# *TR 2004/D12 - Income tax: carrying on business as a professional artist*

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# Draft Taxation Ruling

## Income tax: carrying on business as a professional artist


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***Preamble***

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the* ***Taxation Administration Act 1953****. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office.*

# What this Ruling is about

1. Having regard to the distinctive nature of the arts profession, this Ruling provides guidance on the principles to be applied in determining whether an artist is carrying on *business[1] as a 'professional artist' (refer to the definition of this term in paragraph 3). This question is relevant to a number of tax law issues, such as:

(a) when an amount is income according to ordinary concepts under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997), because it has been earnt in the ordinary course of carrying on such a business;

(b) whether a loss or outgoing has been necessarily incurred under section 8-1 of the ITAA 1997 in carrying on a business of this type;

(c) whether Division 35 of the ITAA 1997 applies,[2] where losses from a business activity are deferred and allowed as deductions in a future year against income from the same business activity; and

(d) more specifically, whether the second arm of the exception contained in subsection 35-10(4) of the ITAA 1997, concerning a '*professional arts business', applies.

2. However, this Ruling deals only with the threshold question of when a person carries on business as a professional artist and does

[1] An asterisk before a term in this Ruling denotes that the term is defined in the *Income Tax Assessment Act 1997* (ITAA 1997). Terms that are defined in the ITAA 1997, and identified with an asterisk in that Act, are similarly identified in this Ruling.
[2] Taxation Ruling TR 2001/14 considers the operation of Division 35 of the ITAA 1997.

not cover in any detail these related issues. Other related issues also not dealt with in this Ruling are:

- the application of Division 70 of the ITAA 1997 to art works (see paragraph 5), which are *trading stock within that Division; and
- the application of Division 40 of the ITAA 1997 to capital expenditure on the cost of *intellectual property, which is a *depreciating asset within that Division.

**Class of person/arrangement**

3. This Ruling applies to professional artists. For the purposes of this Ruling, professional artists are persons who carry on activities of the type referred to in the definition of '*professional arts business', in subsection 35-10(5), that is activities as either:

(a) an 'author of a literary, dramatic, musical or artistic work';

(b) a '*performing artist'; or

(c) a '*production associate'.

4. This Ruling does not set out to consider the meaning of these terms, other than to observe that the terms, '*performing artist' and '*production associate' are defined in section 405-25, which are set out in the Definitions section (see paragraph 98). The 'Note' to subsection 35-10(5) states:

> The expression ‘author’ is a technical term from copyright law. In general, the ‘author’ of a musical work is its composer and the ‘author’ of an artistic work is the artist, sculptor or photographer who created it.

5. In this ruling, the term ‘art work(s)’ is used to describe the product or services produced as a result of activities undertaken during the course of a ‘*professional arts business’, as defined in paragraph 3.

# Date of effect

6. It is proposed that when the final Ruling is issued it will apply to years commencing both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 22 and 23 of Taxation Ruling TR 92/20).

# Ruling

### Nature of art activity

7. This Ruling recognises that because of the nature of art activity, arts businesses typically have different characteristics to those found in other businesses. For example, people who engage in *professional arts businesses are often motivated by creative purposes and the desire to influence public opinion. Art is not always produced with a pre-existing market in mind; rather, an innovative artist may have to create a new market for their work. For this reason, a large part of being in business as a professional artist may involve activities directed towards reputation building and audience/market creation. (See further, paragraphs 34 and 53, for a more detailed description of some of these distinct characteristics of being in business as a professional artist).

8. The courts have recognised the distinct nature of arts activities (see for example, Lord Simon's judgment in *George Hensher Ltd v. Restawile Upholstery (Lancs) Ltd* (1976) AC 64 at 95 (*George Hensher*), as quoted by Hill J in *FC of T v. Murray* (1990) 21 FCR 436 at 451; 90 ATC 4182 at 4194; (1990) 21 ATR 78 at 91 (*Murray*)), and this is also acknowledged in the existence of the income tax averaging scheme in Division 405 of the ITAA 1997. However, a *professional arts business must be distinguishable from a hobby or recreation. As Bowen CJ and Franki J said in *Ferguson v. Federal Commissioner of Taxation* 79 ATC 4261 at 4264-4265; (1979) 9 ATR 873 at 876-877 (*Ferguson*), in relation to carrying on a business generally:

> There are many elements to be considered. The nature of the activities, particularly whether they have the purpose of profit making, may be important. However, an immediate purpose of profit-making in a particular income year does not appear to be essential. Certainly it may be held a person is carrying on business notwithstanding his profit is small or even where he is making a loss. Repetition and regularity of the activities is also important. However, every business has to begin, and even isolated activities may in the circumstances he held to be the commencement of carrying on business. Again, organization of activities in a business-like manner, the keeping of books, records and the use of system may all serve to indicate that a business is being carried on. The fact that, concurrently with the activities in question, the taxpayer carries on the practice of a profession or another business does not preclude a finding that his additional activities constitute the carrying on of a business. The volume of his operations and the amount of capital employed by him may be significant. However, if what he is doing is more properly described as the pursuit of a hobby or recreation or an addiction to a sport, he will not be held to be carrying on a business even though his operations are fairly substantial.

### Usual indicators apply

9. The common law has identified a number of indicators that are relevant in determining whether a taxpayer's activities constitute the carrying on of a business. The question whether a taxpayer's activities should be characterised as a business is primarily a matter of general impression and degree [*Ferguson* ATR 884; ATC 4271]. As noted in the Full Federal Court decision in *Stone v. FC of T* 2003 ATC 4584; (2003) 53 ATR 214 (*Stone*), **no single indicator is determinative**; rather all of the indicators must be considered. Whether a business is being carried on is based on the overall impression gained after looking at the activity as a whole and the intention of the taxpayer undertaking it.

10. The courts have held that the following indicators are relevant to the question of whether a taxpayer's activities amount to the carrying on of a business:

(a) whether the activity has a significant commercial purpose or character; this indicator comprises many aspects of the other indicators;

(b) whether the taxpayer has more than just an intention to engage in business;

(c) whether the taxpayer has a purpose of profit as well as a prospect of profit from the activity;

(d) whether there is repetition and regularity of the activity;

(e) whether the activity is of the same kind and carried on in a similar manner to that of the ordinary trade in that line of business;

(f) whether the activity is planned, organised and carried on in a businesslike manner such that it is directed at making a profit;

(g) the size, scale and permanency of the activity; and

(h) whether the activity is better described as a hobby, a form of recreation or a sporting activity.

11. The above indicators, and some of the cases in which they have been applied, are discussed in some detail in Taxation Ruling TR 97/11, *Income tax: am I carrying on a business of primary production?* However given the special nature of carrying on a *professional arts business, discussion of these factors in the context of determining whether or not an arts activity will amount to the carrying on of a business follows.

#### *Significant commercial purpose or character*

12. Whether an activity has a significant commercial purpose or character is a conclusion that will usually follow as a result of considering the other business indicators described below.

13. The fact that an artist is also pursuing other non-commercial goals will not necessarily deprive the activity of a commercial character. As has been recognised in the context of professional sportspeople, the pursuit of excellence in a chosen field by the taxpayer may amount to the carrying on of a business. What turns the pursuit of excellence into the carrying on of a business is the decision by the taxpayer to try and make a profit from the application of their skills, accompanied by activities designed to implement this commercial goal.

14. The decision of the Full Federal Court in *Stone* concerned a successful sportswoman, and inter alia whether or not various amounts received by her in this regard, were derived in the course of carrying on a business. While there are some differences, there are also parallels between whether such a person carries on business and whether an artist does so. Professional artists and sportspeople have the distinction of pursuing as a business that which many others undertake purely for personal pleasure. Therefore, such taxpayers must be able to distinguish themselves from enthusiastic amateurs. When the sole motivation of a taxpayer (objectively determined) is to achieve personal enjoyment and satisfaction from an artistic or sporting pastime, they will not be regarded as carrying on a business, as was the case in *Stone*. However, the fact that a taxpayer enjoys or even is passionate about what they do will not preclude a finding that they are carrying on a business. What distinguishes a professional artist or sportsperson is the direction of their artistic or sporting prowess towards commercial ends.

(**Note:** Special leave has been granted by the High Court to appeal the Full Federal Court's decision in *Stone*. It remains to be seen therefore how the High Court will view this matter, and what changes to this Ruling may be necessary, following the High Court's decision.)

15. The different conclusions reached by the primary judge and the Full Court in Stone, on whether the taxpayer was carrying on business, highlight the contentious nature of whether someone's activities do meet this description, or are more properly characterised as something else, for example, the vigorous pursuit of a hobby, recreational pursuit or pastime. These different conclusions also illustrate the potential for borderline cases, where the divide between business and hobby or recreational pursuits can be very fine.

### *Intention of the taxpayer*

16. What distinguishes a professional from an enthusiastic amateur is the intention of the professional to carry on as a business that which others frequently pursue merely as a hobby or by way of a pastime (refer to the fourth meaning of 'professional' in the *Macquarie Dictionary, Third Edition*). A taxpayer will have the intention (as determined objectively that is having regard to all the surrounding circumstances), to carry on a business if they make the decision to commercially exploit the skills they may have developed pursuing the

same activity as a hobby or pastime and this is reflected in their overt and planned activities.

17. Another meaning of 'professional' in the *Macquarie Dictionary* is 'one belonging to one of the learned or skilled professions'. In this Ruling the term 'professional' is not used in this sense. Rather, it is used in the sense of the fourth meaning in the *Macquarie Dictionary*, referred to above.

