/01321

CORPORATION TAX – theatre tax relief – whether Christmas Spectacular is an “other dramatic piece” – yes – whether the performers wholly or mainly give their performance through the playing of roles – yes – appeal ALLOWED

Heard on: 20 – 22 July 2022
Judgment date: 05 August 2022

Before

**TRIBUNAL JUDGE AMANDA BROWN QC
MRS JO NEILL**

Between

THURSFORD ENTERPRISES LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Patrick Boch of counsel instructed by Larkin Gowen

For the Respondents: Mr Paul Mark litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal by Thursford Enterprises Limited (**Appellant**) against the decision, contained in a closure notice issued by HM Revenue & Customs (**HMRC**) for the accounting period ended 31 December 2017, that the Appellant's claim to theatre tax relief (**TTR**) in respect of a production known as The Christmas Spectacular, produced and performed in that year, (**Production**) was to be denied on the basis that it was not a "theatrical production" within the statutory definition provided in section 1217FA Corporation Taxes Act 2009.

2. The Tribunal had the benefit of three days of detailed oral argument from the parties, in addition to their skeleton arguments. In reaching the decision on this appeal the Tribunal has taken into account everything referenced by the parties, in both the written and oral submissions. It is however inevitable, given the detail of the arguments and given the quantity of material, that not everything in the appeal can be given specific mention in this judgment.

SUMMARY OF FINDINGS

3. The legislator's choice of "other dramatic piece" is to be given its ordinary meaning and includes any piece of dramatic work that is not, by reference to the ordinary meaning of those words, a play, opera or musical. Other dramatic piece includes any production offering a dramatic illusion or fictional mimetic. Its statutory role is to exclude nondramatic theatre (i.e. any piece of theatre which is presentational as opposed to representational).

4. As HMRC accepted that the Production was dramatic but not a play, opera or musical, it was an other dramatic piece.

5. Where a performer (actor, dancer, singer or other performer) is required to perform in accordance with a directed interpretation/characterisation they will be playing a role.

6. In the Production, as detailed below, the singers and dancers each performed through the playing of roles (choristers, 1940s and 1950s performers, penguins, gospel choir etc) and subject to the direction of the producer who dictated the scope and terms by reference to which the dramatic illusion was delivered. The musicians (including the organist), comedian and juggler did not perform through the playing of roles. However, as the dancers and singers represented more than half of the cast, the production was performed "mainly" through the playing of roles.

THE LEGISLATION

7. In March 2014 HM Treasury issues a consultation document entitled "Theatre tax relief: consultation". The introduction to the consultation document George Osborne (then Chancellor of the Exchequer) stated:

"The UK is home to some exciting and innovative theatre companies producing ground-breaking new productions. It's crucial that these continue to thrive across the UK.

I want to make sure our theatre producers and performing arts can continue to entertain and capture audience's imaginations, ...

Following the Autumn Statement 2013 announcement that the government will introduce a new tax relief for theatre productions we have been working closely with the sector and its supporter to design an effective and well targeted policy.

At Budget 2014 I announced that I am extending the idea behind our successful creative sector reliefs to theatre production. The relief will encourage theatre production across the whole of the UK ...

Theatre tax relief will be available at ... 20% for [non-touring] qualifying productions from September 2014. Relief will be available for a wide range of theatre and performance, supporting plays, musicals, opera, ballet and dance.

Our creative sector reliefs have shown how targeted support can make a real difference not only in terms of promoting economic activity, but also in terms of promoting British culture and the way the UK is viewed internationally ...”

8. The paper provides that the key features of the relief are to:

- Provide a per production tax relief ...
- Support plays, musicals, dance, ballet and opera but exclude sexual entertainment and shows with a competitive element
- Offer the payable tax credit at a rate of relief of ... 20% for [non-touring] qualifying productions.

9. Theatre as to be defined as including plays, musicals, dance, ballet and opera but excluding sexual entertainment, competitions or productions whose sole purpose was for advertising or solely intended for broadcast.

10. It was clear that other criteria for TTR also apply, including that a qualifying production must be produced and performed by theatre production company (as defined) and meeting other statutory requirements vis a vis the nature of expenditure to be relieved.

11. Corporation Tax Act 2009 was amended with effect from 1 September 2014 to include TTR in accordance with the framework proposed in the consultation document.

12. This appeal concerns only the definition of “theatrical production”.

13. So far as relevant, and at the relevant time, section 1217FA provided:

“(1) In this Part “theatrical production” means a dramatic production or a ballet (and, any ballet is therefore a theatrical production, whether or not it is also a dramatic production). But see section 1217FB.

(2) “Dramatic production” means a production of a play, opera, musical, or other dramatic piece (whether or not involving improvisation) in relation to which the following conditions are met:

- (a) the actors, singers, dancers or other performers are to give their performances wholly or mainly through the playing of roles

...

(3) “Dramatic piece” may also include, for example, a show that is to be performed by a circus.”

14. Section 1217FB provided:

“(1) A dramatic production or ballet is not regarded as a theatrical production if:

- (a) the main purpose or one of the main purposes for which it was made is to advertise or promote any goods or services,
- (b) the performances are to consist of or include a competition or contest,
- (c) a wild animal is to be used in any performance,
- (d) the production is of a sexual nature (see subsection (3)), or

(e) the making of a relevant recording is the main object, or one of the main objects, of the company's activities in relation to the performance.

(2) For the purposes of subsection (1)(c) an animal is used in the performance if the animal performs, or is shown, in the course of the performance.

