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**PAINTERS AND SCULPTORS ASSOCIATION OF AUSTRALIA LTD**

**SUBMISSION TO THE BOARD OF TAXATION ON NON COMMERCIAL LOSSES PROVISIONS OF DIV 35.**

We are a member based organisation representing over 200 of Australia's best-recognised artists.

One of our prime objectives as an organisation is to act in the best interests of the visual arts community with respect to various taxation implications of this legislation and its impact on our members.

Our organisation has been involved in discussions and negotiations at both the administrative level and the political level seeking changes to Div 35.

We believe that this legislation is discriminatory towards artists and we enclose various submissions that we have made over the last couple of years which clearly states our case.

*Signal*

EVAN LOWENSTEIN  
DIRECTOR

29 January, 2003

## TAX LEGISLATION DISCRIMINATES AGAINST ARTISTS

Professor Peter Pinson is the Head of the School of Art at the University of New South Wales.

He is also a practising artist who in the year ended 30 June, 2001, incurred a loss in his trading activities.

Under Provisions of the Income Tax Act, dealing with losses from non-commercial activities, that were introduced in July 2000, Professor Pinson was prevented from claiming the loss against other income, unless he met one of four tests, which were :

- sales had to exceed \$20,000
- a profit had to be made in three out of the past five years
- he had to own equipment used in his business in excess of \$100,000
- he had to own real estate in excess of \$500,000 used in the business

There was a concession granted to artists, which provided that if they earned less than \$40,000 from other sources, then the tests did not apply and they could deduct their art related losses against this other income.

In Professor Pinson's case, his income from other sources was more than \$40,000 and as he did not pass any of the four tests, the deductions were quarantined to be claimed at a time when he met one of these criteria.

Our firm requested a private ruling from the Australian Taxation Office, on the following two grounds :

1. It was a condition of Professor Pinson's employment that he be a practising artist and therefore the expenses incurred by him in carrying on that business were necessarily incurred in gaining assessable income.
2. We also argued that his teaching activity should not be separated from the activity of creating art, as many artists, paint, sculpt, create prints, write poetry, perform, as well as teach and they consider that is the same activity.

We have now been advised by the Australian Taxation Office, that our arguments have not been accepted and in their view, expenses incurred by Professor Pinson were incurred in his business activity and "there are no specific provisions which would provide relief, on the grounds this his employment and his business activities are both arts related, or that his employer requires him to produce and exhibit art."

They also advised that by its very nature, teaching art as an employee cannot form part of any business activity and consequently, the losses from one cannot be offset against income from the other.

Professor Pinson is only one of many mid-career artists, who are effected by this decision of the Australian Taxation Office.

Professor Pinson's options are to accept the decision and to defer any claims until he meets the criteria or to lodge an Objection and, if disallowed, take the matter to the Administrative Appeals Tribunal or to the Federal Court.

Naturally, the costs incurred in this exercise would be extremely high and may be beyond the ability of mid-career artists to contemplate. Even if they could afford the costs, they are not assured that the Court or Tribunal's decision would be in their favour.

It is ironic that these regulations do not effect people who incur losses through negatively geared properties or share trading or share investment activities, who under the Legislation can offset losses from these areas against other income.

Yet artists like Professor Pinson cannot claim losses from creative activities. This discriminates against people who create, as against people who shuffle paper around, and add nothing creative to the culture of the nation.

It is also to be noted that the Myer Report of the Contemporary Visual Arts and Crafts enquiry has recommended the removal of the \$40,000 limit, on secondary income of artists and that the exemption from the non-commercial losses provision be extended to all visual arts and crafts practitioners carrying on an legitimate arts business activity.

In our submissions to the Myer Enquiry, we pointed out that there are already in existence guidelines that have been set down by the Australian Taxation Office to distinguish hobbyists from taxpayers carrying on business.

It is our view that once artists have met this criteria and are accepted as professional artists carrying on business, there is no justification in putting additional conditions on their ability to claim legitimate business expenses.