18. The fact that the activity is one that others may do on a non-commercial basis will not deprive the activity of a commercial purpose or character if the taxpayer can demonstrate a subjective intention to carry on that activity as a business, together with steps taken to realise that commercial aim that go beyond merely preliminary activities. Whether or not a taxpayer possesses the relevant intention in an objective sense, to carry on a business will usually be demonstrated by a consideration of the objective factors set out below (for example, regularity of activity; systematic, organised, businesslike approach to the activity; attempts to bring the art work or services to the public; actual sales of art work or services to the public and so on).

19. Purely preliminary activities, such as those involved with deciding whether to commence carrying on a business, will not amount to carrying on a business, and generally will not give rise to deductible expenses. Further discussion of whether an artist has progressed beyond purely preliminary activities and has commenced carrying on a business is set out at paragraphs 50 to 52.

### *Profit motive*

20. This indicator refers to the subjective intention of the taxpayer to profit from the activity, as determined on an objective basis. Mason J in *Hope v. The Council of the City of Bathurst* (1980) 144 CLR 1 at 8 – 9; 80 ATC 4386 at 4390; (1980) 12 ATR 231 at 236, indicated that the carrying on of a business is usually such that the activities are '… engaged in for the purpose of profit on a continuous and repetitive basis'. This intention to profit from undertaking the relevant activity is ascertained by looking at the taxpayer's activities objectively. In other words, it is not enough for the taxpayer to merely assert that they hold the requisite intention. Where it is clear from the objective evidence that the taxpayer cannot show the existence of a genuine belief that their activity can be profitable, they will usually not be found to have the requisite motive of profit-making.

21. The fact that a taxpayer is prepared to make losses to realise a business ambition will not necessarily negate the finding that their activities constitute the carrying on of a business [*Tweddle v. Federal Commissioner of Taxation* (1942) 180 CLR 1; (1942) 7 ATD 186 (*Tweddle*)]. Nor will the fact that the prospects of turning a profit may be slim [*Glennan v. Commissioner of Taxation* (2003) 53 ATR 101, *Tweddle*] or the fact that the taxpayer also enjoys or even is

passionate about the activity [For example, professional sportspeople: *Stone*].

22. Many businesses make losses, especially in the short term. In *Tweddle, Ferguson and Thomas v. FC of T* 72 ATC 4094; (1972) 3 ATR 165 (*Thomas*), the courts held that the taxpayers were carrying on businesses, notwithstanding that they made losses over several years. This was because the taxpayers in these cases had an intention and expectation on objective grounds, that their activities would eventually become profitable. In all of these cases the taxpayers intended to carry on their businesses for an indefinite period.

23. The presence of losses, without more, cannot support the conclusion that the taxpayer does not have a genuine belief that they will eventually be able to make their business pay. The High Court in *Tweddle* has stressed that it is not the function of the income tax legislation, or of those who administer that legislation, to dictate to taxpayers in what business they shall engage or how to run their businesses profitably or economically. Rather, the tax law must operate upon the results of a taxpayer's activities as it finds them.

24. In the case of an arts business, which is a notoriously high risk commercial activity where there is more variability between the cost of creating the art and its commercial value, it may often be difficult to assess whether a profit motive exists solely from whether a profit has in fact been made by the activity. Therefore, whether a taxpayer is engaged in the following kinds of activities will be relevant in ascertaining whether that taxpayer has a genuine intention to profit from their arts activities:

- endeavouring to bring the art work or service to relevant markets (see comments in paragraph 7);
- creating or enhancing industry contacts (for example gallery owners, art dealers, literary or performing arts agents, critics);
- offering art work for sale as well as actual sales of art work to the public;
- offering expert services through commission or consultancy;
- related income seeking activities (other than direct sales) including applying for grants, awards, patronage, commissions, and so on;
- making their art work accessible to the public through activities designed to raise the profile of the taxpayer as an artist; for example: publicly exhibiting art works; creating works for public performance, contributing written work for publication;
- entering art competitions, residencies and award events;

- undertaking research into the proposed arts business and consultation of experts (art experts or business advisers) prior to and during the activity; and
- reputation building as part of an overall intention to make a profit.

25. In *Stone* the Full Federal Court did state at paragraph [74] (at ATC 4594; ATR 225) that an activity might be properly classed as a business notwithstanding the absence of any expectation of profit. However, it is clear from what the Court said at paragraph [91] (at ATC 4597; ATR 228), that in concluding that no business was being carried on in that case, they bore in mind whether or not the taxpayer had a purpose of profit making.

26. It will be a question of fact in each case whether the available evidence points to an activity being pursued with profit making in mind, or whether the taxpayer is driven solely by the personal enjoyment and satisfaction they derive from their art, so as not to constitute the carrying on of a business.

27. If the Full Court intended to say however, that expectation of profit would never be important, then this would be in conflict with other authorities: see for example, *Ferguson* at ATC 4264-4265; ATR 876-877 (see paragraph 8), and *Hope* at CLR 8-9; ATC 4390; ATR 236 (see paragraph 20), which recognise it as a relevant indicator to have regard to.

28. Even if profit making is said subjectively to be in mind, the making of heavy losses over a prolonged period may objectively cast doubt on this: see, for example, the Full Federal Court decision in *Hart v. FC of T* 2003 ATC 4665; (2003) 53 ATR 371 (as discussed at paragraph 64). See also the Notes to Examples 3 and 9.

### *Repetition and regularity*

29. As an artist is often engaged in producing unique pieces of work, the pattern of repetition characteristic of other businesses may not be present to the same degree in an arts business. However for an arts activity to be carried on as a business, the activity should be conducted on a regular basis overall. There will also be repetition, usually not in the sense of producing identical output, but rather in the repeated application of the artist's skills to different pieces of work.

30. However being in business is not the same as just being 'busy' (see Hill J in *Goodman Fielder Wattie Limited v. FC of T* 91 ATC 4438 at 4447). Therefore constant activity is not required to find that the taxpayer is carrying on a business. Indeed, as noted in various places in this Ruling, artists may for financial reasons engage in other types of non-arts related work, which may be periodically or simultaneously interspersed with their arts activities.

31. This business indicator will often be present in an arts business in the following ways:

- the artist practises their arts skills in the manner and for the time required to maintain a high professional standard;
- the arts activity is conducted with sufficient regularity to demonstrate a commitment to engage in a business, not just indulge a hobby or pastime;
- the artist regularly participates in activities designed to promote their art work and/or build their reputation as an artist. Depending on the type of art work involved, this can include such things as the setting up of a website to display their works; circulation of invitations to art openings or exhibitions; or entering art competitions; and
- the artist engages in a systematic application of their skills across a variety of artistic endeavours.

32. What may be critical in borderline cases however is just what acts are being done regularly and repetitively. In such cases it will be necessary for a taxpayer to be able to demonstrate regular attempts to promote themselves and their art work to the public, for the purpose of finding or creating markets for their art work.

### *Activities of the same kind and carried on in the manner characteristic of the relevant industry*

33. There is no one type of arts industry. Therefore, this factor has to be applied by reference to the particular type of art practised by the taxpayer. An arts activity is more likely to be a business where it is conducted by the taxpayer based on business methods and procedures of a type ordinarily used in the same kinds of arts activities that would commonly be recognized as being *professional arts businesses.

34. This business indicator may be demonstrated in a number of ways, for example:

- industry and peer recognition as an artist;
- qualifications (or equivalent experience) typical of those in the relevant industry sector. (In some sectors of the arts industry formal qualifications are the norm. In others, especially in new and emerging types of art, it would be less usual for an artist to have any formal qualifications);
- public recognition as an artist (for example, is the taxpayer described as such in the media? Is their opinion as an artist sought by the public? Is their art work used by others as examples for teaching purposes?);

- meeting the eligibility and selection criteria for grants, awards and professional opportunities (for example, residencies) open to artists in the relevant industry sector (for example, individual applicants for grants from the Australia Council must be able to demonstrate that they are identified and recognised by their peers as a practising artist; in addition, the selection criteria for all grants from the Australia Council requires applicants to provide evidence of detailed planning and ability to execute the proposed project);
- appointment to a position being contingent on the person's status as an artist (for example, being offered a position as a resident artist; where a teaching position is based on the employee's status as a professional writer; being appointed as a member of relevant boards or committees);
- memberships of professional associations, including unions (that is, does the taxpayer's industry sector have any organisations that are dedicated to serving the professional needs and interests of artists? If so, is the taxpayer a member?);
- reputation building in a manner consistent with others in the relevant industry sector;
- methods of application and time commitment to activity consistent with others in the relevant industry sector; and
- obtaining the advice or services of an agent, manager, legal or financial adviser, if it is common in the taxpayer's industry sector.

***Organisation in a businesslike manner and the use of system***

35. Although the actual creation of art may be the product of intuition and inspiration, professional arts activity can still be carried on in a systematic and organised manner in accordance with ordinary commercial principles.

36. Whether an arts activity is being carried on in a businesslike manner will be demonstrated by the presence of factors such as:

- good record keeping of sales, expenses, invoices, receipts and accounts;
- presence of formal, written contracts to record agreements to supply art works or services;
- use of an accountant, lawyer, business manager or other appropriate source of commercial expertise;
- presence of a written business plan (that is, a written description of the intended future direction of the

business and how that future direction will be realised), perhaps developed in consultation with the taxpayer's accountant or manager;

- maintaining insurance in respect of their arts products or performances for public liability where their work is being shown or performed;
- renting exhibition space, use of publicly funded exhibition space, or use of public space for other types of public presentation (if appropriate, depending on the type of arts activity being carried on);
- advice from professional artists who have succeeded in their industry sector;
- keeping relevant qualifications and skills up to date (for example, through taking relevant courses, subscription to journals, attendance at conferences);
- systematic and researched attempts to bring the art work to suitable markets; and
- use of traditional business structures (like companies, trusts or partnerships). Lack of use of such a structure however is merely neutral in deciding whether an arts activity is being carried on as a business, as many *professional arts businesses are carried on by artists individually as sole traders.

