

TR 2005/1A - Addendum - Income tax: carrying on business as a professional artist

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There is an Erratum notice for this document.

 This addendum incorporates corrections made by TR 2005/1ER which was issued on the 26 May 2009

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Addendum

Taxation Ruling

Income tax: carrying on business as a professional artist

This Addendum amends Taxation Ruling TR 2005/1 to provide further guidance on the meaning of carrying on business as a professional artist to reflect the decisions of the High Court in *Federal Commissioner of Taxation v. Stone* (2005) 222 CLR 289; [2005] HCA 21; 2005 ATC 4234; (2005) 59 ATR 50 and the Administrative Appeals Tribunal in *Pedley v. Federal Commissioner of Taxation* [2006] AATA 108; 2006 ATC 2064; (2006) 62 ATR 1014.

TR 2005/1 is amended as follows:

1. Paragraph 9

Omit:

Full Federal Court decision in *Stone v. FC of T* 2003 ATC 4584; (2003) 53 ATR 214 (*Stone*)

Substitute:

Federal Court decision in *Evans v. FC of T* 89 ATC 4540; (1989) 20 ATR 922

2. Paragraph 14

Omit the paragraph (including the note); substitute:

14. The decision of the High Court in *Federal Commissioner of Taxation v. Stone* (2005) 222 CLR 289; [2005] HCA 21; 2005 ATC 4234; (2005) 59 ATR 50 (*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. 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.

14A. In *Stone* it was accepted that the taxpayer's principle motivations were the pursuit of excellence and the pursuit of honour for herself and her country. However, taken as a whole, the athletic activities during the 1998-99 income year constituted the conduct of business. This conclusion proceeded from the acceptance of the proposition that she had turned her athletic talent to account for money and the amounts were more than trivial.

3. Paragraph 15

Omit 'the primary judge and the Full Court'; substitute 'the Full Federal Court and the High Court'.

4. Paragraph 20

Insert after the paragraph:

20A. In *Stone*, the point is made that the state of mind or intention with which the taxpayer undertakes activities giving rise to receipts is relevant, but it is only one fact to take into account. The fact that a taxpayer's motives are idealistic rather than mercenary will not prevent a conclusion that the taxpayer is engaged in carrying on a business.

5. Paragraph 25

Omit the paragraph.

6. Paragraph 27

Omit the paragraph.

7. Paragraph 28

Omit the paragraph; substitute:

28. Even if profit making is said 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 of this Ruling). However, in *Pedley v. FC of T* [2006] AATA 108; 2006 ATC 2064; (2006) 62 ATR 1014 a professional art business was being carried on even though the indicator 'whether the taxpayer has a purpose of profit as well as a prospect of profit from the activity' constituted a problem for the taxpayer. Taken as a whole the indicators were positive. See also the Notes to Examples 3 and 9 at paragraphs 112 and 141 respectively of this Ruling.

8. Paragraph 56

Omit '(see *Stone*)'.

9. Paragraph 58

Omit the paragraph; substitute:

58. In *Stone*, the High Court was required to determine whether an athlete was carrying on a business of being a professional athlete. The court found that the taxpayer had turned her athletic talent to account for money and the amounts involved were not trivial. The conclusion was reached that the taxpayer was engaged in business.

10. Paragraph 59

Omit the paragraph; substitute:

59. In *Stone*, it was accepted that the taxpayer's principle motivations were not related to making a profit from her sporting activities. Her motivations were more idealistic than mercenary. However, as noted, at paragraph 55 ([2005] HCA 21), the state of mind or intention with which a taxpayer undertakes activities is relevant but only one of the factors to take into account.

11. Paragraph 60

Omit the paragraph.

12. Paragraph 61

Omit the first sentence; substitute:

It should be noted however, that a business can be carried on in conjunction with other income producing activities, for example, employment (as was the case in *Stone*).

13. Paragraph 66

Insert after the first sentence:

In *Pedley* the taxpayer was held to be carrying on a professional art business in the relevant year, even though the profit motive indicator was problematic.

14. Paragraph 95

Insert after the paragraph:

***Pedley v. FC of T* [2006] AATA 108 – professional artist who in commercial terms has been unsuccessful**

95A. The taxpayer was well qualified in the field of arts and had worked as a professional artist for 20 years. She had a studio, employed an accountant, had a website and sought to publicise her work. The taxpayer took part in many exhibitions over the years but few sales or commissions eventuated. Her activities were funded in part by income from lecturing in art and by grants. The question for decision was whether the taxpayer was carrying on a business as a professional artist.

95B. The Tribunal held that the taxpayer was carrying on a business as a professional artist during the relevant year. It found that the taxpayer had more than merely an intention to carry on business as an artist, and that her career in this respect was her major occupation to which other activities were subordinate. Although the taxpayer had been unsuccessful in commercial terms, it was not necessarily the case that this would always be so.

15. Paragraph 151

Insert:

Pedley v. FC of T [2006] AATA 108 – professional artist who in commercial terms has been unsuccessful 95A

16. Case References

Insert:

- *FC of T v. Stone* (2005) 222 CLR 289; [2005] HCA 21; 2005 ATC 4234; (2005) 59 ATR 50
- *Pedley v. FC of T* [2006] AATA 108; 2006 ATC 2064; (2006) 62 ATR 1014

This Addendum applies before and after its date of issue.

Commissioner of Taxation

6 May 2009

ATO references

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Income Tax ~~ Deductions ~~ other business and professional expenses
Income Tax ~~ Deductions ~~ record keeping