



## **Submission to Board of Taxation**

### **Div 35 post implementation review of quality and effectiveness of Non Commercial Loss provisions.**

Prepared by:  
**Evan Lowenstein** B.Ec CPA  
Director  
Lowensteins Arts Management Pty Ltd  
Certified Practising Accountants

#### **INTRODUCTION**

We are a firm of Accountants and tax agents who have about 1200 clients involved in mainly arts related fields.

We have offices in both Sydney and Melbourne and have a wide experience in dealing with the tax affairs of the artistic/creative community Australia wide.

We are finding that the provisions of Div 35 adversely affect many of our clients. The clients of our firm who face the main brunt are those earning over \$40,000 from other sources and have losses from their artistic endeavours.

Most of these taxpayers are professional artists who are academics of some seniority who by necessity need to be practising artists in order to obtain employment in tertiary level art schools.

## **TEST CASE**

In June 2002, we applied for a private ruling requesting the Commissioner to exercise his discretion pursuant to Div 35-55 with regards to a senior academic who agreed to be used as a test case for the purposes of seeking clarification on whether his loss from artistic activity could be offset against his income derived from employment as a senior academic at the University.

The Tax Office responded with a very comprehensive Notice of Private Ruling of which the main thrust was that there is a distinction between the taxpayer's activity as an artist and that of a Professor.

We disagree with the intent of the legislation even though we have no argument with the legalistic interpretation of the Ruling.

We submit that the grounds for the exercise of the Commissioners Discretion is exercised in too narrow a fashion that does not take into account the career path of those in the arts. From evidence gleaned anecdotally, the Commissioner is mainly biased towards giving discretion to Primary Production activities.

## **Compliance Issues**

The legislation which enables taxpayers to apply for a private ruling gives rise to a questionnaire which places extreme and unrealistic burden on the Rulee to provide information which is extremely hard to quantify, Many questions do not apply to the vast majority of those who are asking for the exercise of the discretion. To ask a senior Artist to seek outside verification for the fact that it takes time to earn a profit

in the arts is not realistic.

When the legislation was first introduced, we calculated that the cost to get a private ruling to be almost 3 times the normal cost of preparing a tax return. Simply the length of the questionnaire was so involved that we envisaged an extra \$500 to \$1000 per return depending on the extent of the input from the Taxpayer themselves.

Therefore we have the situation where the Taxpayer is foregoing what could theoretically be a positive ruling and therefore gain the ability to claim losses against a large accounting bill from his/ her Accountant.

## **UNINTENDED CONSEQUENCES**

The Board is assessing the likelihood of unintended consequences of a substantive nature.

We submit that the Arts Community has been caught up in the net, which seeks to disqualify certain people who can not pass the 4 tests from claiming losses against other income.

We do not have any trouble with the intent of the Legislation which seeks to prevent the Collins /Pitt Street farmers from claiming uncommercial losses against their other income, as often it is an artifice designed to avoid tax.

However from our experience the vast majority or members of the Arts Community are caught up in this notwithstanding the amendments, which gave them a \$40,000 cap on earnings and put them on a par with Primary Producers.

Most senior artists are also senior academics and are earning in excess of \$40,000.

It is a condition of their employment that they practise their art and some are even

given a day off a week to pursue their commercial art practice.

To distinguish as the Tax office have between the 2, 3 or many more activities on the basis that one activity is employment and the other is business seems to be quite unfair from the point of view of equity.

An artist does not make that distinction; teaching, painting; writing is all an intrinsic part of their career as a professional artist.

We believe this to be an unintended consequence of the legislation.

We as a firm have been active in pursuing changes to this legislation. We continue to be available to the Board should it seek some further clarification of some of the points listed above.

Contact details:

**Evan Lowenstein**  
Lowensteins Arts Management Pty Ltd  
Level 5  
574 St Kilda Road  
Melbourne  
VIC 3004.

Ph: 9529 3800  
Fax: 9525 1616  
Email: [evanl@lowensteinsarts.com.au](mailto:evanl@lowensteinsarts.com.au)