### *Size or scale of activity*

37. Most professional artists carry on their business as sole traders. This will necessarily limit the size or scale of their activities. However the Courts have recognised that a person can be carrying on a business in a small way [*Ferguson*, *Thomas*].

38. The fact that many artists also are engaged in other business or employment activities, concurrently with their arts activities, does not preclude a finding that the arts activities constitute the carrying on of a business [See *Tweddle* and *Ferguson*]. It is understood that many professional artists need to supplement their arts income with income from other sources, especially in the early stages of their careers.

39. The courts have also recognised that the nature of some businesses may be such that periods of business activity 'may be intermittent with long intervals of quiescence in between' (per Lord Diplock in *American Leaf Blending Co SND Bhd v. Director-General of Inland Revenue* (1978) 3 All ER 1185 at 1193). This observation is especially pertinent in the context of artists, for the following reasons:

- most artists supplement their arts-related income with income from other sources. For example, a film maker may work in a non-arts field for six months in order to

generate sufficient income to work full time on a film project for the other six months of the year;

- many artists will have periods of perceived commercial inactivity while they are engaged in the creative process. For example, a visual artist in a 'non-exhibit' year who is building up a body of work or a writer who is in the research-phase of a new book; and
- in order to maintain the high professional standards required of a professional artist, many artists will devote substantial time to the maintenance and development of their artistic skills and experience. For example, by attending workshops, a master class or undertaking a residency.

40. Therefore, the fact that an artist may have some periods of perceived relative inactivity will not (by itself) preclude a finding that the taxpayer is carrying on a business throughout the whole period, including periods of relative inactivity. However, any periods of relative inactivity should not be so great as to suggest that the artist has ceased to carry on their arts business altogether (see *Inglis v. FC of T* (1979) 40 FLR 191; (1979) 80 ATC 4001; (1979) 10 ATR 493). Whether this inference can be drawn must be considered in light of the factors described above, and in the context of the special characteristics of an arts business. Whether an arts activity is being carried on with sufficient size and scale so as to constitute a business may be demonstrated by the following:

- the activity and output must be beyond what is needed to meet the personal needs of the artist; and
- the volume of output must be sufficient to enable the taxpayer to be regularly bringing their work to suitable markets.

41. The association of small scale activities with other business activities in the arts industry may assist in demonstrating that the taxpayer is carrying on a *professional arts business (see Hill J's comments in *Evans v. FC of T* 89 ATC 4540 at 4555; (1989) 20 ATR 922 at 939-940, discussing how the association of gambling with other business activities in the racing industry may make it more probable that a taxpayer is carrying on a business, part of which includes gambling).

42. It is recognised that most artists will apply their artistic skills across a range of related activities during their professional life. This diversity of practice often occurs out of economic necessity. For example, an actor may take a part in a musical if that is the kind of work that is available, or a musician may spend part of their time tutoring private students rather than performing. However, this diverse application of artistic skill may also be driven by the artist's need for creative stimulation and by the individual development of the artist over the course of their career. For example, an artist may begin their career as an actor and gradually evolve into a director.

43. Therefore, in considering whether a taxpayer is carrying on a business, it is acknowledged that an artist may engage in a variety of arts-related activities, none of which, when viewed in isolation, would be of sufficient scale to amount to the carrying on of a business. However, the same activities viewed as a whole may present a cohesive picture of an artist diligently exploiting their skills in a variety of ways so as to amount to the carrying on of a business. See Examples 10 and 11 below.

### *Not a hobby or recreation*

44. The pursuit of a hobby (or recreational pursuit, or pastime), is not the carrying on of a business for taxation purposes. Money derived from the pursuit of a hobby is not regarded as income and therefore is not assessable. As was said in *Ferguson* at ATC 4265; ATR 877:

> … if what he is doing is more properly described as the pursuit of a hobby or recreation or an addiction to sport, he will not be held to be carrying on a business, even though his operations are fairly substantial.

45. Expenses incurred in relation to a hobby activity, or recreational pursuit, or pastime, are not allowable deductions. However it is recognised that a hobby, and so on, can sometimes turn into a business – a taxpayer may enjoy what they do and still be carrying on a business. What distinguishes the professional from the hobbyist is an intention (objectively determined), to carry on as a business that which others undertake merely for personal enjoyment, coupled with activities which implement the taxpayer's intention to carry on a business.

46. To be carrying on a *professional arts business, the taxpayer typically will hold the intention (as determined objectively) of being a *professional* artist, as the term 'professional' was described in paragraph 16. To this end the taxpayer is likely to:

- seek to bring their art work to suitable markets, so as to gain a profit from the application of their artistic skills; and
- attempt to build their public reputation as an artist and public awareness of their art work.

47. By contrast, some indicators of a taxpayer engaged only in the pursuit of a hobby or recreation include:

- it is evident, as determined on an objective basis, that the taxpayer does not intend to make a profit from the activity;
- losses are incurred because the dominant motive for engaging in the activity is personal pleasure, rather than the taxpayer also being driven by the desire to commercially exploit their artistic skills;

- there is no plan in place to demonstrate how the taxpayer intends to make a profit from their art work;
- any sales that are made by the taxpayer are to friends and relatives, not to the general public; and
- the taxpayer does not intend to carry on a business, but rather intends to pursue a hobby or engage in a form of recreation (as shown by the absence of the other business indicators discussed above).

**Application of the indicators**

48. The following table provides a summary of the indicators and how they have been applied by Boards of Review and the Administrative Appeals Tribunal in determining whether or not various artistic activities amounted to carrying on a business. Note that the last three items shown are factors which support the main indicators.

| **Indicators which suggest a business is being carried on** | **Indicators which suggest a business is not being carried on** |
|---|---|
| A significant commercial purpose or character exists<br><br>Note: This tends to be a conclusion drawn from application of all of the factors discussed above. | No significant commercial purpose or character (see *Case P18* 82 ATC 77; (1982) 25 CTBR (NS) 620; *Brooke v. C of T* [1999] AATA 603) |
| Purpose and intention of the taxpayer in engaging in the activity – purpose being to carry on business (see *Case C1* (1952) 3 TBRD 1) | No purpose or intention of the taxpayer to carry on a business (see eg *Case P18* re activities only minimally directed toward commercial exploitation of works) |
| An intention to make a profit from the activity (Case C1, *Case P67* 82 ATC 317; (1982) 25 CTBR (NS) 867, *Case R96 84 ATC 637;* (1984) 27 CTBR (NS) 1159, *Case L57*(1989) 11 NZTC 1326) | No intention to make a profit from the activity (see eg *Brooke*, re an absence of a plan to bring the activities in question into profit) |
| The activity is or will be profitable<br><br>Note: This factor may provide objective evidence of a taxpayer's intention to make a profit from their art activity. However, where a taxpayer is engaged in a high risk activity like art, the fact that the taxpayer's activity is not readily profitable may not be decisive of whether or | The activity is inherently unprofitable |

| | |
|---|---|
| not they are carrying on a business, especially if other business indicators are clearly present. | |
| Repetition and regularity of activity (*Case P67*, *Case R96*, *Case L57*) | Lack of repetition or regularity of activity |
| Activity is carried on in a similar manner to that of the 'ordinary trade' (*Case N30* 81 ATC 163; (1981) 24 CTBR (NS) 852, *Case R96*, Case L57), being the relevant sector of the arts industry in which the taxpayer's activities fall | Activity carried on in an ad hoc manner, or not in a similar manner to the relevant arts industry sector in question (*Brooke)* |
| Activity organised and carried on in a businesslike manner and systematically – eg records are kept (*Case N30, Case P67*, *Case R96*) | Activity not organised or carried on in the same manner as the normal ordinary business activity – eg records are not kept (*Brooke*) |
| Sufficient size and scale of the activity (*Case R96*, Case L57) | Insufficient size and scale, although business can be carried on in a small way |
| Not a hobby, recreation or sporting activity (*Case N30, Case P67*, *Case R9*6, Case L57) | A hobby, recreation or sporting activity (*Case P18*) |
| A business plan exists | There is no business plan (*Brooke*) |
| Sizeable commercial sales of product (*Case L57*), although business can be carried on in a small way | Sale of products to relatives and friends, or very small commercial sales (*Brooke*). |
| Taxpayer has knowledge, experience or skill | Taxpayer lacks knowledge, experience or skill |

49. In the case of an arts business, these indicators need to be applied having regard to the nature of the arts activities and the typical characteristics of an arts business in the particular industry. For example, although a particular art activity may be carried out on a small scale, and sometimes irregularly, this in itself, will not be determinative of whether, having regard to all of the indicators, a business is being carried on or not. The scale and irregularity of activity may be characteristic of the type of artistic pursuit in question, even when carried on as a business.

### Preliminary activities

50. Purely preliminary activities, such as those involved with deciding whether to commence carrying on a business, will not amount to carrying on a business, and generally will not give rise to deductible expenses. A taxpayer who intends to carry on business as an artist must have progressed beyond this stage and be actively seeking opportunities to bring their art to suitable markets. This may be demonstrated by the following:

- the taxpayer is ready, willing and able to supply the public with their work. For example, in the visual arts sector, this may be demonstrated by the taxpayer being ready to take commissions for the preparation of art work – it is not necessary that the taxpayer has produced a stock pile of pre-existing art work; and
- any initial research into possible markets, audiences or opportunities for their art has been completed and the taxpayer has embarked on the activities that are designed to reach these targets.