(3) A production is of a sexual nature for the purposes of subsection 1(d) if the performances are to include any content the nature of which is such that, ignoring financial gain, it would be reasonable to assume the content to be included solely or principally for the purposes of sexually stimulating any member of the audience (whether by verbal means or other means).

...

(5) In this section ... "wild animal" means an animal of a kind which is not commonly domesticated in the British Isles ..."

15. The explanatory notes prepared on the introduction of TTR state:

"New section 1217FA defines what is meant by "theatrical production", "dramatic production", "dramatic piece" and "live".

- Plays, operas musicals or other dramatic pieces are theatrical productions if the playing of roles is the whole or major part of what is done by persons performing, each performance is live to an audience before whom the performers are actually present.
- A "dramatic piece" may include a show performed by a circus. For example, where the performance is scripted, the performers play roles as opposed to something like a pure high-wire trapeze performance which is generally regarded as more of an indoor sport.
- Any ballet is a theatrical performance, whether or not there is also a dramatic production. This allows for contemporary ballet productions where there may not be a dramatic narrative, but the production incorporate elements of classical ballet and classical ballet technique."

16. The terms of the legislation were amended with effect from 1 April 2022 as regards any productions for which the production phase begins after that date. Relevantly, the provision no longer applies to an "other dramatic piece" but to a "relevant dramatic piece" which is defined as "a dramatic piece [definition of dramatic piece is not amended] (other than a play, opera or musical) that tells a story or a number of related or unrelated stories".

THE ISSUES

17. It is convenient to frame the disputed issue before considering the facts and the evidence.

18. As this appeal concerns the Production for which the production phase (and all other phases) took place in 2017 the Tribunal must determine whether the Appellant is entitled to TTR under the legislation as originally drafted. The parties agreed that the legislative change did not have retrospective effect, was not a clarification of the law as originally drafted and was not to be used as an aid to interpretation of the original drafting.

19. The dispute between the parties' centres on the interpretation of two phrases: "other dramatic piece" (in section 1217FA(2) opening words) and "playing of roles" (in section 1217FA(2)(a)). HMRC had originally also denied relief on the basis that the Appellant's main purpose (or one of its main purposes) was advertising. That argument was conceded at hearing.

20. In summary on "other dramatic piece" HMRC's position was that in order to be an other dramatic piece the Appellant needed evidence of a storyline or narrative which could be clearly

followed through the characters. The Appellant's position was that there is no statutory requirement for it to have a narrative or story.

21. As regards "paying of roles" HMRC's summary position is that "playing a role" requires the actor, singer, or dancer to perform "outside 'normal life'". By contrast, the Appellant contends that none of the performers in the Production are performing as themselves. Their acts were not "as seen" of the type common in a variety performance. Each performer was playing the role ascribed to them both by reference to the direction received from the script and producer/choreographer in each scene.

THE PRODUCTION

22. The Tribunal was provided with an archive video of the 2017 Production (the video was produced for the purpose of the director and choreographer and was not intended as a representation of the experience of the Production), the souvenir programme, script of readings, and music schedule. The Tribunal had the benefit of the witness statement and oral testimony of:

(1) Ms Karen Cull (the currently production manager for the production but formally a singer, assistant cast manager and orchestra manager) and

(2) Dr Julius Green (trustee of the Appellant with extensive experience of working in theatre as a professional producer of plays and musicals in the West End, throughout the UK and across the world, he also lectures at a number of institutions teaching performing arts).

23. The Tribunal considered both witnesses to be credible, clear and helpful. From all the evidence available, set out below is a description of the Production and the factual findings of the Tribunal.

24. The Appellant is a wholly owned subsidiary of the Thursford Collection (**Collection**), a registered charity. Pursuant to an agreement dated 23 February 2017 the Collection commissioned the Appellant to produce the Christmas Spectacular. Under that agreement the parties agreed that the Appellant would be responsible for producing, running and closing the Production, make an effective creative, technical and artistic contribution to it and directly negotiate, contract and pay for rights, goods and services in relation to it. Collection licenced the rights and assets in respect of the Production. Certain production services were subcontracted back to Collection, including use of the premises, resources and expertise of Collection. It is unclear whether there was a similar agreement every year.

25. The Production is an annual Christmas show that takes place at the Collection which runs from early November to late December. It is performed in an auditorium erected for the purpose of the Production. In each season there will be between 80 and 86 three-hour performances which are usually sold out. The Tribunal were told, and the evidence was not challenged, that for many of the audience, who travel from all over the UK to attend, it is seen as the "go to" Christmas destination and that for those attending it is "part" of Christmas.

26. The Production's producer is John Cushing who conceived of the concept of the Production. He is now aged 82. The process of preparing for the Production begins in late January with a debrief of the previous year's production. Mr Cushing spends considerable time then creating what was described a "seamless dramatic journey to Christmas" through the "weaving together" of readings, scenes and music from which the music, vocal and orchestral scores are then written. Mr Cushing identifies speciality acts. Together the musical arranger, the production team and the specialty acts will build the detail of the program. The whole programme is carefully and meticulously scripted to run precisely to time and to reflect the "light and shade" of the emotional journey on which the audience are to be taken.

27. Casting begins in May. On average the Appellant receives approximately 1000 applications from singers trained across all genres of music, in 2017 that number was 1,109. 360 were then auditioned over 6 days. At the audition the versatility of each applicant was assessed. The singers will be required to perform in all/the majority of musical aspects of the Production, as set out below, in 2017 that included numbers from musicals, classical choral music, 50s band styles etc. It is important to the casting team that the singers can perform to the required level of excellence across all genres. Having established their vocal ability, the applicants 88 were then asked to attend what is known as a movement call with the choreographer to ensure that the applicants can move (dance) and will take direction such that they act and present on stage as required. For the Production the applicants were taught modern Motown and classic Fred Astaire routines which would establish the skills for the Production. Whilst vocal excellence is required the Appellant places considerable emphasis on vocal diversity and an ability to be directed so as to perform (including dancing where necessary) as part of the show. The tripartite ability to sing, dance and act is known as “triple threat”.

