

THE TAX OFFICE AGGRESSIVE STAND ON PENALTIES.

After a relatively mild approach taken by the ATO over the past 3 years since the introduction of GST and all the accompanying tax changes. The Tax Office has reminded tax agents and through them to their clients, that they are now looking at imposing penalties for non lodgements of Activity Statements and other Tax documents.

Although the penalties regime is enshrined in the legislation, the Tax Office practised taking a softly softly approach. The Tax Office were quite sympathetic in imposing penalties. They saw their role primarily as education of taxpayers as to how to comply with the GST.

Now with the education phase pretty much over and the GST bedded in, the Tax Office is now turning its attention to compliance.

The Commissioner of Taxation Mr Michael Carmody has in past media releases put taxpayers on notice that the following penalties will be imposed.

Depending on the size of business

Small business (less than \$2,000,000 turnover) face \$110.00 penalty for each 28 day period that their tax documents are not lodged. This penalty can be escalated up to \$550.00 per statement.

These penalties also apply to the following documents:

- Income Tax Returns
- PAYG Withholding Annual Reports
- FBT Returns.

The ATO has said that in many cases where there is a refund or no tax payable, there will be no penalties imposed. But from our experience this guideline has not been followed and many clients with refunds have received fines.

The lesson out of this is try not to be late....

Should there be any reason for being late please contact us promptly so we can make arrangements to try to secure a deadline extension.

YEAR END TAX PLANNING

As we approach the end of the financial year it is time to turn our attention to some tax planning issues that can have an impact on year-end tax liabilities.

Here are some points to consider towards the end of the year.

➤ DEFERRING INCOME

Most taxpayers who are on a cash basis will not be assessed on income until it is actually received.

It may be prudent to examine the nature of income received.

➤ ACCELERATE DEDUCTIONS

Some points to action in order to claim all legitimate deductions are to:

1. Ensure all superannuation contributions are paid before 30th June.
2. Write off bad debts before 30th June.
3. Consider scrapping old equipment and redundant stock.

4. Maximise any prepayments subject to transitional rules
5. Pay out bonuses before year-end as well.

➤ CAPITAL GAINS TAX

For those of you who may have a capital gains tax issue, if possible try and defer disposal to the beginning of the next year. For those capital gains tax events make sure the asset is held for at least 12 months in order to gain access to the 50% discount available to certain entities.

➤ ARTIST ISSUES

For our many artist clients:

Try and review expenses before year-end, prepay certain expenses and review all income.

With all the recent emphasis on gifting art works under the Cultural Gift Program and the Tax Office guidelines on trading stock it is important for advice be sought before gifts are made before the end of the year.



CERTIFIED PRACTISING ACCOUNTANTS

During the past 12 months, I have experienced a number of highs and lows.

My resignation from Lowenstein Sharp to concentrate my efforts on the development of the Sydney Practice and to devote more time and energy to the visual arts and the related creative areas, was a most exciting challenge.

With my Partners, Adam Micmacher, who has taken responsibility for the Sydney Office and Evan Lowenstein who looks after the Melbourne Office, together with the support of our dedicated staff of Adam Locastro, Henry Rais, Nicole Bernadou, Lyn Faulkner and Cheryl Johnston, we have built a very cohesive base to provide improved and expanded services to our clients.

Unfortunately, some of these activities have been delayed due to my recent illness, operations and recovery, however over the next few months, we hope to be able to provide you with some additional services and innovations.

I would like to take this opportunity to thank our friends and clients for the good wishes for my speedy recovery. I am happy to say that due to the wonderful care and attention from Nurse Sylvia, I appear to be on the road to a full recovery and I hope to be back to my normal [if perhaps a little less hectic] lifestyle in the near future.

TOM LOWENSTEIN

WARNING TO EMPLOYERS- NEW SUPERANNUATION CHANGES

The Government has announced as from the 1st of July 2003 all Superannuation payments made for employees under the Superannuation Guarantee Charge will have to be paid quarterly (currently 9% of gross wage).

In addition to further add to the burden of paperwork facing employers and small business, the employee will have to be notified in writing that the contribution has been made on their behalf.

The new dates are as follows:

<u>QUARTER</u>	<u>CUT OFF DATE FOR CONTRIBUTIONS</u>
1 ST JULY - 30 SEPTEMBER	28 TH OCTOBER
1 ST OCTOBER - 31 DECEMBER	28 TH JANUARY
1 ST JANUARY - 31 MARCH	28 TH APRIL
1 ST APRIL - 30 JUNE	28 TH JULY

The dates for notifying employees has to be within 30 days of making the final contribution for the Quarter.

There are very large penalties for not complying with these new provisions including interest components, administration fees and fines.

For example for failing to notify an employee that they have had a contribution made on their behalf the penalty is an astonishing \$3,300!!.

Although the Tax Office have said that they will be adopting a cooperative attitude in the first 2 quarters of the 2003/2004 year....

So it is important for all employers to make provision for these changes.

MELBOURNE

Level 5, 574 St Kilda Road
Melbourne VIC 3004
T: 03 9529 3800, F: 03 9525 1616
lam@lowensteinsarts.com.au

SYDNEY

Suite 601/3 Waverley Street
Bondi Junction NSW 2022
P.O. Box 651 Bondi Junction NSW 1355
T: 02 9389 2400, F: 02 9389 6506
lam@lowensteinsarts.com.au

ARTISTS BEWARE

There are two issues relating to artists that require careful consideration.