51. Activities do not remain preliminary merely because the taxpayer is yet to turn a profit. If the taxpayer is attempting the commercial exploitation of their skills in such a way that if they were to succeed the profits would be taxable as income derived from the carrying on of a business, then if the same activity does not generate a profit, it must still remain the carrying on of a business. As the High Court said in *Tweddle* at CLR 6; ATD 190:

> …If the appellant succeeds and makes a profit it will plainly be taxable, and it is difficult to see how his activities could at that moment of time be transmogrified from an indulgence in a somewhat unusual form of recreation into the carrying on of a business.

52. Once the taxpayer has commenced carrying on a business, time spent in the preparation of an art work does not render the arts activity merely preparatory in nature, and thus, not in the way of a business. The ‘preparatory’ or ’preliminary’ criterion relates to the business as a whole, not individual pieces of work. Once a business has commenced, it is recognised that in some cases (for example the authoring of a book) a lengthy period of time may elapse between the commencement of new works (for example, the authoring of further books) and the finalisation of those works.

## Explanation

### Nature of art activity

53. This Ruling recognises that because of the nature of art activity, arts businesses typically have different characteristics to those found in other businesses. For example:

(a) people may engage in art activity for purposes other than the desire to make a profit, for example, for creative purposes which may include the desire to influence and change public opinion. These purposes will usually continue to be present even when the activity amounts to the carrying on of a business;

(b) art activity, even when carried on as a business, may be performed as a supplement to other income earning activities, or may be supplemented by other income earning activities;

(c) the relationship between the cost of creating art and its commercial value is more variable. In some cases there will be no relationship between the cost of creating art and its commercial value. Accordingly, even when the art activity amounts to the carrying on of a business, there may be no certainty that the art activity will lead to income being derived;

(d) art activity may not be pursued with the same degree of repetition or systematic behaviour as other businesses; and

(e) artists are likely to seek to build a reputation by seeking recognition in their field, for example by developing an audience for their work and by making their work available to the public.

54. The courts have recognised the distinct nature of arts activities and this distinction is also evident in the existence of the income tax averaging scheme in Division 405 of the ITAA 1997. In *Murray*, Hill J, at FCR 451; ATC 4194; ATR 91, referred to the judgment of Lord Simon in the *George Hensher* case, where his Lordship said at AC 95:

> It is probably enough that common experience tells us that artists have vocationally an aim and impact which differs from those of the ordinary run of mankind.

55. However, arts activities are frequently carried on as hobbies or recreation. An arts business must be distinguished from such activities.

### Usual indicators apply

56. The common law provides a number of indicators that are relevant in determining whether an operation constitutes the carrying on of a business. These indicators apply to any set of operations (see *Stone*), including when determining whether a person carries on business as an artist.

### Significance of profit motive

57. In traditional commercial activity, the intention of the taxpayer to make a profit and the presence of actual profits are important indicators that the taxpayer is indeed carrying on a business. In high risk industries like professional sport or art which are characterised by the pursuit of athletic or artistic excellence, the application of this indicator remains important, but must be applied in light of the distinctive characteristics of these industries.

58. In *Stone*, the Full Federal Court was required to determine whether an athlete was carrying on a business of being a professional athlete. The court found that the taxpayer was not engaged in a business activity to exploit her sporting prowess or to turn her talent 'to account for money'. In coming to this conclusion, the court noted that it could not be said that her activities revealed a systematic application of her talents as a sportswoman for the commercial objectives of her sponsors.

59. The Full Federal Court in *Stone* made the following observations at paragraph [74] (at ATC 4594; ATR 225):

> Whether a person is carrying on a business will depend upon a number of facts and no single factor will be determinative in a particular case. Thus, it will be relevant to determine whether a relevant activity is carried on in a businesslike way and in accordance with commercial principles. If there is system in the activity, coupled with repetition and continuity, that will be indicative of a business. An important factor is whether the relevant activity has a purpose of profit making. However, the fact that the activity does not actually produce a profit is not decisive. Indeed, even where it is not expected to derive a profit, an activity may nevertheless be properly characterised as the carrying on of a business.

60. It is noted however, that notwithstanding the last sentence in the passage quoted above, in concluding that Ms Stone did not carry on business the Full Court did consider whether or not she had a purpose of profit making in relation to her athletic activities. Thus, at [91] (at ATC 4597; ATR 228) they said:

> If an athlete engages in training and competition outside ordinary working hours that is a practical indication that her or his purpose is likely to be the enjoyment of competition, the excitement of winning and the honour and glory that goes with that, rather than profit making.

61. It should be noted however, that the Full Court acknowledged that a business can be carried on in conjunction with other income producing activities, for example, employment. The mere fact that an artist works at their art outside of any hours of employment will not be decisive of whether their artistic activities amount to a business.

62. Thus although the presence of profit-motive is an important consideration in deciding whether a taxpayer is carrying on a business, the fact that an activity generates a profit cannot by itself convert that activity into the carrying on of a business. Conversely, the absence of actual profit by itself is not sufficient to deny an activity a characterisation as a business in any given year. As was stated by the court in *Ferguson* at ATC 4264; ATR 876:

> … Certainly, it may be held a person is carrying on business notwithstanding his profit is small or even where he is making a loss.

63. If a taxpayer were to continue to make losses for an extended period, then it may be possible to infer that the taxpayer does not intend to profit from their activities. However, in drawing this inference, it will be important to look not only at the absence of actual profit, but also at whether the taxpayer is actively pursuing opportunities to increase the likelihood that their activity will become profitable in the future. Especially in a high risk industry like art, often the profit-motive indicator will be demonstrated more by the taxpayer's genuine attempts to make their arts activity profitable, rather than consistent actual profits.

64. The Full Federal Court has recently considered the significance of actual profit-making in a non-arts context. In *Hart v. FC of T* 2002 ATC 5193; (2002) 51 ATR 471 (*Hart*) a company had been operating at a loss for about 13 years. Dowsett J held that no business was being conducted. He said at ATC 5199; ATR 478:

> My primary reason for that conclusion is simply the unlikelihood that anybody running a business would continue to incur such heavy losses for so long. As I have said, I accept the proposition that it may take some time to become established in a business of that kind, but there must be a limit. …[3]

65. Following *Hart*, it can be said that in a general business context the weight to be given to the profit motive indicator may increase the longer losses are made from the activity. However, in the context of artists, they generally continue to practice their art notwithstanding the absence of significant financial reward. The following factors are noted in this regard:

(a) the capacity of an artist to derive income is not 'linear' – in other words, the derivation of income in a particular year is not an indicator that similar income will be derived in the following year or years (hence the existence of the income averaging provisions for artists);

[3] The conclusion that no business was being carried on was endorsed by the Full Federal Court on appeal: refer *Hart v. FC of T* 2003 ATC 4665; (2003) 53 ATR 371. Note in *Tweddle* the taxpayer had continuous losses between the years 1926 to 1942. Notwithstanding this, in deciding the taxpayer was carrying on a business in the year ending 30 June 1940, Williams J said (at CLR 7; ATD 190) 'he has a genuine belief that he will be able eventually to make the business pay.'

(b) the income derived by an artist is not always a result of the artist directing their art work to a particular commercial market, but rather may depend upon the acceptance of the artist's work by the market; and

(c) the popularity of an artist's work (and therefore their commercial success) may fluctuate over time, for reasons outside the control of the artist.

66. As noted already, it is necessary to ensure that consideration is given to all the other factors, to determine whether or not, as a matter of overall impression, a business is being conducted.

67. It is also important to distinguish between those activities which are carried on as a hobby or recreation and those activities which amount to the carrying on of a business. What distinguishes the vigorous pursuit of a hobby from the carrying on of a business will often be the absence of an intention to make a profit.

### Application of the indicators

68. Taxation Ruling TR 97/11 sets out the origin and meaning of the general indicators for determining whether an activity constitutes the carrying on of a business.

### Summary of some relevant case law

69. There have been several cases decided on whether taxpayers pursuing artistic activities were carrying on a business. The following is a summary of some of these.

### *Case C1* (1952) 3 TBRD 1 – housewife and author

70. For five years the taxpayer had been earning income from writing while being a housewife. One of the questions for decision was whether the taxpayer was carrying on a business as a writer.

71. The Board of Review held at TBRD 1:

> …although engaged in the ordinary duties of a housewife, she earned a few pounds from newspaper articles, poetry, an occasional short story, and radio plays … . … besides being interested in the creative side of her writing, she was also much interested in the financial returns...

72. The Board of Review considered the taxpayer's intention and her literary skills in arriving at a decision that she had been exercising a profession, and was therefore carrying on a business at all relevant times. The Board found at TBRD 2:

> The taxpayer's choice of her first occupation as copy-girl on a daily newspaper inclines us to the view that she intended to equip herself for a career of earning money by her pen. Her subsequent actions are consistent with the successful carrying out of such intention. For some years…indeed, up to the present, the taxpayer has been in the habit of exploiting her literary talent by writing (in various forms) for gain. In other words she has been exercising a 'profession'.

### *Case N30* 81 ATC 163 – teacher and poet

73. The taxpayer, a teacher and a poet, claimed deductions for expenses incurred by him in writing and publishing poetry books. One of the questions for decision was whether the expenses were incurred by the taxpayer in the course of carrying on a business as a poet, even though the activity had failed to produce a significant level of income when compared to that derived by some businesses, or by him as a teacher.

74. The Board of Review held that the taxpayer was carrying on a business as a poet after considering the following indicators. The Board recognised that the taxpayer spent long hours over many years in research and in writing his books, as well as in the pursuit of activities concerned with their publication and sale. The taxpayer sought professional advice on publication and distribution techniques to maximise the impact of his works on the public. Those activities were considerable, systematic, and organised, to the extent that they should be regarded as amounting to the carrying on of a business and not merely the vigorous pursuit of a pastime. The Board considered that general support for this approach could be found in the case of *Thomas*, where Walsh J found that the activities of a taxpayer were not carried on merely for the purpose of a hobby, despite the apparent lack of business efficiency with which the taxpayer conducted his activity.