28. Ultimately 58 singers were selected. They are contracted “in the role of” soprano, mezzo, tenor or base. Once contracted they may be required to perform as part of the ensemble, as a soloist or a swing singer (someone who performs a role on a rotating basis with others).

29. A similar process is undertaken in respect of the dancers. The choreographer holds a two-day intensive audition process also in late May/early June. As with the singers, the dancers may have different training backgrounds but will be required to perform across all styles of dance. 421 dancers registered for the dance auditions, 259 of whom were auditioned over 2 days. Of the 73 dancers selected to return for the second day of the audition, 22 were selected and 8 offered a reserve place. The dancers will be required to satisfy the triple threat too.

30. There is more continuity in respect of the 30-piece orchestra all members of which are not selected annually. However, the musical director will be required to audition for any seats that have become vacant. There will also be a full deputy orchestra.

31. Mini biographies of each singer, dancer and musician is provided in the programme demonstrating the diversity of experience of each performer. The singers come from a range of backgrounds including opera, classical, musicals and television. Similarly for the dancers who ballet and contemporary backgrounds some of whom had worked on cruise ships and in film.

32. Costume design will begin in June (measurements having been taken at the auditions). The Appellant has three large costume stores housing costumes from previous production which may be refitted or adapted, and new costumes will be designed and made each year.

33. Once the music and design of the show has been set, usually by late August, the choreographer, working with the producer, will choreograph each scene. The production manager will then timetable the rehearsals. In respect of each scene the singers and dancers will be rehearsed initially in London so that each group can learn the choreography/music/words.

34. The stage used for the production is unusual, it is only 20ft deep but is 140ft wide. A replica stage space is constructed in late September for when the cast arrive for stage rehearsals to begin. On site rehearsal begins in early October. There is a meticulously produced timetable for rehearsals which brings together small groups which then build and interact until shortly before opening the technical and dress rehearsals take place.

35. The format of the Production is similar each year with scenes, readings and songs which evoke a journey to Christmas. The auditorium is decorated lavishly and with Christmas trees and lights.

36. Mr Cushing introduces the Production in the programme:

“At Christmas time, the joy and love we share comes from the truth and belief in the birth of Christ and is accompanied by traditions that people have celebrated since the dawn of civilisation.

Thursford celebrates the atmosphere of a traditional, happy, meaningful Christmas, and running through every celebration, there is music – the songs everyone knows and loves.

... With more than 65 musical pieces and the talents of a cast of over 100, this is an extravaganza of non-stop singing, dancing, humour, and variety...

May the next three hours be an uplifting and intriguing Christmas collection, full of delights and surprises for you, inspiring you to recall your own happy Christmas memories and traditions. ...”

37. Dr Green described the Production as large scale, site specific, immersive theatre in which the ambience, consistent theming and fully designed and integrated location combine to with the dramatic content to provide the dramatic illusion of the event.

38. Both Ms Cull and Dr Green explained that the Production is that of the cast. Each member of the cast will appear on multiple occasions throughout the performance. In each instance following the script and/or direction of the choreographer/producer. The Production is intended to be consistently and identically performed at every performance in accordance with the planned production and schedule.

39. In 2017 Act 1 opened in darkness with harp music and a reading of “Bring the Christmas Life into this House” by Josephine McKinnon during which various Christmas lights were lit. The evocation of this piece is of reflection on Christmas past and the hope of Christmas to come.

40. This was followed by an ensemble of 6 brass players providing a fanfare then joined by 8 string players playing “Star of Bethlehem” by John Williams as the singers process through the audience singing and congregating in front of the stage. All members of the cast are wearing Dickensian costume. This scene lasts 5 minutes. The lyrics of the song focus on the anticipation of the coming of change through Christmas, hope, love, wisdom and freedom to “see the world we long to see”.

41. The singers then sing an unaccompanied piece “Born on A New Day” by John David. Again the theme or message of the lyrics is that the birth of Christ represents the start of a new day and the hope of change. Length is 2 minutes.

42. This is followed by a scene in which the company, involving a solo singer in a flowing white 1940s style dress and chorus ensemble dressed in top hat and tails together with high kicking flamboyantly dressed dancers with feather head dresses perform “Who?” By Jerome Kern from the 1946 film “Til the Clouds Roll By”. The lyrics of the song have a theme of anticipation and waiting. Length 3:45 minutes.

43. Paul Eastwood, a comedian, then appears. He interacts with the audience and acts as master of ceremony. The Tribunal was informed that his act is heavily influenced by Mr Cushing who scopes the tone and content of the material. He is on stage for 4:15 minutes whilst the rest of the company change costumes.

44. A rock and roll scene follows during which a medley from the 1950s is performed: Book of Love, Blue Moon, Do You Wanna Dance, Chantilly Lace by an increasing number of couples until the full company is on the stage. There is a lead singer and a chorus. Certain

members of the orchestra are also on the stage with brass instruments, electric guitars and a saxophone. Length 4:15 minutes.

45. Paul Eastwood then performs for a further 5 minutes.

46. John Udry, a juggler performs to Cactus Polka played on the Wurlitzer organ. He does not speak but engages the audience with a sense of both humour and, to a degree, jeopardy. The Tribunal were informed and accept that as with Mr Eastwood, Mr Cushing requires that Mr Udry's performance fits with the theme of the Performance. We were told that in his "undirected" show Mr Udry would banter with and interact verbally with the audience. He is on stage for 3:25 minutes.

