

# LAW SOCIETY SUBMISSION

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**OPERATION OF SECTION 481 TAXES CONSOLIDATION ACT 1997**

DEPARTMENT OF FINANCE

JANUARY 2017

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## ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

## 1. Introduction

The Law Society of Ireland has recently been made aware that the Revenue Commissioners (“Revenue”) notified Screen Producers Ireland in relation to a proposed change to the operation of section 481 of TCA 1997.

The proposed change takes the form of an additional condition to be inserted in each certificate issued pursuant to section 481 of TCA 1997 (“481 Certificate”). This submission outlines a number of concerns with the proposed amendment to the current system of certification. The Society understands this change is proposed to apply to both new productions and productions currently underway and indeed additional requirements have been included in certificates issued in recent weeks. The proposed additional wording is:

“[The] Producer Company shall take all reasonable steps to ensure that all individuals employed directly or indirectly through an intermediary or otherwise and all contractors or providers of services, engaged by the producer company or qualifying company, as the case may be are in compliance with all the obligations imposed by the Tax Acts, the Capital Gains Tax Acts, the Value-Added Tax Consolidation Act 2010 and the Social Welfare and Pensions Acts” (the “Proposed Condition”).

There are a number of points the Society would raise in relation to the Proposed Condition and they are outlined below.

## 2. Communication of the proposed amendment

Firstly, the Society would like to raise a serious concern in relation to the communication of the introduction of the Proposed Condition. Despite the large number of parties affected by this substantial change, the Proposed Condition has not been communicated in an official public channel, such as a Revenue eBrief, Guidance Note or by way of statutory instrument. Indeed, the Society is not aware of the issue being discussed or raised at either the Main TALC Meeting or the TALC Direct Tax Committee meeting. Furthermore, most of the members of the Law Society Taxation Committee (the “Committee”) were unaware of the proposed change until it was raised by a member at the last Committee meeting, when they were provided with a copy of an e-mail sent by Screen Producers Ireland to its members.

Unless there were significant policy reasons not to do so, the Society is of the view that any change of this nature should have been raised through the normal TALC forums to give an opportunity for interested parties experienced in tax and legal matters to make any appropriate submissions. Furthermore, if such a change is to be introduced it should be communicated by one of the methods outlined above. As of the date of this submission, the Society notes that there is no published statement by Revenue on the introduction of the Proposed Condition and no information on the Proposed Condition has been included on the Film Relief section of [www.revenue.ie](http://www.revenue.ie). In addition, the Revenue Guidance Note for “Section 481” Investment in Film (updated July 2016) (the “481 Revenue Guidance”) has not been updated to refer to or elaborate on the Proposed Condition.

### 3. Ability to satisfy the proposed condition

Compliance issues are likely to arise for producer companies especially in circumstances where there are ambiguities in Revenue guidance and the communication of same.

The Society notes that the 481 Revenue Guidance currently states that *“Revenue will not issue a certificate unless the producer company, qualifying company, any companies controlled by the producer company and each person who is the beneficial owner of, or able to control more than 15% of the ordinary share capital of the producer company is tax compliant”*, which is verified by the submission of Tax Clearance Certificates.

In this condition it is at least possible to satisfy the condition by obtaining Tax Clearance Certificates. However, the extremely broad language included in the Proposed Condition includes the requirement on the Producer Company to take steps to ensure *“all individuals employed directly, or indirectly through an intermediary or otherwise and all contractors or providers of services”* have complied with not just provisions of the Tax Code but also of *“the Social Welfare and Pensions Acts”*. It is neither practical nor reasonable to suggest that a Producer Company should be able to verify compliance of all parties that it directly or indirectly deals with on a film or television production, especially given such a breadth of legislation and considering also that the Proposed Condition is not limited to compliance in connection with the particular film or television production in relation to which the certificate is issued.

A Producer Company is – for various legal and commercial reasons further discussed below – unlikely to be able to check or confirm if a counterparty has breached the relevant legislation and thereby satisfy the obligations imposed on the Producer Company by the Proposed Condition. This potentially will give rise to significant hurdles for producers seeking to finance the tax credit, as the risk associated with failure to satisfy the condition undermines the tax credit’s bankability.

### 4. Confidentiality

- 1.1. A further issue arises in relation to confidential treatment of taxpayer information. A taxpayer’s information cannot be made available to third parties. In circumstances where Revenue takes the view that a Producer Company is not compliant, it may be impossible for Revenue to provide the Producer Company with the information it would need to identify and potentially remedy the issue.
- 1.2. Moreover, there could be additional concerns from a data protection perspective in the accumulation and storage of details relating to tax where this information is communicated between the Producer Company and Qualifying Section 481 Company. The Society seeks confirmation that data protection advice has been obtained in relation to the additional data which the producer companies are being requested to gather and whether such collation will be in compliance with all Data Protection legislation.

## 5. Timing issues

There are inherent compliance difficulties for Producer Companies in achieving compliance with the Proposed Condition as there is no guidance as to what might constitute reasonable steps for the purposes of this requirement. The process leading up to the point of Revenue Certification is lengthy and often spans a number of months from the date of incorporation of the section 481 Qualifying Company. The initial contracts entered into by the Producer Company and/or the Qualifying Section 481 Company in the course of a project are likely to have been entered into prior to applying for Revenue Certification in accordance with section 481.

If by way of a “*reasonable step*” envisaged by the Proposed Condition, the Producer Company requests a tax compliance warranty in the Production Services Agreement, this would have to have been done at the point of execution which leads to difficulties for the significant number of projects that are already under way.

To this end, verification is a central issue for a Producer Company who is not in a position to enforce compliance, and practically must rely on a promise or warranty of any party engaged that tax compliance conditions have been met. It is difficult to see what further steps a Producer Company might reasonably be expected to undertake.

## 6. Retrospective taxation

It is a long established common law and constitutional principle that changes to law and especially taxation law should not be introduced with retrospective effect. A company should only be required to comply with legal requirements at the time of application for 481 certification. In light of the fact that the Proposed Condition is being imposed at the point of certification, this will mean it affects all current and pending applications.

The Society recommends that, if the Proposed Condition is to be imposed, there should be a carve-out in respect of all applicants for certification who were not informed of the Proposed Condition prior to submission of the application for certification.

## 7. Conclusion

The Society welcomes confirmation from the Revenue Commissioners in relation to the following issues:

- (i) That the Revenue Commissioners engage with the Society on the issues outlined within this submission, which raise serious legal and commercial concerns, prior to implementing the proposed change; and so that a pragmatic and practical approach is adopted.

- (ii) That the Revenue Commissioners publish guidance on reasonable and achievable conditions which would allow producer companies to comply with the Proposed Condition in light of the points the Society has raised on confidentiality, extent of the legislation listed and also from a data protection perspective.
- (iii) Confirmation that the Revenue Commissioners have received data protection advice, as outlined above, particularly as it relates to third parties and information sharing.
- (iv) Consideration of a exemption in respect of all applicants for certification who up until very recently, were not informed of the Proposed Condition prior to submission of the application for certification.

Finally, the Society is available and interesting in meeting with Revenue officials to discuss the issues outlined above; to and work with Revenue and relevant bodies to deal with the concerns we have raised.

For further information please contact:

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