75. The Board decided (at ATC 166) that the taxpayer:

> …did everything within his power as a comparatively unknown poet to ensure that his works would be available to the public and printed in sufficient numbers so that any immediate demand that may have followed publication could be met.

### *Case P18* 82 ATC 77 – health surveyor and author

76. The taxpayer was employed as a health surveyor. He had pursued an interest in writing for many years and had an ambition to become a commercial writer on a full-time basis of plays, books and/or articles. In the 1979 income year the taxpayer claimed expenses related to two weeks of a six week trip to the UK, stating that this time was devoted to his activities as a writer. The question for decision was whether the taxpayer was carrying on a business as a writer.

77. The Board made a number of findings of fact, including that the taxpayer had no set purpose or plan connected with his writings which could have given rise to the trip or to his travels within the UK. While the taxpayer usually spent up to 22 hours a week for a substantial part of each year in conducting his writing activities, the taxpayer's total published works to 1979 included only several newspaper articles, a book on gardening, a textbook on food for children and several short stories for children. Also, his work appeared to be still in the developmental stage and subject to alterations and improvements as to content and style.

78. The Board of Review held (at ATC 80):

> …while the taxpayer devoted much time and energy to his interest in writing and in associated matters and sought ways and means, including the trip to the UK, by which his proficiency in these respects might be enhanced, his activities overall did not amount to more than the vigorous pursuit of a pastime or hobby, which did not amount to the carrying on of a business in the year in issue. On the evidence, his activities in that period appeared to be only minimally directed towards the commercial exploitation of his works…

79. The final finding to disallow the taxpayer's claims for the 1979 income year was (at ATC 80):

> Evidence concerning completed works on hand (if any) was only sketchy, and that concerning marketing activity associated with them or with partly completed works was vague and unconvincing. At all events, his evidence fell far short of establishing to our satisfaction that a 'commercial purpose or character' attached to those activities.

### *Case P67* 82 ATC 317 – medical practitioner and photographer

80. The taxpayer, a medical practitioner, claimed substantial deductions for expenses arising out of his activities as a photographer. One of the questions for decision was whether the taxpayer was carrying on a business as a photographer.

81. The Board of Review made a number of findings of fact including that the taxpayer spent about 12 per cent of his available time photographing and documenting native wildlife, and made many trips to remote areas to do this. Articles on wildlife written by him and illustrated with photographs he had taken had been accepted for publication. He had accepted a commission to provide slides for a series of educational sets on insects to be sold to schools, and had been commissioned to make an environmental impact report. He had also made a medical training film and was involved in other medical photography.

82. In determining whether the taxpayer was carrying on a business, the Board referred to the summary of relevant criteria contained in the joint judgment of Bowen CJ and Franki J in *Ferguson* where their Honours said at ATC 4264-5:

> There are many elements to be considered. The nature of the activities, particularly whether they have the purpose of profit-making, may be important. However, an immediate purpose of profit-making in a particular income year does not appear to be essential. Certainly, it may be held a person is carrying on business notwithstanding his profit is small or even where he is making a loss.

83. The Board recognised that the taxpayer's activities in the photographic and related fields went further than the vigorous pursuit of a hobby. Also, while the taxpayer's operations were not initially organised in a 'business-efficient manner', the Board attributed this to the fact that he was trying to enter into a new market.

84. The Board found that the taxpayer was carrying on a business. The Board held (at ATC 323) that the taxpayer's photography activities had:

> … sufficient elements of continuity, organisation and repetition to warrant the description of 'a business'. The taxpayer's evidence indicated an object of profit making, even though the returns in the years under review were small, due no doubt in part to the apparently limited market for the particular products and the seeming difficulty of breaking into it.

### *Case R96* 84 ATC 637 – public servant and musician

85. The taxpayer was a clerk employed by the public service. During the tax years in question, the taxpayer engaged in the writing of lyrics, the composing of supporting music and the rehearsal and recording of those works with a succession of bands and incurred losses from this activity in each of the years. One question for decision was whether the taxpayer was carrying on a business as a musician.

86. The Board of Review made a number of findings of fact, including that the taxpayer's activities were undertaken on a continuous and repetitive basis, without interruption throughout the years in question. The taxpayer devoted considerable time and effort to the activities and having regard to his financial circumstances, the capital employed was substantial. The activities were organised in a businesslike manner and the operations involved in the venture were of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made.

87. The Board of Review held that the taxpayer was carrying on a business in each of the income years under review in their final finding (at ATC 640):

> …the absence of profit could create the impression that the activities lacked a significant commercial purpose or character (see *Thomas v. FC of T* 72 ATC 4094 at 4099), and yet we are satisfied that on the balance of probabilities the taxpayer possessed an expectation that profit would eventually be earned and that the methods employed by him were directed more to making profits than deriving pleasure.

### *Case L57* (1989) 11 NZTC 1326 – farmer and painter-artist

88. The taxpayer was a farmer and claimed expenses incurred in creating artistic paintings. One of the questions for decision was whether the taxpayer was carrying on a business as a painter.

89. Barber DJ of the NZ Taxation Review Authority made the following findings of fact. After returning from a trip to the United States to improve his art work by studying paintings, both the taxpayer's number of completed paintings and sales increased. However, the taxpayer still incurred a net loss from this activity.

90. The Taxation Review Authority of New Zealand held that the taxpayer was engaged in the profession of an artist even though the pecuniary profit was low among the taxpayer's artistic motives. Barber DJ stated (at NZTC 1333), that the taxpayer's:

> … output of paintings and volume of sales seems to me to be quite appropriate for a professional artist who is not full-time. He committed money to his artistic activities by outlaying it on paints and other materials and on expensive frames. He outlayed a very substantial amount of time and effort. When his painting is related to the activities of other artists, it must be seen as consistent with the modus operandi of a typical artist – if there is such a person.

91. Barber DJ did note that he found sufficient motive for profit in the taxpayer's activity and that the mere fascination with art and the taxpayer's lack of focus on profit to the degree of a good business person, did not convert his activity as an artist into merely a hobby for tax purposes.

### *Brooke v. Commissioner of Taxation* [1999] AATA 603 – architect, lecturer and artist-painter

92. The taxpayer was an architect who also conducted some primary production activities and an art activity. One of the questions for decision was whether the taxpayer was carrying on a business as an artist.

93. The Tribunal held at AATA 624:

> Having regard to the relevant indicators considered earlier in respect of the primary production situation, the Tribunal … cannot be satisfied that there is a significant commercial character and **purpose** to his artistic endeavours for it to find in favour of the taxpayer. (emphasis added)

94. The Tribunal (at AATA 624) made a number of findings of fact which included that the taxpayer had an interest in art, a 'degree of skill and expertise' and that he wanted to sell his works. However, the Tribunal thought there was little evidence of him conducting his activity in a 'businesslike manner', or having a serious intention of making a commercial profit.[4] It was clear that the taxpayer conducted his art activity for his own enjoyment and he was more interested in exhibiting in order to gain fame and recognition, than to make sales. The Tribunal found (at AATA 624) that 'the 'profit' derived from his art activity was measured in terms of 'recognition', as opposed to money'. A final finding was (at AATA 625):

> … that there is an absence of any evidence to suggest the … taxpayer has a plan for **bringing the art activities into profit**, for example, the undertaking of market research, the making of regular contact with art galleries or dealers and the generation of advertising and publicity with respect to his own gallery. (emphasis added)

95. It is acknowledged that an artist may seek to 'gain fame and recognition' in order to boost their reputation as an artist, as part of a plan to attract income from their art activities. Therefore, it is not necessarily accurate to draw a distinction between a quest for 'recognition' on the one hand and 'profit' on the other, as occurred in Brooke's case. It may be the case that pursuing public recognition is part of an artist's business plan to make their arts activities profitable – on the assumption that a good public reputation will lead to increased demand for the artist's work.

### Preliminary activities

96. Many costs incurred preliminary to the commencement of business are not deductible. In *Softwood Pulp and Paper Ltd v. FC of T* 76 ATC 4439; (1976) 7 ATR 101, expenses relating to the establishing of a paper production facility were not deductible, as they were held to be entirely preliminary and directed at deciding whether or not an undertaking would be established to produce assessable income.

97. It should also be noted that expenses incurred during the early period of business before any income commences to be derived may be deductible where this is a normal characteristic of the type of business being conducted. However, the taxpayer should be aware of the possible application of the rule in Division 35 of the ITAA 1997 which may operate to prevent or limit losses of individuals from non-commercial business activities being off-set against other assessable income in the year in which the losses are incurred.

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[4] In reaching their conclusions in this case the AAT expressly stated that they had found the taxpayer to be a very unreliable witness. Were a more credible taxpayer to present a similar set of circumstances, it is not clear that the outcome reached in *Brooke's* case would necessarily follow.

# Definitions

98. In this Ruling, the following terms mean the same as those in subsections 405-25(2) to (5):

(2) You are a ***performing artist*** if you exercise intellectual, artistic, musical, physical or other personal skills in the presence of an audience by performing or presenting:

(a) music; or

(b) a play; or

(c) dance; or

(d) an entertainment; or

(e) an address; or

(f) a display; or

(g) a promotional activity; or

(h) an exhibition; or

(i) any similar activity.

(3) You are also a ***performing artist*** if you perform or appear in or on a film, tape, disc or television or radio broadcast.

(4) You are a ***production associate*** if you provide *artistic support for:

(a) an activity described in subsection (2); or

(b) the activity of making a film, tape, disc or television or radio broadcast.