47. "Gradually There Gathered" (an extract from The Rainbow, by DH Lawrence) is then read by a male reader who is stood on the stage. The theme again of this piece is expectation and anticipation. As the reading finishes the organ begins to play and singers, and the Tribunal were told, dancers, dressed as choristers and holding tall candles slowly process from the rear of the auditorium singing "O Little Town of Bethlehem". These performers remain interspersed among the audience and sing "Tomorrow Shall Be My Dancing Day" by John Rutter both songs anticipate the arrival of Christ and the love and joy that such arrival shall bring. Length 6:30 minutes.

48. Then enter 18 male dancers dressed as toy soldiers pretending to play trombones whilst the orchestra play "Seventy-Six Trombones". The dancers move about the stage in military style. There is a comedic element to the performance reflective of toy soldiers. Length 4:00 minutes.

49. "Hello Muddah, Hello Fadduh" presented as sung speech, accompanied by instrumental music by a reader on stage with dramatic effect. Length 2:20 minutes.

50. The reader is replaced by 10 singers singing "Days" by the Kinks. The lyrics are reflective of loss but by reference to light. The singers are static for this song. They move onto a song titled "Twelve Days of Christmas". It is not however the traditional Christmas song, but a written medley loosely based on that song. The singers move providing some dramatization of the song as they sing. The Tribunal was not provided with, and could not access, the lyrics of the Twelve Days of Christmas as performed it has not been possible to discern definitively the asserted contribution to the journey. Length 5:00 minutes.

51. The next scene is the organist playing Black and White Rag. The feature of the scene is that cameras are on his hands and feet as he plays illustrating the black and white. Length 2:50 mins.

52. What the Tribunal understands is considered one of the highlights of the Production was the next 5:55 minute scene in which 14 dancers are dressed as, and mimic the movements of, penguins as they dance to "Somewhere Only We Know" and "Pavane".

53. The juggler appears again in a silent performance to music selected by Mr Cushing – Tubular Bells and Fairytale of New York. Length 2:30.

54. A reading of "Christmas Party" by Alison Chisholm is dramatised by a woman on stage wearing a dressing gown. The theme of the reading is one of a reflective regret. Length 2:30.

55. The Fred Astaire medley is 5:00 minutes. It opens with a solo singer and the ensemble performing "Top Hat" from the 1935 musical of the same name reflecting and emulating the film in its style of presentation. They also perform "The Continental" (Con Conrad) from "The Gay Divorcee" and "Puttin on the Ritz" (Irving Berlin) featured in the film of the same name. All three songs are performed in the style of the films from which they are references with a

lead dancer assimilating Fred Astaire. It is unclear what the lyrics of these songs contribute to the journey to Christmas.

56. Paul Eastwood performs for 9:30.

57. The Act 1 Finale initially involves 24 singers emulating a gospel choir singing “Go Tell It on the Mountain” and “Mary Had A Baby”, “Well The Saviour is Born – Amen” and “Give Me That Old Time Religion”; all singers adopt the mimetic of a gospel choir as well as singing in that style. The lyrics herald the arrival of Christ. Length 5:00.

58. Total length of the first act is 1:21.10.

59. The second Act starts with the orchestra on the stage performing a series of instrumental numbers (White Christmas, Blue Skies, Count Your Blessings, Let Me Sing and I’m Happy) for 2:40 mins. The ensemble joins and perform “it’s beginning to Look a lot Like Christmas” starting with a duet who interact with one another in a flirtatious way, they are joined by a further 4 couples who perform a choreographed support to the initial couple. This leads into “Silver Bells”. These songs have familiar lyrics anticipating the arrival of Christmas. This scene ends with a further instrumental with non-verbal vocal contribution of “Morgans Um Sieben”. This section is a total of 8:30 mins.

60. The orchestra remain on stage with 6 violinists coming forward and playing Irish fiddle music which becomes an orchestral rendition of Riverdance to which 18 dancers perform the Riverdance in Irish dancing costume. Riverdance was originally performed as an interval dance at the 1994 Eurovision Song Contest in Dublin but became a theatrical production consisting mainly of traditional Irish music and dance. The scene reproduced in the Production reflects that of the principal show of the same name. Length 3:40.

61. A Jazz band supported by the full orchestra then plays an instrumental rendition of “Alabama Jubilee”. The full company joins for a Disney medley of “Zip-a-dee-doo-dah”, “Heigh-Ho”, “Whistle While You Work”, “Give a Little Whistle” and “When you Wish Upon a Star”. For “Zip-a-dee-doo-dah” and “Heigh-Ho” the men march and skip. “Whistle While you Work” sees interaction between the female and male singers. The whole section is highly directed and choreographed though could be said at times to have the feel of a concert when the singers are stationary. The choice of the songs and the particular excerpts follow a narrative from happiness to awe. Length 7:30 minutes.

62. Mr Eastwood takes the stage again for 10:00 minutes during which he picks up on the Disney theme and other sections confirming that they are the same “day in day out”. As the orchestra returns he flirts and banters with Ivana the orchestra leader, then picks up a trumpet indicating he will play the live the Coronation Street theme, which he mines. He interacts with the conductor who “removes” him from the orchestra. The witnesses confirmed that these interactions were replicated nightly.

63. The next scene opens with Once in Royal David’s City played by orchestra members following which the company (singers and dancers) dressed as choristers return, processing with candles and then remaining within the main auditorium in the aisles, singing carols (“We Three Kings” and “Silent Night”). The lyrics of these traditional carols focus on the arrival of Christ’s birth. The witnesses confirmed that the dancers may be singing but will do so quietly. “Barcarolle” is then performed, there are no lyrics to this carol. Length 9:25 minutes.

