

Submission of the Arts Law Centre of Australia on the impact of the non-commercial loss provisions of the *ITAA* on professional artists. The submission provides examples in support of the submission provided by the Australia Council for the Arts.

The examples set out below are typical of the circumstances of arts practitioner taxpayers from a range of arts professions. Arts Law provides these examples with the aim of giving the Board a better understanding of the commercial practices of the various arts sectors. These examples also illustrate the points made in the submission by the Australia Council concerning the impact of the non-commercial loss provisions in Division 35 of the *Income Tax Assessment Act 1997*.

Example 1: Artists who earn more than \$40,000 per annum from non arts-sources and who make losses from their arts business, but are unable to deduct the losses generated by their arts business due to the operation of Division 35. That is, they can't meet any of the four "commerciality tests" in Division 35:

1. H is a visual artist/sculptor who has a senior full-time lecturing position in an Art School at a university. Whilst not a condition of his contract of employment, H is expected to be carrying on an arts practice in order to properly carry out his teaching and other academic duties. H earns approximately \$70,000 per annum in his academic position so therefore does not fall within the exemption in Division 35. H is also unable to meet the commerciality requirements in Division 35.
 - H is a mid-career artist. He has a Master of Fine Arts degree. He has exhibited in solo and group shows most years in the last 10 years. His work is also regularly selected in competitions, although he has not won one. He has also applied for State and Commonwealth grants but has not yet been successful. For years 1998-2002 H exhibited annually at a gallery that represented him. During those years he made a modest profit in 2 of the 5 years (\$2,000 and \$5,000). In the other 3 years he made losses of \$500-\$8,000. In 2003 he was not represented by a gallery but still exhibited on 4 occasions in group shows and made a small profit \$1,000. His income from his professional arts business has never reached \$20,000.
 - Whilst in some years H has made a small profit from his arts business, he has not returned a profit from the arts business in 3 out of 5 years.
 - H has a studio which he built at the rear of his home in which he carries out his arts business, but this is not worth \$500,000 (resides in city other than Sydney);
 - H does not utilise other assets on a continuous basis worth \$100,000.
2. P is a professional visual artist who is the head of an art school and receives a salary of \$122,000 per annum. One of his conditions of employment is that he is a practising artist.
 - The sales from P's arts business are under \$20,000 per annum.
 - P has not made a profit in the past three out of five years.

- P has invested less than \$100,000 in his business and less than \$500,000 in real property.
 - P is unable to avail himself of the exemption in Division 35 as his income is more than \$40,000.
 - P made losses from his arts business of \$20653 and his accountants considered that the loss should be regarded as an expense incurred in gaining assessable income (his academic position) and should be deducted pursuant to Division 8-1 of the ITAA. P's accountant's asked for a private ruling whereby the ATO consider the activity of P as a visual artist to be: creating art, lecturing about art, writing about art and that all arts related activities should be grouped under the same activity test. The ATO rejected this approach.
3. L is a classical guitarist. She is also a senior academic at a university (in guitar studies). Until recently most of her income was obtained from this position.
- L's income is approximately \$80,000 per annum.
 - For twelve years L has also carried on a business as a professional guitarist. In the first 12 years of her career as a professional guitarist she has not satisfied any of the commerciality tests set out in Division 35, subsidizing her business as a classical musician through her academic income.
 - It will only be in the next financial year that through her work with a fabulous new classical group, she will make a substantial profit.
 - This example illustrates that the building of a professional artistic profile and portfolio requires significant time, personal dedication and investment. The recent success was impossible to predict, the nature of the market being extremely volatile.
4. F is carrying on a business as a classical pianist. However F's major income is earned through his teaching activities from which he earns more than \$40,000 per annum.
- F studied at a tertiary level in piano performance. F is regarded in Australia as a pianist of the first rank yet his income from performance and royalties is curtailed because of the limited opportunities. He engages a manager to assist him obtain engagements whenever possible.
 - F invests heavily in his artistic business. His expenses include:- recording costs, competition entry fees, travel, piano maintenance and a manager.
 - F does not earn \$20,000 income per annum from his business as a pianist and he is yet to make a profit. His future income from artistic activities is difficult to predict.
 - F does not invest assets of more than \$100,000 in his business nor does he have any real property which is utilised in his business.
5. G is a composer and composes music for films. G has worked as a composer for 10 years and has worked on feature films which have had some success in the "art-house" market. Because of the difficulties providing for his family from arts business income alone, last year G decided to take up a position with a national community development

organisation where he works full-time and earns a salary of \$50,000. During G's evenings, on weekends and whilst on annual leave he continues to compose for films.