(5) You provide ***artistic support*** for an activity if:

(a) you provide services relating to the activity as:

(i) an art director; or

(ii) a choreographer; or

(iii) a costume designer; or

(iv) a director; or

(v) a director of photography; or

(vi) a film editor; or

(vii) a lighting designer; or

(viii) a musical director; or

(ix) a producer; or

(x) a production designer; or

(xi) a set designer; or

(b) you provide similar services relating to the activity. …'

# Examples

99. The following Examples are not meant to detract from our view that all the relevant indicators need to be considered when deciding whether an activity amounts to a business. The Examples are necessarily short, and should not be taken to indicate that the level of detail contained in them will always be sufficient to reach the necessary conclusion. In fact, typically information in greater detail than that shown is required in order to do this.

***Example 1: Teacher/Photographer – no business being carried on***

100. Rosalie is a mathematics school teacher and avid photographer. She regularly attends photographic exhibitions and occasional public lectures on photography. Over the last ten years, Rosalie has completed several adult education courses in photography. She attends a local photography club every week, and goes on weekend assignments with friends from the club. She spends about four hours a week working in a dark room in her laundry at home. Rosalie is striving to refine her technique and regularly enters work in club competitions for which she has received occasional accolades. She also subscribes to photography magazines. She has made no attempt to sell her work or exhibit it outside the photo club circuit. She does not have a business plan of any kind, nor does she keep records of her expenses. In the past she has given some of her work to friends and family as gifts. Occasionally, people have approached her at shows to purchase some of her works. She has been happy to sell these. She has taken photos of school events and provided photos for school publications at the request of the school principal, for no charge. Is Rosalie carrying on a business?

101. No. Rather, her activities amounted to a hobby for the following reasons:

- although Rosalie has knowledge and expertise in the field of photography, as well as regularly engaging in photographic activity, she does not attempt to market her work for commercial purposes, nor exhibit in public galleries;
- the size and scale of her activity is small, as it is generally restricted to weekends and a few hours during the week;

- Rosalie has no plan or intention to make a profit from selling her photos and her activities are motivated purely by her recreational interest in photography;
- her photographs are usually given away to friends and family rather than sold to the general public; and
- records are not kept and the activity is not carried on in the same manner as that of the ordinary business activity of professional artistic photographers.

***Example 2: Social worker/Jeweller – no business being carried on***

102. Jill is in her mid thirties and works full time as a social worker. She has always enjoyed making things and, since leaving school, has developed an interest in jewellery-making. Four years ago she took a couple of courses at TAFE to improve her skills and technique. She makes pins, neck pieces and earrings in a variety of materials and incorporating found objects. The amount of time Jill spends making jewellery varies, depending on her interest and available time. At first she gave away the things she made to friends and family as gifts. However, in the last two years she has started selling her jewellery, but still only to family and friends. Jill is starting to think about trying to sell her jewellery at the local markets that operate on the first weekend of each month. She has begun talking about sharing a stall with another jewellery-maker at those markets.

103. After taking into account the cost of materials, Jill estimates that she currently makes a modest profit of around $60 a month from her sales to family and friends. She keeps documentary evidence of her income and expenditure. Is Jill carrying on a business?

104. No. Rather, her activities amount to a hobby for the following reasons:

- she has knowledge and expertise in the field of jewellery making and design, although only limited formal qualifications (formal qualifications are not essential, but are of some relevance to the issue of whether a business is being carried on by the taxpayer);
- her sales are only to family and friends and she has not yet made any effort to bring her work to the attention of a broader market;
- her approach to jewellery making is not as systematic or as organised as those persons who are carrying on business as a jewellery maker and designer;
- although she makes a small profit, she is motivated by personal enjoyment rather than a desire to be a professional artist;

- her record keeping is inadequate for a person carrying on a business; and
- while she regularly practices her craft, her activity is conducted on a small-scale and it does not yet have sufficient other hallmarks of a professional jewellery making and design business.

(**Note:** On these facts Jill may be about to commence carrying on business as a jewellery maker and designer. If she started to try and sell her work at local markets and increased the scale and regularity of her jewellery making activities to cater for this development, then Jill may have commenced carrying on a business.)

***Example 3: Video installation artist – carrying on a business***

105. Tanya graduated from art school three years ago. She has just completed the first year of a post graduate degree. Tanya primarily makes video installation art but she also works in a number of other mediums including drawing, printmaking, computer animation and graphics.

106. In the past two years, Tanya has had three exhibitions in artist run spaces – two of these were group shows. These exhibitions generated sales totalling $3,000 but did not include any sales of her installation art which currently has a very limited market. However, it is attracting a growing audience and Tanya has been invited to exhibit an installation piece at a regional art gallery. She genuinely believes that the additional exposure will generate commissions for her installation work.

107. Last year Tanya applied for a New Work grant from the New Media Arts Board of the Australia Council to support the creation of a new piece of installation art. Tanya met the general eligibility criteria for individual applicants (including the requirement that she be able to demonstrate that she was identified and recognised by her peers as a practicing artist) and was also found to be competitive on the selection criteria for the particular grant. The selection criteria required Tanya to be able to demonstrate the following:

- that her proposed work would be innovative and test existing artistic boundaries;
- that there was artistic merit in the creative rationale within the new media art she was proposing;
- that the planned outcome of her work would have artistic merit;
- that she had engaged in thorough planning of her project and had the ability to carry out the proposal; and
- the calibre of herself as an artist.

108. Despite meeting the eligibility criteria and demonstrating compliance with the selection criteria, Tanya was ultimately unsuccessful in her application. However, her application was part of an overall plan to systematically attempt to make a profit from the application of her artistic skills.

109. Tanya spends 30 hours a week on average working on her art but this can vary depending on what paid work she gets to subsidise her art practice. Tanya has invested in a video camera, computer and scanner for her art practice and her recurrent expenses include rental of exhibition space, equipment hire, insurance, freight, rental of an editing suite and art and office supplies. She is a member of a professional arts association. This allows her to develop valuable contacts concerning market opportunities, and how to exploit them. She uses a room in her rented accommodation as a studio and office.

110. Tanya also does some freelance graphic design work for CD covers, newsletters and posters for which she received income of $5,000 last year. Notwithstanding this income, her arts-related income last year was exceeded by her arts-related expenses. Tanya recently signed a four-month contract for $4,000 to undertake a community based project teaching media and computer skills to young people on several afternoons each week. In addition, she undertakes a variety of other paid casual work including cleaning, child minding and working as a waitress.

111. Tanya keeps records of her income and expenses and prepares her own tax returns. She is currently planning her next body of work for exhibition in six months' time. Is Tanya carrying on a business?

112. Yes. Tanya's activities amount to the carrying on of a business for the following reasons:

- Tanya has an intention to make a profit from her arts business, although at this time her arts income is supplemented from other non-arts sources. She is deriving some income from her art (and is applying for grants to support her art activity), and is exhibiting her work to the public. The freelance graphic design work and community based project are part of her broader arts enterprise;
- she rents exhibition space and purchases equipment relevant to her arts practice;
- she meets eligibility criteria for government grants and is able to be competitive on selection criteria for government grants;
- she has relevant qualifications, knowledge and expertise in her chosen field;
- she regularly engages in her arts activities;

- she is pursuing the marketing of her installation work through the processes that are usual for someone in her field of the arts; that is, by exhibiting her work in the hope of gaining commission projects. She has made sales and continues in her attempts to market and sell her work, demonstrating her intention to make a profit;
- she maintains appropriately organized and detailed records of her income and expenses; and
- her intention is to establish a successful arts enterprise. Her work is beginning to attract some peer recognition (that is, she has been invited to exhibit in a public art gallery).

(**Note:** if Tanya were to continue making losses from her arts activities over a lengthy period then this may suggest that she does not intend to profit from those activities, which in turn may point against the conclusion that she is carrying on a business. However, if Tanya can show that she is actively taking steps to increase the likelihood that her arts activities may become profitable in the future, then the 'profit-motive' factor may be satisfied. As profit-motive is but one part of the legal test for when a taxpayer is carrying on a business, the other business factors also need to be considered in determining whether she is carrying on an arts business.)

### *Example 4: Landscape painter – carrying on a business*

113. Andrew does not have any formal qualifications as an artist, but has been painting landscapes for several years. He is employed full-time as a solicitor, but works on his art every night and at weekends – on average 18 hours a week. He rents a small studio to conduct his painting and store his materials. In the 2001 year, in line with his business plan, he exhibited his works at various local galleries as part of group exhibitions and sold a number of paintings for a total of $9,200. He received very good write-ups in art review magazines, and is a member of two professional arts associations. His art expenses for 2001 were $11,200, comprised of the following:

| Type of expense | Amount |
|---|---|
| Materials | $2,320 |
| Rent | $5,000 |
| Gallery commission (40% of total sales) | $3,680 |
| Membership fees in professional arts associations | $150 |
| Journal subscription fees | $50 |

114. In 2001 Andrew returned a net loss of $2,000 from his art activity. In 2002, he had an 'off-exhibition' year to build up a body of work so that he could participate in exhibitions he has planned for 2003, which meant that no sales were made. In 2002 Andrew engaged an agent for the first time, to assist with the exhibitions (local and interstate) he has planned for 2003 and with marketing his work more generally. Andrew's income from his art activities has to date been exceeded by his expenses, although he comes close to making a profit in the years when he is able to exhibit. He is setting up a website of his works for greater exposure. He intends to ultimately resign or reduce the hours worked in his full-time job and spend more time marketing and producing his art, if that is sustainable. He and his agent are keeping detailed records of his income and expenses. Is Andrew carrying on a business?