64. The orchestra, supplemented by bag pipes, then performs “Gabriel’s oboe”. This scene is unquestionably concert like and lacks any apparent dramatic direction. Length 2:30 minutes.

65. Anita's dance, a ballet scene, is then performed by the dancers accompanied by the orchestra. The dancers dance on pointe indicating that all 12 were likely to have been trained ballerinas as it is the only dance form in which the dancers are on pointes. Length 2:30 minutes.
66. A reading of "This Time of Year" by Betty Black is read which reinforces the hope that Christmas encourages acts of love and peace which if founded in a belief of Christ brings Christmas throughout the year. It is performed to the underscore of Chi Mai. The performer stands between two snowmen. Length 1:30 minutes.
67. "I Believe" by Elvis Presley is then sung initially by a duet joined gradually by the ensemble. The lyrics reinforcing the sentiment of the reading which preceded it. Length 2:05 minutes.
68. The penultimate reading is Christmas "Will Soon Be Here Again" recited from the stage announcing the arrival of Christmas. This leads into a solo led renditions of "Away in a Manger", "God Rest You Merry Gentlemen" and a full ensemble rendition of "O Come All Ye Faithful" (including the final verse usually reserved only for Christmas day). This section is very concert like in appearance and feel. Length 6:45.
69. The final reading "Memory" by Mary E Richardson is a reflection on the potency of memories of Christmas by a singer from centre stage. The reading is verbally dramatised.
70. The finale is a medley of Christmas songs ("Chestnuts Roasting on an Open Fire", "Merry Christmas Merry Christmas" and "I've Got Love to Keep me Warm") initially by a duet dressed in Father Christmas costumes. The duet is joined by both singers and dancers similarly dressed. The numbers are choreographed and directed strictly for uniformity of presentation with some members of the cast performing in the aisles.
71. The show closes with a flight of doves over the audience symbolising the peace of Christmas.

APPROACH TO STATUTORY INTERPRETATION

72. The parties were in broad agreement that the Tribunal "simply" needed to interpret the statutory language to discern the intention of Parliament.
73. The approach to be adopted, and the material to be used in undertaking this task, was agreed as that set out most recently by the Supreme Court in *R 9on the application of O (a minor by her litigation friend AO) v Secretary of State for the Home Department* [2022] UKSC 3 in the lead judgment of Lord Hodge:

"29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

“Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. ...

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. ... Thus, when courts say that such-and-such a meaning ‘cannot be what Parliament intended’, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.”

32. In their written case the appellants sought to support their contention ... by referring to statements by a Government minister, Timothy Raison, to the Standing Committee which considered an amendment which became section 1(4) to the 1981 Act. Such references are not a legitimate aid to statutory interpretation unless the three conditions set out by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 640 are met. The three conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering.”

74. The parties both referred the Tribunal to the detail of the approach to be adopted in respect of : 1) identifying the purposive interpretation to be adopted by reference to the mischief rule, 2) the need to avoid an interpretive gloss to statutory words, 3) interpreting to ensure statutory language has meaning and is not otiose but which also avoids absurdity, as provided

by the leading text on statutory interpretation Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020).

OTHER DRAMATIC PRODUCTION

75. The Appellant contends that the task of the Tribunal is to interpret “other dramatic piece” by reference to the language used and the purpose for which TTR was introduced.

76. Mr Boch contended that “other dramatic piece” was to be construed widely by reference to the context and purpose for which TTR was introduced as set out in the consultation document i.e. to support innovative British theatre. He contended that to require a story/narrative was an impermissible gloss on the statutory wording which had the potential to lead to absurdity.

77. In correspondence, and by reference to the evidence of Dr Green, it was contended, that (inter alia) *Waiting for Godot* by Samuel Beckett and *Cats* by Andrew Lloyd Webber were examples of plays and musicals which lacked a story, certainly a story within the traditional Freytag’s concept of having a beginning, a middle and an end (referenced by HMRC) and requiring a protagonist and an antagonist. As such to require a story would exclude from TTR productions readily and inevitably accepted by HMRC as included within the scope of the relief – expressly *Waiting for Godot* and *Cats*.

78. The Appellant contended that the purpose of “other dramatic piece” was to provide for the inclusion of dramatic pieces that may not otherwise meet the more precise language of play, opera or musical and thereby allowing for the evolution and development of modern and innovative theatre.

79. In response to HMRC’s contention that “other dramatic piece” needed to be construed by reference to the principle of ejusdem generis (i.e. that general words in a list should be interpreted such that they must have the same common features that constitute the genus of the specific items in the list) the Appellant contended firstly that the ejusdem generis principle was inapposite and, in any event, it was incorrect to assert that a narrative/story is a common and dominant feature of plays, operas and musicals.

80. The Appellant contended that if it was necessary to identify a genus for play, opera or musical so as to determine whether something was an other dramatic piece the Encyclopaedia Britannica did provide a potential candidate which entirely met the purpose for TTR as articulated in the consultation document. Under the heading theatrical production, the Encyclopaedia Britannica provides:

“Theatrical production comprises all aspects of planning rehearsal and presentation of a work. Such a work is presented to an audience at a particular time and place by live performers, who use either themselves or inanimate figures, such as puppets, as a medium of presentation. A theatrical production can be either dramatic or non-dramatic, depending on the activity presented.