TOM LOWENSTEIN

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## **SUBMISSION**

### **RE : THE VISUAL ARTS**

I am making this representation, in my capacity as Executive Director of The Painters and Sculptors Association and as the Senior Partner of Lowenstein Sharp, Certified Practising Accountants, with offices in Melbourne and Sydney.

Our firm has acted as accountants and advisors to artists for the past 25 years and at present we attend to the tax affairs of some 700 - 800 artists, predominantly visual artists, but also including writers, musicians, actors, photographers, ceramicists and others in the creative areas.

Among the visual artists, we cover the whole spectrum:

- the very successful artists, like John Olsen, Charles Blackman, Margaret Olley, John Coburn
- the established and mid- career artists, who are selling their work, but still need to supplement their income, and
- the recently graduated young emerging artists commencing their careers, who are selling very little and must supplement their income to survive.

The recently introduced "intergrity measures" (legislation dealing with losses from non commercial activities) are having disastrous consequences for some artists, despite the amendments which have enabled them to offset losses from their art related activities against non art income of less than \$40,000.

My understanding is that the purpose of the legislation was to stamp out a number of practices whereby taxpayers, who in fact may have been hobbyists, claimed expenses of "carrying on a business", and would offset these losses against other business income.

Most of these practices, which resulted in substantial losses to revenue, related to hobby farmers, but it appears that artists were caught up in the process.

I feel that there is a lack of understanding by most people, including politicians and the tax office, of what motivates artists and creative people.

Based on my 25 year involvement in the arts, I would like to make a few observations about visual artists, although most of these observations also apply across all sectors of the arts :

1. Artists, generally, are not predominantly financially motivated. This does not mean that they don't want to make money. It means that their priorities lie in attempting to create great works of art and they are not prepared to compromise their art in order to maximise their profits.

Tax considerations rarely influence their decisions, or their expenditure. Artists have not chosen their profession on the basis of the tax benefits available, nor do they carry on their business with a view to minimize tax. To compare artists to hobby farmers, and indirectly label them as tax avoiders, when all they do is to claim expenses in carrying on their business, is regarded by them as insulting.

2. All artists would like to earn sufficient income from their art to support themselves.

It is not by choice that they take on other jobs or undertake other income producing activities; it is due to necessity, it is due to the fact that they do not earn enough income from their art.

It is not a case of the waiter who paints in his spare time, but a painter who cannot earn enough income from the sale of his paintings, who waits on tables to supplement his income, so that he is able to continue his art activities.

3. It is the inherent nature of the arts profession that recognition and the accompanying financial success in most cases takes many more years, than the financial rewards in most other professions or trades.

If we look at some of the currently successful artists, such as John Olsen and Charles Blackman, early in their careers, they were washing dishes and cooking in restaurants. Other well known artists, if they could not get teaching jobs, took on laboring and other manual jobs

4. I am aware that the Government and the Tax Office are concerned that there are some individuals calling themselves artists, who are actually hobbyists, and not carrying on business as artists, and are consequently abusing the system.

However I am also aware that there are guidelines in existence, that have been set down by the Tax Office to distinguish hobbyists from practising artists. At present negotiations are in progress between representatives of the Tax Office and a number of arts organizations, and individuals, (including myself) to finetune some of the criteria which defines a professional artist.

**It is my view that once artists meet the criteria, and are accepted as professional artists, there is no justification in putting additional conditions on their ability to claim legitimate business expenses.**

The current Legislation does not affect the established artists, who have no difficulty in satisfying at least one of the criteria.

It affects those artists who are already struggling to make ends meet and who can least afford to forego the tax deduction on the losses from their art related activities.

In fact the current legislation has the effect of penalizing artists for their lack of financial success, which I am sure is not the intention and therefore should be amended.

I am more than prepared to expand on any of the points referred to in this Submission, and provide some anecdotal data to support it.

Yours sincerely,  
THE PAINTERS & SCULPTORS ASSOCIATION  
OF AUSTRALIA

**TOM LOWENSTEIN,  
EXECUTIVE DIRECTOR**

## BACKGROUND

In 1997, a number of artists were targeted by the Tax Office to determine whether they were "in business" for taxation purposes.