- During the last 10 years G has never earned \$20,000 income from his business as a composer.
 - G has made either very small profits (\$1,000) or losses of \$5,000-\$10,000 from his business as a composer.
 - G did not utilise real property worth more than \$500,000 – in fact until taking a full-time position in a non-arts related field could not contemplate ever owning any real property.
 - G did not utilise assets worth \$100,000 or more in carrying out his business as a composer.
 - There is no likelihood in the near future of G being able to satisfy any of the commerciality tests in Division 35.
 - Before taking up his current position G worked in post-production work in a commercial studio and would have been able to rely on the exemption for artists in Division 35 as he did not earn more than \$40,000.
6. We have a number of examples of film-makers who have been making films for 4-10 years. They work in full-time "day jobs" so that they can make films in their spare time or while on leave from their salaried positions. Most earn more than \$40,000 in their day jobs. The various positions the film-makers perform include:- project officer-type positions with government film organisations such as Australian Film Commission (AFC), Film Finance Corporation, Screenwest; producer in a production company that makes television commercials, manual work on an oil rig, waiter in hospitality industry and actors (a couple with regular employment earned more than \$40,000). The films they make include short feature films, documentaries and dramas. None of the filmmakers are able to satisfy the commerciality provisions of Division 35.
- Due to the small opportunity for returns and the high costs involved in making films, none earned \$20,000 or more from film-making businesses. Costs include: - travel, writing, printing, research footage, shooting film (\$5,000-\$10,000 per minute), entry fees for film festivals, productions costs. A 12-15 minute film funded by the AFC costs \$20,000-\$100,000 to make.
 - None made profits from their film-making businesses. Even filmmakers who receive grants/funding to cover the majority of costs, still make a loss as a result of non-funded costs.
 - No-one utilised real property worth more than \$500,000 in their film business; and
 - No-one had assets worth more than \$100,000 which they utilised in their film business.

Example 2: Artists who are currently under the \$40,000 cap for non arts-related income (and thus fall within the exemption in Division 35), who are carrying on an arts business, yet who could not meet any of the four commerciality tests.

7. A is a visual artist who has been carrying on an arts business for 14 years. He is represented in State and National galleries. His work is regularly selected for major competitions and he has won a major prize (\$10,000). A has received several Australia Council and state government grants. Until a year ago, A also worked part-time as a casual lecturer in an art school. A has recently moved States, with the aim of his art work reaching a greater market, but has had to take employment in a non-arts related position 3 days/week. A has never earned \$40,000 or more from non-arts related income so falls within the exemption in Division 35. In 12 out of the last 14 years, however, A would have been unable to meet the commerciality tests set out in Division 35.
- A has, in a good year, earned \$15,000- \$20,000 from his arts business. This has occurred in 2 of the last 14 years;
 - A made a profit from his art work in 4 of the last 14 years and would have been able to satisfy the profit test, for the first time, only last year;
 - A has always rented studio space and is unlikely to ever be able to afford to buy a studio worth \$500,000 where he could carry on his arts business;
 - A utilises other assets worth \$10,000 only, in carrying on his arts business (computer equipment and machinery).
8. R is a young opera singer who has invested heavily in her professional arts business. After training at a tertiary institution in opera studies, R has paid for ongoing tuition in vocal and language studies. Other expenses include competition entry fees, coaching expenses, and travel expenses. R is fortunate in that she has received some prize winnings and one government grant, whereas many of her colleagues have not, as these opportunities are limited. R takes employment in flexible low paid jobs in order to be able to devote herself to her opera business so is able to avail herself of the exemption for professional artists in Division 35. Her circumstances, however, which are fairly typical of an emerging opera singer, illustrate the inappropriateness of the requirements of the commerciality provisions for a person carrying on a professional arts business as an opera singer.
- In the past 7 years R has never earned \$20,000 income from her opera singing activities although she performs regularly and employs an agent.
 - R has not made a profit in any year from her opera singing activities as at this stage in her career the expenses inevitably are greater than her income.
 - R has invested less than \$100,00 in assets in her business and less than \$500,000 in real property.

Example 3: An artist who is engaged in multiple activities that are all related to her art and who has difficulty working out whether she is carrying on one arts business or several discrete arts businesses

9. D is a dancer and choreographer and is carrying on a business as a professional artist. D mainly works freelance for other dance companies and is an emerging choreographer.

D has also worked internationally as a dancer for various companies and choreographers. D also works 10-10 hours week in a café to supplement her income depending on how much work she has from her dance business at any one time. D is engaged in a wide range of activities from which she derives her arts business income. The sources of her income include:

- Grant from Australia Council of \$9400 to develop a new solo work;
- Commission from the Performance Space in Sydney to choreograph a 10 minute dance piece;
- In 2003 she was employed for three months as a dancer in an international dance project in Berlin choreographed by an Australian choreographer in residence. D was paid \$6500 for the 3 months work but she paid her airfare to, and accommodation in, Berlin (\$3200);
- D teaches one dance class at a reputable company each week and one class per week of dance therapy to disabled children, earning \$6500 per annum.
- D produces a limited season work with a group of other independent performers at a private dance studio. The performance runs for 3-4 nights at a dance venue in Newtown. The dancers/choreographers charge a fee for the performance which usually covers their costs.
- D's expenses include international airfares and accommodation, local travel, venue hire for rehearsals and performance, marketing expenses for performance, studio hire for developing new dance work, dance classes, massages, training attire and costumes. The total is \$19,700.