Whilst dramatic productions frequently conform to a written text, it is not the use of such a text but rather a fictional mimetic (from Greek *mimesis*, ‘imitation’, ‘representation’) nature of the performer’s behaviour that makes the work dramatic. For example, a person walking a tightrope is performing an acrobatic act, whereas a person who pretends to be an acrobat walking a tightrope is performing a dramatic act. Both performers are engaged in theatrical presentation, but only the latter is involved in the creation of a dramatic illusion. Though a dramatic performance may include dancing, singing, juggling, acrobatics, or other non-dramatic elements, it is concerned mainly with the representation of actual or imagined life.

In nondramatic theatrical productions there is no intimation of “another existence” but simply entertainment of excitation of the audience by the performer. Whether acrobatic or musical, gestural or vocal, such activity is theatrical because it is presented by a live performer to an audience, but it remains non-dramatic so long as it has a purely presentational quality rather than a representational one.”

81. The Appellant relied on fictional mimetic and the presentation v representational distinction as the relevant distinction for the purposes of interpreting “other dramatic piece”.

82. HMRC’s position on this issue was, with respect to Mr Mark, somewhat hard to pin down and seemed a little fluid.

83. As articulated through correspondence HMRC considered a story to be necessary and that “the loosely connected theme of Christmas” was not enough. HMRC contended in correspondence that an other dramatic piece requires there to be “a sense of drama, with a narrative (oral mimed or otherwise implied) and a storyline (which would generally have a beginning middle and end). ... it is not necessary for the dramatic piece to have a written script. A sense of drama can be provided by the visualisation of the production, the music and other sound effects and provided there is also a story unfolding then that production may be described as a dramatic piece”. By their statement of case HMRC accepted that the Production was “dramatic”, and that the Production was “presented in a dramatic fashion, designed to build suspense in the audience and draw moments of awe and appreciation”. However, it was contended that the Production was not an “other dramatic production” on the basis that those words were to be interpreted such that as a general item in a list an “other dramatic piece” be construed by reference to the ejusdem generis rule. HMRC contended that the genus or common characteristic of “play, opera and musical” are that they “tell a story or a narrative”, through an artistic medium through which the story is told varies. As, in HMRC’s view the Production, was a series of musical, spoken, comedic and entertaining acts or sketches loosely based around the general theme of Christmas, it did not have the necessary story or narrative.

84. At the hearing Mr Mark again accepted that the Production was a dramatic piece but that in order to be an “other” dramatic piece the Production needed to have a story. By reference to an unspecified dictionary (presumed The Shorter Oxford English Dictionary) it was contended that in order to have the necessary feature of an “other” dramatic piece (as distinct from a dramatic piece) the production needed to represent “an account of imaginary or real people and events told for entertainment” by reference to which it was contended that a story required real or imaginary characters that the audience can follow. Mr Mark said that by reference to this definition of story, one he considered to have been accepted by Dr Green, *Waiting for Godot* and *Cats* could both be seen to have a story i.e. the audience could follow the characters of Vladimir and Estragon in *Waiting for Godot* and the various cats in *Cats*.

85. HMRC contended that on the Appellant’s case all dramatic productions would be included within the definition of “theatre production”, including pop concerts, stand-up comedians etc. which he contended cannot have been the statutory intent. This, Mr Marks contended, was illustrated by reference to the explicit inclusion of ballet within the definition of theatrical production, as per the explanatory note, whether or not the ballet has a narrative.

Discussion

86. At this stage of the analysis the focus is on the production as a whole. TTR applies to ballet and dramatic productions. Dramatic productions are defined by reference to plays, opera and musicals and other dramatic productions. The language is simple and, in the view of the Tribunal, clear. Parliament did not, by its choice of language, intend that relief should extend to nondramatic theatre productions.

87. As set out in the Encyclopaedia Britannica a nondramatic production is presentational and not representational in character. Nondramatic productions would include concerts performed in a theatre in which the musicians or singers present their skill for the purposes of entertainment. Similarly, an exhibition of acrobatic skill is nondramatic, as envisaged in the explanatory note vis a vis high wire trapeze. However, a production is dramatic where there is the creation of a dramatic illusion and/or the performance is representational.

88. The parliamentary draftsman recognised that in the case of ballet distinguishing between the dramatic and the nondramatic is more difficult. A performance of Swan Lake or the Nutcracker is clearly representational. However, many contemporary ballets are presentational, the ballet dancers entertaining as ballet dancers. It is the representational quality or dramatic illusion of a drama that is missing and not the “narrative” (a word not adopted in the statutory language) and hence what distinguishes it from a dramatic performance.

89. The language adopted, the stated purpose for which TTR was introduced and the terms of the explanatory note all appear to be met by reference to the description as provided by the Encyclopaedia Britannica.

90. Applying this approach, subject to meeting the requirements of section 1217FA(2) and 1217FB, any production considered as a whole which is dramatic in nature (i.e. an account of imaginary or real people and events told for entertainment representational and providing a dramatic illusion will be eligible for relief.

91. It was accepted by HMRC at the hearing that the Production was dramatic. The Tribunal agrees. The Tribunal considers that there are elements of the Production which, taken on their own, would not be considered to be dramatic, rather that they were presentational. However, the Tribunal considers that the Production, taken as a whole is representational and conveys a dramatic illusion/imagined life. As explained by Dr Green the audience is taken on an imaginative journey of Christmas memories. As such it is an “other dramatic piece”.

92. On the basis of the above conclusion it is not necessary to consider whether the Production has a story/narrative or what those words mean. It was not clear from HMRC’s submission whether, under the pre-1 April 2022 legislation, it was necessary for there to be a single story, or whether a number of stories (related or unrelated) would suffice. On the basis of their chosen definition of story it is implicit that a number of related or unrelated stories would be sufficient on the basis that the characters which were required to be followed may or may not relate directly to one another.