1. CLAIMING LOSSES FROM ART RELATED ACTIVITIES WHEN OTHER INCOME EXCEEDS \$40,000

Under the Provisions of the Income Tax Act, dealing with losses from non-commercial activities, artists are prevented from claiming the loss from arts activities against other income, unless one of the following four tests are passed :

- sales exceed \$20,000
- a profit is made in three out of five years
- equipment is used in the business in excess of \$100,000
- Real estate is used in the business in excess of \$500,000

There is a concession which provides that if income from other sources is less than \$40,000 then the tests do not apply and artists can deduct their art related losses against this other income.

HOWEVER WHAT IS THE POSITION WHEN OTHER INCOME EXCEEDS \$40,000?

We have written to the Australian Taxation Office and requested a private ruling, based on an actual example of Professor Peter Pinson, who is the Head of School of Art at the University of New South Wales.

In our Ruling, we argued that it was a condition of Professor Pinson's employment that he be a practising artist and therefore the expenses incurred by him in carrying on that business, were necessarily incurred in gaining assessable income.

We also argued that his teaching activity should not be separated from his art related activities, as many artists paint, sculpt, create prints, write poetry, perform, as well as teach and we considered that this is all the same activity.

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

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

As a result of this communication from the Australian Taxation Office, we wrote to the Prime Minister, The Treasurer, The Minister for the Arts, as well as to representatives of other political parties.

We enclosed details of "the Professor Pinson decision" and pointed out that his options are to accept the decision and to defer any claims until he met the criteria, or to lodge an Objection and if this was disallowed, then take the matter to the Administrative Appeals Tribunal or to the Federal Court.

Naturally the costs incurred in this exercise would be extremely high and may be beyond the ability of many mid-career artists to even contemplate.

We also pointed out that it was ironic that these regulations do not effect people who incur losses through negatively geared properties or share trading or investment activities, who under the Legislation can offset losses from these areas, against other income. Yet, artists, like Professor Pinson cannot claim losses from creative activities.

This discriminates against people who create, as against people who shuffle paper around and add nothing creative to the culture of the nation.

We also pointed out that the Myer Report on the Contemporary Visual Arts and Crafts Enquiry has recommended the removal of the \$40,000 limit on secondary income of artists and that the exemption from non-commercial losses provisions, should be extended to all visual arts and crafts practitioners carrying on a legitimate arts business activity.

As yet, no decision has been made in relation to these recommendations.

In the meantime, we are continuing dialogue with the Australian Taxation Office with the aim of claiming some expenses in relation to teaching activities, whilst deferring some direct expenses, which are art related.

GIFTING OF ARTISTS' OWN WORKS

As previously advised a number of artists had received letters from Institutions, to which they had gifted their own works of art.

This was accompanied by a letter from the Committee on Taxation Incentives for the Arts, which enclosed a memorandum from the Australian Taxation Office, setting out their interpretation of donations from an artist's personal collection and/or from trading stock.

Although the intention of the Committee was to ensure that artists obtained the maximum tax deduction entitlement, the letter and the memorandum contained a number of statements and interpretations which could have disastrous implications for artists donating their own works.

1. Our concerns are as follows :

According to the memorandum, all works produced by artists, have at some stage been part of their trading stock, unless they are able to demonstrate to the contrary to the Commissioner of Taxation.

It is our view that the basis of this assumption is incorrect, as artists do not produce all of their artwork for the purpose of sale in the ordinary course of business, and therefore not everything created by them is trading stock

Many artists, can during or after completion of a work, decide that these works are not for sale. These may be:

- a. Entry into a prize or competition.
- b. A work that has been produced specifically as a gift to a member of the family or friend.
- c. If the work is completed and the artist feels that it is not good enough to exhibit.
- d. Work that is a departure from previous work of the artist and signifies an important change of direction.
- e. Working drawing sketches, or sketch books.

It has been our attitude that the personal collection of an artist includes works which were not created for the purpose of sale and were not exhibited or were exhibited but not for the purpose of sale. It was our understanding that a declaration by the artist to that effect was sufficient to qualify the work as part of the artist's personal collection.

Based on our interpretation of the letter and the memorandum, such declaration would no longer be sufficient for this purpose.

2. The memorandum requires artists to transfer, artworks from trading stock to their personal collection with four important elements :

- a. The artist has to reimburse himself by including an amount in his assessable income representing the art materials used in the artwork.
- b. The work has to be physically moved to another part of the studio, to signify that it will no longer be available for sale.
- c. The artist would need to be able to substantiate [not retrospectively] that the item was removed from trading stock on a particular date.
- d. That the item is then held for a further period of 12 months, before it is donated under the Cultural Gifts Program.

From my experience and having discussions with artists, there would not be one artist who could, truthfully say that he/she has complied with these requirements.

3. If artists followed the advice, contained in the memorandum, the following problem would arise :

It is obvious from the correspondence from the Committee, and from the memorandum of the Australian Taxation Office that the intention of the transfer from trading stock to personal collection is for a gift to be made pursuant to the Cultural Gifts Program, which requires that a person holds the asset for more than 12 months.

However, if the asset is acquired by the taxpayer for the purpose of donating it [which it clearly is in this case], the deduction is limited to the lesser of the amount paid by the taxpayer or the current market value. Consequently, the artist could be denied a deduction for the market value of the gift.

We consider that the memorandum from the Australian Taxation Office is flawed and based on an incorrect premise, and we believe that any artist who relies on it could make the gift more vulnerable.

We therefore urge all artists to seek professional advice before they make any gifts of their own works.