This resulted in substantial dialogue between the Tax Office and the Arts Law Centre of Australia, the National Association for the Visual Arts and a number of practitioners.

This culminated in a forum where papers were presented by Peter Pledge, Assistant Commissioner of Taxation and Tom Lowenstein of Lowenstein Sharp, CPA [papers enclosed].

On careful reading of both these papers, it becomes obvious that there was a great deal in common in the attitude of the presenters, the main difference being the emphasis placed on the profit motive. Both presenters agreed that each case has to be looked at on its merits.

This question of "carrying on business" received quite a deal of public exposure, made artists and their advisors aware of the issues involved and with the exception of one or two incidents, there has been very little activity by the ATO in relation to artists "carrying on business".

Nevertheless, at present there are negotiations between Arts Law, NAVA and the Australian Taxation Office, to officially clarify the situation and to put in place, firm guidelines and criteria to establish the boundaries between professional artists and hobbyists.

## NEW BUSINESS TAX LEGISLATION

As from the 1 July, 2000, the new Integrity Measures, introduced Legislation dealing with losses from non-commercial activities.

This Legislation had the effect, that even if it was accepted without question, that an artist was "carrying on business", he or she would still be precluded from claiming losses from such business activity, unless he or she met one of four criteria.

1. Assessable income had to exceed \$20,000
2. Profits had to be made in 3 out of 5 years.
3. Assets utilized in the business had to exceed \$100,000
4. Utilized real estate worth more than \$500,000

Subsequent amendments to the Legislation enabled artists with income from other sources of less than \$40,000 to offset their art business losses against this other income. Without a doubt, this has been of great assistance to the very low income earners. However, it is still a major problem for artists who receive other income in excess of \$40,000 and are precluded from deducting the losses from their art related activities.

My understanding of the background to the Integrity Measures was to stop "hobby farmers" from rorting the tax system, yet it is likely that many of these taxpayers would be able to meet at least one of the criteria, the most likely being able to claim utilizing assets of \$100,000.

Regrettably it appears that the industry that is mostly affected by this legislation is the artistic community.



Very few artists will show a profit in 3 out of 5 years, or utilize \$100,000 in assets or \$500,000 in real estate, so the only criteria available to them is to achieve sales in excess of \$20,000.

For a struggling artist to achieve this, every year is extremely difficult, if not impossible, and even established artists, are not guaranteed successful sales from each exhibition.

I am enclosing herewith a number of anecdotal cases, which highlight the problems faced.

#### CASE 1

"A" aged 70, a sculptor with an international reputation, with major public commissions in Canberra, Melbourne and Sydney.

"A" is in receipt of \$60,000 as a widow's Superannuation pension and is in the process of preparing for a major exhibition.

She has no cash or assets; the only funds available to meet her costs of making the sculptures are her Superannuation receipts, less income tax and living expenses. Consequently, as a result of the current Legislation, it will take "A" at least three years to prepare for her exhibition, compared to less than two years under the previous Legislation.

## CASE 2

"B" Potter with an international reputation, having had exhibitions regularly in Australia, as well as in Japan.

He usually has one exhibition every three years, and is likely to sell somewhere between \$200 - 300,000.

He will then spend the next two years researching and developing a new body of work. His investments yield him other income, in excess of \$40,000 and consequently he is obliged to quarantine his losses arising from his art related activities, until such time as he meets one of the criteria set down by the Legislation.

## CASE 3

"C" is a Professor of Fine Art at a New South Wales University and is in receipt of a salary in excess of \$100,000.

One of the conditions of employment by the University is that all Lecturers and Professors be practising artists and in fact the University is confirmed, that they regard that "B" is a professional artist. )

During the previous year, "B" has had four solo exhibitions, as well as a number of mixed exhibitions, however his sales did not reach \$20,000 and also he has not met any of the other criteria and in fact has lost in excess of \$20,000 from his art related activities.

As his income from other sources exceeds \$40,000, "C" is under the current  
Legislation required to quarantine the losses from his art.

As you can understand, there are numerous other cases, with identical or very similar  
problems.