115. Yes, although this may be regarded as a borderline case. If Andrew's activities were predominantly aimed at pursuing non commercial goals, and his scaling down of his full time career was merely to accommodate this, it is unlikely that he would be considered to be carrying on a business. However, Andrew's activities amount to the carrying on of a business for the following reasons:

- although he does not have formal qualifications, he has relevant expertise as an artist and has received recognition from industry peers;
- he devotes a significant amount of time to his arts activity, and he regularly practices his art;
- he has good public exposure and marketing plans, has exhibited his work to the public for sale, and has viable plans in place to increase this;
- he has also sold some of his works, thus deriving income from his arts activity;
- he has appointed an agent, rents a studio and participates in exhibitions;
- he is a member of professional arts associations;
- he maintains appropriately organised and detailed records of his income and expenses, which form part of an overall business plan; and
- his intention is to establish a successful arts enterprise.

(**Note:** if Andrew was merely producing art for his own pleasure, or selling the occasional painting to friends without any concerted efforts to achieve additional sales, then it is unlikely that the activity could be regarded as carrying on a business. The scale of activity, in particular the plans to increase exposure and peer recognition, and the amount of time devoted to his art, demonstrate a commitment by Andrew to his arts practice and an intention to make a profit from his art. Although he is not currently returning a profit, Andrew has a genuine

intention to do so and he is actively pursuing avenues to increase the likelihood his arts work will become profitable in the future.)

***Example 5: Artist – no business being carried on***

116. Jennifer has been painting for several years. She is employed as a public servant, but works on her art in her spare time – on average 12-15 hours a week outside normal work hours. She uses a spare room in her home as a painting studio and to store materials.

117. Jennifer is a member of a local landscape painting club which regularly arranges painting trips to sites in the area and once a year to the Northern Territory. Jennifer attends club meetings once a month and shows her work at club meetings to gain feedback from the other club members. She engages in this art activity with a great deal of enthusiasm and commitment.

118. Jennifer does not make any concerted efforts to sell her art works. Such sales as she has made have been to family and friends, and then only at prices that just cover the cost of the materials used. In 2001 Jennifer sold two of her art works to friends for a total of $760 and she spent $4,800 to create several other works of art. Jennifer does not keep receipts for all her expenses.

119. Every year Jennifer enters her work into the Royal Easter Show exhibition and in 2002 Jennifer won some prize money. The cost of creating the art work she submitted for the Royal Easter Show exhibition exceeded the prize money she was awarded. Jennifer is only interested in occasionally entering individual artworks in local community festival exhibitions and competitions, rather than regularly exhibiting a body of work to the general public for sale. Is Jennifer carrying on a business?

120. No, Jennifer's activities do not amount to the carrying on of a business for the following reasons:

- she continually produces art works and spends a considerable amount of time in the activity, but she does so for personal pleasure rather than having any developed plans to display a body of her work to the public for sale or to create a market for her work;
- while Jennifer does enter her work in local competitions and festivals, she does not have any aspirations to build a reputation as a professional artist;
- her art work is generally sold to family and friends rather than the general public;
- her record keeping is inadequate for a person carrying on a business, in that she does not keep all her receipts for expenses;
- it is unlikely the activity will make a profit due to the minimal efforts to sell her work, build her reputation as an artist or create a market for her work; and

- although she has made some efforts to achieve high quality in her art work, this has not been for the purpose of commercially exploiting her artistic talent. Rather it has been solely for the purpose of enhancing her reputation in the local community and amongst her friends and fellow enthusiasts in the painting club.

***Example 6: Sculptor – carrying on a business***

121. Joe graduated from art school in 1985 and undertook a post graduate diploma in 1988. He spends 20-30 hours per week on production of his art and generates income from sales of between $5,000 to $8,000 a year. His art-related expenses (which include materials, gallery commissions and freight costs) are typically around $7,000 a year, broken down (approximately) as follows:

| Type of expense | Amount |
|---|---|
| Materials | $4,000 |
| Freight and insurance | $1,500 |
| Gallery commissions | $1,500 |
| Membership fees in professional arts bodies | $50 |

122. Joe records his income and expenses and keeps photographic and digital documentation of all his art. He has a separate studio and storage space on his property.

123. Joe does not have a formal business plan, but does endeavour to sell his work. He has become sufficiently well known to have a solo exhibition annually and he also participates in group exhibitions. His work has been shown in commercial galleries in Sydney and Melbourne, regional galleries and in artist run spaces. He has entered up to 12 competitions a year since he started sculpting 13 years ago and his sculpture has been featured in three noteworthy art prize competitions. He is currently not represented by a gallery or agent.

124. Over the years he has applied for a number of government arts grants where he met the eligibility criteria, but so far has been unsuccessful. Last year he applied for a Presentation and Promotion grant from the Visual Arts/Craft Board of the Australia Council in order to fund the promotion of his art works to a broader cross-section of the Australian public. Joe met the general eligibility criteria for individual applicants (including the requirement that he be able to demonstrate that he was identified and recognised by his peers as a practicing artist) and was also found to be competitive on the selection criteria for the particular grant. The selection criteria required Joe to be able to demonstrate his high calibre as an artist and to provide evidence that his promotion project was well planned and would increase opportunities for artists, broaden the audience for his art and stimulate

critical debate. Joe was ultimately unsuccessful with his application, but has been encouraged to apply again.

125. His works are represented in private and corporate collections and two of his works are in the Artbank collection. His work has been reviewed in a number of publications. He is a member of two professional art associations.

126. Joe undertakes a range of part-time work to supplement income from his arts practice, including teaching art three nights a week and taxi driving on weekends. He aims to earn sufficient income to enable him to cease his non-arts employment. Is Joe carrying on a business?

127. Yes. Joe's activities amount to the carrying on of a business for the following reasons:

- although Joe's activities generate only a very small profit and do not appear to be commercially significant, there are sufficient other factors which indicate that a business is being conducted;
- Joe has formal qualifications in the relevant field as well as knowledge and expertise;
- Joe regularly applies for funding for his art and he meets eligibility criteria for government grants and is able to be competitive on selection criteria for government grants;
- Joe is actively seeking ways to promote his art to the public;
- Joe dedicates considerable time to the activity;
- Joe's work is regularly shown in public galleries and occasionally in art competition venues;
- he is a member of professional art associations;
- his activity is organised and carried on in a businesslike manner and in a way that is consistent with this particular sector of the arts industry;
- his work has peer and public recognition; and
- he has demonstrated an intention to make a profit from his arts practice.

***Example 7: Writer – carrying on a business***

128. For the past ten years Serge has worked full-time in his chosen field as a writer. Initially Serge published his work himself but he now has a contract with a major publishing firm. He spends his time researching, writing and promoting his work. Research and promotion often involve interstate and international travel to literary festivals, readings and public appearances. Serge generates income

from sales, royalties, appearance fees, commissions and grants. Serge's annual income from these sources has varied from $8,000 to $45,000 over the past five years but has averaged out at approximately $25,000 a year. His expenses are generally around $15,000 a year.

129. Two years ago Serge was appointed to an academic position, with a salary of $65,000 a year. Serge was selected for this position on the basis of his profile and performance in the literary field. His employer requires him to maintain his practice as a writer, and has indicated that Serge is expected to spend half of his time teaching and half of his time on his practice as a writer. Is Serge carrying on a business?

130. Yes. Serge's activities amount to the carrying on of a business for the following reasons:

- Serge's main source of income is now as an academic. However, he is continuing to carry on a business of being a writer. Indeed, Serge is required to maintain his practice as a writer as a condition of his present employment;
- he has relevant knowledge and expertise in his field;
- he has peer and public recognition as a writer;
- he regularly practises his writing activity (noting again that this is indeed a requirement of his current employment);
- there is evidence of an intention to make a profit (notwithstanding some years do not produce a profit);
- his practice is conducted in a manner consistent with the norms for that particular sector of the arts industry; and
- he devotes a significant amount of time to his artistic activities.

***Example 8: Poet – carrying on a business***

131. Brian's income as a poet is sourced mainly from sales, commissions, royalties and appearance fees. Over the last four years his income from these sources was $12,000, $6,000, $8,000 and $15,000. His expenses were $10,000, $12,000, $7,000 and $18,000 respectively. The increase in expenses was due to an increase in depreciation as a result of upgrading his computer equipment and his attendance at an international literary conference which Brian combined with research for his next project.

132. Brian generally dedicates 25 to 30 hours a week to his poetry practice. He combines his poetry practice with part-time scriptwriting for television and teaching. As an established and respected poet, Brian's work is published in poetry magazines and other publications.

He has published books of his own work and has been published in anthologies with other poets. His work has been critically reviewed. He has participated in local and international festivals and, by invitation, has produced and presented works at prominent literary events in London and Ireland.

133. Brian recently negotiated a deal for a new book with a large publishing firm but unfortunately the contract fell through because of a change of management within the firm resulting in a shift away from poetry publication. Brian has self-published and sold a number of poetry books and short works and some of these are held in public and educational libraries.

134. He has been the recipient of two government literary grants and receives payments under the Public Lending Right and Educational Lending Right Schemes.

135. Brian keeps detailed records of his income and expenses and, with the help of his accountant, has developed a three-year business plan for his poetry activities. Brian's creative work does not have wide public appeal but he is focussing on ways of increasing his audience. He actively seeks opportunities for promoting and marketing his work and is pursuing a publishing contract for his next project. Is Brian carrying on a business?

136. Yes. Brian's activities amount to the carrying on of a business for the following reasons:

- although Brian has not produced a profit in the current income year, there is an intention to produce a profit and Brian is actively pursuing avenues to increase the likelihood that his poetry practice will become consistently profitable in the future. He derives income from his poetry through sales, appearance fees, grants and under the government schemes. His poetry activity has been profitable on a regular basis in the past;
- Brian devotes a significant amount of time to his poetry activities;
- although Brian does not have formal qualifications, he has public and peer recognition and acceptance as a poet as well as knowledge and experience in his field;
- he has engaged an accountant to assist in producing a three-year business plan and keeps appropriately organised and detailed records of his income and expenses; and
- the size and scale of his poetry activity and marketing of work are consistent with the norms for this sector of the arts industry.

