

26 February 2004

Chairman of the Board  
The Board of Taxation  
Post-implementation review NCL  
c/- The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Chairman,

**Re: Post-implementation review of the Non-Commercial Losses ('NCL') rules in Division 35 of ITAA 1997**

In order to assist the Board of Taxation ('the Board') with its post-implementation review of the NCL rules, the National Tax and Accountants' Association Ltd ('NTAA') would like to submit the following comments for consideration by the Board.

Although many post-implementation issues associated with the NCL rules were adequately addressed by the ATO Tax Practitioner Forum (NCL), the following comments relate to further issues that the NTAA believes need to be addressed.

**1. Grouping 'similar' business activities under S.35-10(3) of ITAA 1997** – where an individual taxpayer carries on separate business activities of a 'similar' kind, the taxpayer has the option of grouping those activities when applying the NCL rules.

In Taxation Ruling 2001/14, the Tax Office provides a list of factors that can be used to determine whether separate business activities are 'similar' – refer to paragraph 50 of the ruling. In addition, Example 2 (from paragraph 123) illustrates how to apply these factors in making this determination.

However, based on feedback the NTAA has received from its members, the NTAA believes that taxpayers need further guidance in this area by way of more practical examples. This would enable taxpayers (and tax practitioners) to gain a better understanding of how the grouping rules apply to different factual circumstances and, therefore, would reduce the uncertainty that currently exists in this area.

**2. The 'other assets' test in S.35-45 of ITAA 1997** – there are currently two problems with the 'other assets' test in S.35-45 that have not yet been resolved:

- (a) Taxpayers who have entered the Simplified Tax System ('STS') **cannot** count depreciable assets in an STS pool towards the \$100,000 threshold. That is, Item 1 in the table to S.35-45 **only** makes reference to those assets whose decline in value can be deducted under Division 40 of ITAA 1997 (generally, for non-STS taxpayers).

Item 1 does **not** make reference to those assets whose decline in value can be deducted under Division 328 of ITAA 1997 (for STS taxpayers). This has also been confirmed by the Tax Office in a recent Interpretative Decision (refer to ATO ID 2003/1005).

This clearly appears to have been an oversight when the legislation was drafted. Therefore, the NTAA strongly recommends that the Government amend the legislation to include a reference to depreciating assets whose decline in value can be deducted under Division 328 (ie, for STS taxpayers).

- (b) For depreciating assets, Item 1 in the table to S.35-45 prescribes that it is the 'written down value' of each asset that is counted towards the \$100,000 threshold.

However, where the asset has been allocated to a low-value pool (refer to Subdivision 40-E of ITAA 1997) or even an STS pool (refer to Division 328), the 'written down value' of the asset **cannot** be identified, because it is effectively subsumed into the pool balance.

Therefore, the NTAA strongly recommends that the legislation be amended to also address this issue.

If there are any further queries in relation to the above comments, please do not hesitate to contact me on (03) 9862-7724.

Yours Sincerely,

**James Deliyannis**  
**Senior Taxation Manager**