93. Were it necessary to have determined whether there was a story or stories running through the Production, the Tribunal would not have accepted HMRC’s limited definition of story. The Shorter Oxford English Dictionary does not limit story in the way the HMRC seek to do. Story is defined as follows:

“an account of imaginary or real people and events told for entertainment ...;
a plot or storyline ...; a particular person’s representation of the facts of the
matter ...”

94. This wider definition would include representation within its terms (as distinct from presentation) and also includes Dr Green’s preferred definition of story (which he accepted would apply to *Waiting for Godot* and *Cats*) that a story simply provides a framework of understanding and framing tool/device for a dramatic piece.

95. Dr Green and Ms Cull were both clear in their evidence that when Mr Cushing created the Production each scene was carefully and meticulously included for the contribution it made to the illusion imbuing the audience to recall their own happy memories of Christmas. As invited the Tribunal has considered all the scripted sections and lyrics used (original and

adapted) and is satisfied that in the sense of being drawn into an imagined world of memory and reflection for a world filled with the love, hope and peace associated with the arrival of Christ in the Christmas story, there is a story inherent within and running through the Production. There are also “mini” stories within it which are conveyed in a dramatic way.

PLAYING A ROLE

96. The Appellant contends that everyone involved in the Production is playing a role because none of them are playing themselves. As professional performers they are paid to adopt a role. Mr Boch referenced an example given by Ms Cull that each performer must put on their performance “face”, even where they are having a bad day or are stirred by the emotion of the Production. However, the singers or dancers feel they must nevertheless smile as a 1950s dancing girl in Vagas, hold a pious expression as chorister etc.

97. Mr Boch referenced the judgment of the First-Tier Tribunal in *Albatel Ltd v HMRC* [2019] UKFTT 195 (TC) in which the Tribunal determined that Lorraine Kelly was entitled to deduct her agent’s fees when calculating National Insurance Contributions on the grounds that her earnings were from employment as an entertainer (defined as “an actor, dancer, musician, singer or theatrical artist”). HMRC had refused deduction on the basis that Ms Kelly, when appearing on her TV programme “Daybreak”, was appearing as herself and did not thereby meet the definition of entertainer. The Tribunal accepted that Ms Kelly did not appear as herself, that she represented a persona of herself and was performing.

98. Reliance was placed on the steadfast view of both Ms Cull and Dr Green that the roles played by the singers and dancers included those of choristers, penguins, Vagas show girls (and boys), Irish dancers etc. and were not simply playing themselves.

99. Again HMRC’s position on playing a role seemed to shift and change. Their principal challenge to the Appellant’s case was that if it were correct that every “actor, dancer, singer or other performer” were playing a role simply because they were doing the job they had been trained to do the terms of section 1217FA(2)(a) would be otiose and would add nothing to the requirement that a production be a dramatic performance and be performed by professional performers.

100. HMRC took the Tribunal through scene by scene and confirmed:

- (1) The cast were playing a role in “Who?” (see paragraph 42 above). The lead singer was adopting the same role as Judy Garland and that all other members of the cast were in supporting roles.
- (2) The dancers in “Seventy-Six Trombones” (see paragraph 48 above) were playing a role because they were acting as if they were toy soldiers and pretending to play trombones.
- (3) The performer reciting “Hello Mudda, Hello Fadduh” (see paragraph 49 above) and “The Office Party” (see paragraph 54 above) dramatised the performance and was thus playing a role.
- (4) The dancers in the penguin scene (see paragraph 52 above) were all acting and mimicking penguins and so playing a role.

101. HMRC contended that the difference between these scenes and the rest were that the cast in the other scenes were presenting a skill/being themselves as singers or dancers as there was a lack of continuity in characterisation to justify the performance as the playing of a role.

Discussion

102. The Tribunal agrees with HMRC that the provisions of section 1217FA(2)(a) must represent a condition that is not de facto met by virtue of a production being a dramatic

production (it being noted that the requirement to play a role does not apply in order for a ballet to be eligible for TTR). As such the Appellant's argument that simply because the performer is being paid to be on stage and adopt a performance persona is not sufficient.

103. However, the Tribunal also cannot accept that by singing and dancing in a variety of clearly distinct and particular styles the singer or dancer in question is simply performing as themselves.

104. HMRC criticised the Appellant's case on the basis that it rendered the "playing a role" requirement otiose; however, HMRC's case that to play a role there must be consistent characterisation seemed to add little to their own assessment of what was required for there to be an "other" dramatic piece – which, as above, relied on there being an account of characters which the audience can follow. It would seem on that definition it would again inevitably be the case that a performance with characters would meet the requirement that it be through the playing of roles.

105. The Tribunal really struggled to understand the basis on which the scenes which HMRC accepted as involving the playing of roles could be distinguished from those that were not. For instance HMRC contended that the cast were not playing a role in the Top Hat scene (see paragraph 55 above) because the performance was not intended as a representation of the scene in the musical nor did it form part of the musical itself. As such, they contended that it was merely a presentation of a song from a musical by the cast. This was despite the obvious similarity between the scene and the film. Similarly, HMRC would not accept that any of singers (or indeed dancers who were either not singing or singing quietly) in the chorister scenes were playing the role of choristers on the basis that church coral singing is a style of singing and thereby a skill possessed by the singers.

106. During argument HMRC accepted that all members of the ensemble of a musical or opera would be accepted by HMRC as playing a role: supporting the lead character and it was on this basis that they accepted that the cast were all playing roles in the Who? scene (see paragraph 42 above).