***Example 9: Film-maker – carrying on a business***

137. Julianne completed a diploma in film-making in 2000. She works in other non-arts related employment 3 days a week, on weekends and some nights. Julianne made one short film two years ago which was accepted in competition at three international film festivals and won two international awards. She entered into an exclusive broadcast licence with XYZ TV for five years for this film. She received a small cheque of $1,500 in respect of the television broadcast licence fee covering all XYZ TV broadcasts of her film over the next five years. To date, she has not recovered all her production costs in making and exploiting her first short film.

138. Last year, Julianne commenced another short film project, and spent a total of $10,000 on its production. Her expenses included film supplies, facilities and equipment hire, processing and so on. Once finished, Julianne will enter her new short film into Australian and international film festivals and, if successful, will apply for a marketing grant from the Australian Film Commission to promote the film.

139. Last year Julianne also began researching a documentary project aimed at television and is in the process of developing a script for her first feature film. She spends on average approximately 20 hours a week on her film-making. This includes work on all her current projects (short film, feature film and documentary) as well as continuing efforts to exploit her finished work.

140. Although Julianne has developed a number of contacts in the film and television industry, she has not been able to secure development funding for the feature film. Julianne is completing the second draft of the screenplay and is trying to secure a producer. She is confident that this will lead to increased exposure, which in turn will increase her chances of obtaining grants from the state and federal funding agencies to develop and make her films, and lead to further opportunities to work with broadcasters and film production companies on commissioned or independent projects. Is Julianne carrying on a business?

141. Yes. Julianne's activities amount to the carrying on of a business for the following reasons:

- Julianne's intention is to establish a successful arts enterprise. She has the intention to make a profit from her film-making business although at this time her income is supplemented from other non-arts sources. She is deriving some income from her art (that is grants income, prize money, licence fees), and she is actively seeking opportunities to bring her work to the public and to make a profit from her work;
- she has the relevant qualifications, knowledge and expertise;
- she regularly engages in film making and promotional activity;

- she is vigorously pursuing the marketing and screening of her work in order to increase the likelihood of gaining a commission project and royalty income from her existing films;
- she maintains appropriately organised and detailed records of her income and expenses and other film-related activities (like competition and grant applications, licence agreements and so on); and
- her work is beginning to attract some peer recognition.

(**Note:** if Julianne were to continue making losses from her film making activities over a lengthy period then this may suggest that she does not intend to profit from those activities, which in turn may point against the conclusion that she is carrying on a business. However, if Julianne can show that she is actively taking steps to increase the likelihood that her film making activities may become profitable in the future, then the 'profit-motive' factor may be satisfied. As profit-motive is but one part of the legal test for when a taxpayer is carrying on a business, the other business factors must also continue to be present for Julianne to be regarded as continuing to carry on a film making business.)

***Example 10: Freelance musician – carrying on a business***

142. Wendy is a flautist who graduated with a diploma in contemporary performance in 1995. She plays in Sydney clubs for two nights a week. Wendy has good exposure as a musician in Sydney. Wendy also earns income by giving private lessons to individual students (both in Sydney and the surrounding areas) and conducting a school orchestra in a Sydney high school (as a contractor, not an employee). Her teaching and playing commitments take up approximately 26 hours a week, and in addition she also practices her music around 20 hours a week. Her total arts-related income from teaching, conducting and playing is $12,000 per year. Due to this low income, she also works in a public library for 3 days a week and earns $18,000 a year from this employment. Her total arts-related expenses (excluding depreciation) are approximately $12,000 per year, including expenses associated with purchasing music scores, instrument-related expenses, performance attire, travel expenses, journal subscriptions, professional memberships, advertising and venue hire. Wendy's total arts-related expenses (again, excluding depreciation) in any given financial year are apportioned approximately as follows:

| Type of expense | Amount |
|---|---|
| Music scores | $200 |
| Repairs to instrument | $600 |
| Insurance for instrument | $350 |
| Performance attire/dry-cleaning | $500 |
| Travel expenses | $4,000 |
| Journal subscriptions | $250 |
| Membership fees for professional arts associations | $250 |
| Advertising | $1,500 |
| Professional costs (eg CDs/concerts) | $750 |
| Fees for accompanists | $1,600 |
| Venue hire | $1,500 |

143. Wendy advertises through entertainment newspapers, and has a website. Wendy is endeavouring to generate a larger following which will enable her to perform in larger venues and charge a higher performance fee. Wendy advertises her flute lessons on local noticeboards and school newsletters. On occasions, Wendy auditions as a flautist for shows which are playing for short seasons in Sydney and/or interstate. If successful, she may work up to 5 days a week on those shows.

144. Wendy keeps copies of all her receipts and expenses, and records of her performances and teaching commitments on a calendar for each financial year. Is Wendy carrying on a business?

145. Yes. Wendy's activities amount to the carrying on of a business for the following reasons:

- she has professional qualifications;
- she regularly advertises her services;
- she regularly performs her work in public and regularly practices her music so as to maintain a standard of performance appropriate for a professional musician;
- she has an intention to make a profit from her music activities (although no profit was actually made in the relevant year, and she supplements her arts income with other non-arts income);
- she keeps appropriately organised and detailed records of her income and expenses in relation to her various music-related activities and records of her performances and teaching engagements; and
- she devotes the majority of her time to her music activities.

***Example 11: Electronic Musician/Composer – carrying on a business***

146. Justin Black is a new media artist who composes and performs original electronic music. Justin's music is primarily directed at live audiences via the Melbourne club scene, but he also produces work for television commercials and occasionally for short films.

147. Justin is able to get work performing his music at Melbourne dance parties and corporate events on a freelance basis throughout the year, although he is busiest around December/January. He does not yet play regular weekly gigs at any of Melbourne's major dance clubs. However he is seeking to increase his exposure among the Melbourne club scene so that he can secure a regular gig. In line with this aim, Justin organises a dance party twice a year at a Melbourne bowling club where he performs his original music. Each time, he spends $3,000 on hiring the venue, speakers and other equipment, and $1,500 on marketing and promotion of the dance party. He places advertisements in local music magazines and invites club owners to attend for free, as a form of advertising. The tickets for Justin's events sell for $35 each, and are limited to 500 tickets. In this past financial year, both of these dance parties sold out.

148. Justin buys records every week, and spends approximately $2,500 on records per year, and a further $2,000 on blank CDs. He owns digital recording and mixing equipment and computers, which he uses for sampling, mixing and recording original dance music. He also uses his computer equipment to keep track of his expenses and receipts. In this past year he has been commissioned to provide original music for a short film for a nominal fee of $100 which goes towards his costs. He anticipates that this will gain him additional exposure. Justin is a self-taught electronic musician, and does not have any formal tertiary qualifications in music.

149. After taking into account Justin's total income and expenses (including depreciation on his equipment), he makes a small profit for the year of income of approximately $1,000. He is employed 4 days a week as a music-news researcher for radio and one day a week at a record store specialising in dance music. He earns $28,000 pa from this employment. The remainder of the week is primarily devoted to his composition and performances. Is Justin carrying on a business?

150. Yes. Justin's activities amount to the carrying on of a business for the following reasons:

- he has an intention to maximise his income from his music activities;
- he devotes a significant amount of time to his music activities;
- he advertises and promotes his music in ways that are designed to reach his target audiences;

- his total music-related activities include the presentation of the dance parties and events, the composition and recording of original dance tracks and his work on television commercials and short films. Together, these activities are of a significant size and scale;
- he has a commitment to his music activities and has a plan to increase his exposure to the markets and audiences most likely to respond to his music; and
- although he does not have any specialist or formal tertiary qualifications (this is usual in the electronic music industry and indeed for all new media artists), Justin has relevant experience and recognised skills in the area of original electronic music, especially dance music.

# Your comments

151. We invite you to comment on this draft Taxation Ruling. Please forward your comments to the contact officer by the due date.

| | |
|---|---|
| **Due date:** | **3 September 2004** |
| **Contact Officer:** | **Erc Pepicelli** |
| **E-mail address:** | **erc.pepicelli@ato.gov.au** |
| **Telephone:** | **(08) 8208 1890** |
| **Facsimile:** | **(08) 8208 1800** |
| **Address:** | **GPO Box 800**<br>**ADELAIDE SA 5001** |

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**Commissioner of Taxation**
21 July 2004

*Previous draft*:
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*Related Rulings/Determinations:*
TR 92/20; TR 97/11; TR 2001/14

*Subject references:*
- artists and craftspersons
- carrying on a business

*Legislative references:*
- ITAA 1997 Div 35
- ITAA 1997 35-10(4)
- ITAA 1997 35-10(5)
- ITAA 1997 Div 40
- ITAA 1997 Div 70
- ITAA 1997 Div 405
- ITAA 1997 405-25
- ITAA 1997 405-25(2)
- ITAA 1997 405-25(3)
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- ITAA 1997 405-25(5)
- TAA 1953 Pt IVAAA

*Case references:*
- American Leaf Blending Co SND Bhd v. Director-General of Inland Revenue (1978) 3 All ER 1185
- Brooke v. C of T [1999] AATA 603
- Case C1 (1952) 3 TBRD 1
- Case L57 (1989) 11 NZTC 1326
- Case N30 81 ATC 163; (1981) 24 CTBR (NS) 852
- Case P18 82 ATC 77; (1982) 25 CTBR (NS) 620
- Case P67 82 ATC 317; (1982) 25 CTBR (NS) 867
- Case R96 84 ATC 637; (1984) 27 CTBR (NS) 1159
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- FC of T v. Murray (1990) 21 FCR 436; 90 ATC 4182; (1990) 21 ATR 78
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