107. The Shorter Oxford English Dictionary relevantly provides the definition of role as "an actor's part in a play, film etc; the function assumed, or part played by a person or thing in a situation". The origin of the word is 17th century French and is derived from the roll of paper on which an actor's part was written at a time where each actor was given only their own lines, cues and direction.

108. The Tribunal considers that this definition, understanding of the origin of the word and its context within the provision for TTR renders the interpretation of playing a role within a dramatic production clear. The Tribunal considers that where a performer is required to perform in accordance with a directed interpretation/characterisation (as distinct from identified character) they will be playing a role. It is the freedom to perform without direction and by reference only to their training that they will not be playing a role. In such a situation that individual will be performing as themselves. There will, in the Tribunal's view, be productions which are dramatic when taken as a whole in which performers may, nevertheless, perform by reference to their skill only and in such a case it will be necessary to determine whether such performers represent the majority of performers and thereby exclude the production from relief.

109. The Production represents an almost paradigm example of such a situation whereby the "playing a role" criteria had the potential to deny TTR to an other dramatic piece.

110. By reference to a careful analysis of the Production the Tribunal considers that:

(1) Paul Eastwood (the comedian) whilst part of a dramatic production and provided with some direction as to his act (he may not be lewd) is not, at least for the majority of his performance, playing a role. He has written his material and has the freedom to perform it. The performance of his material includes a role-playing element, for comedic effect (flirting with Ivana) but, in the Tribunal's view, Mr Eastwood is not playing a role overall.

(2) The juggler too is part of a dramatic production, but he is presenting his skill as a juggler. He has been directed to do so without banter with the audience but that does not constitute, in the tribunal's view directed interpretation or characterisation.

(3) The Tribunal also considers that the musicians (including the organist) are not playing a role. The orchestra performs the score as led by the conductor but do so in their capacity only as themselves, there is no interpretive element involved in their personal performance (though of course there is their contribution to the musical interpretation of the piece being played).

111. As such the Production is not one in which the performers wholly play roles.

112. The parties were agreed that whether the performers were mainly playing roles was a matter of impression for the Tribunal. The Tribunal is uncomfortable with that agreed position as it is contrary to a basic tenet of tax law that it should be certain. The overall impression of one Tribunal may, on the same facts, may be different to that of another.

113. However, it is to be noted that the section 1217FA(2)(a) test requires that the actors, singers, dancers or other performers give their performance wholly or mainly through the playing of roles. The Tribunal considers, contrary to the agreed position adopted by the parties, that it must be determined whether the majority (the language adopted in the explanatory note) of the performers are playing roles, if they are, the performance will be given mainly through the playing of those roles.

114. The ensemble of singers and dancers appear in the majority of the scenes (as a company or in smaller groups). They are hired on the basis not only of their singing and/or dancing abilities but also on their ability to be directed/act or take on the characterisation required of them to contribute to the intended dramatic illusion. The Production is meticulously directed and choreographed such that each singer or dancer adopts the directed interpretive effect for each scene. Each performer adopts a sombre and pious demeanour befitting to their role as a chorister, a forced and "glitzy" smile in *Top Hat* and *Who?* and so on. Whilst it is the case that in the second act some of the sung numbers are more presentational or concert like (i.e. the scene described in paragraph 68) and, vis a vis those scenes, the singers are performing as themselves, without the material influence of a directed interpretative style, these numbers are few and all of the singers and dancers have otherwise played the roles of Dickensian carollers, 1950s show members, rock and roll performers, choristers, toy soldiers, dramatists, penguins, stars of film/musical, gospel choir members, ballet dancers, and party revellers dress as Father Christmas. The dancers only perform in role as they play no part in the more concert like scenes.

115. As the dancers and singers together represent the majority of the cast (80 out of 112) it is clear that the performance is mainly through the playing of roles. Had it been the case that there had been 80 musicians/comedians/jugglers and only 42 singers or dancers the mainly playing roles test would not have been met.

FLOODGATES

116. HMRC contended that if the Production was considered to be entitled to TTR the floodgates would be opened and that the Royal Variety Performance, pop concerts, and karaoke productions would similarly be entitled.

117. With respect that argument is hyperbole. As the Tribunal understands it, on the evidence given by Mr Green, the Royal Variety Performance is a collection of acts who perform “as seen”. Each act will prepare and perform without reference to the other acts, the performers perform only their own act before being replaced on stage by the next act. The performance is produced but the individual acts are not directed as to interpretation or characterisation. Depending on the blend of acts and whether they are presentational or representational the performance may or may not, overall, be dramatic. Even if overall dramatic the production may or may not be mainly performed through the playing of roles. If, however, it is dramatic overall and performed mainly through the playing of roles it would be eligible for TTR.

118. A pop concert may have dramatic effects but is unlikely to present a dramatic illusion, it is most likely to be presentational, lacking any fictional mimetic. But even if sufficiently dramatic (Take That’s Circus Tour was potentially sufficiently dramatic to qualify as an other dramatic piece) the band members will be performing without directed interpretation and therefore as themselves.

119. Karaoke is unlikely to even be a theatre production never mind dramatic. It is in the experience of the Tribunal questionable whether the performers could be considered to be singers. Given the nature of Karaoke the performers are likely to be considered to be playing roles but without an overall fictional mimetic or dramatic illusion the Karaoke show would not be an other dramatic production.

DISPOSITION

120. For the reasons stated the Tribunal concludes that the Performance is an other dramatic piece in which the performance is mainly through singers and dancers playing roles and TTR is available.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

121. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**AMANDA BROWN QC
TRIBUNAL JUDGE**

Release date: 05 AUGUST 2022