SUBMISSION TO THE BOARD OF TAXATION
RE POST- IMPLEMENTATION REVIEW OF NON-COMMERCIAL LOSSES
Submitted by Jane Blanckensee 102 A Matheson Road Applecross W.A. 6153

I am an individual taxpayer carrying on the business of a small professional practice. As a sole professional practitioner I provide listening and spoken language therapy services for those with hearing and language difficulties. I have specialist certification in Auditory Verbal Therapy, which capitalizes upon using amplification or assistive listening devices (such as cochlear implants) to gain access to hearing and subsequently promote the development of spoken language in the deaf.
It is a result of direct experience of the application of a Private Ruling available within the Non-Commercial Losses Legislation that I submit the following opinions regarding the existing law.

Having downloaded and read
EXTRACT FROM THE REGULATION IMPACT STATEMENT ACCOMPANYING THE NEW BUSINESS TAX SYSTEM (INTEGRITY MEASURES) BILL 2000 I note
The objectives of the New Business Tax System
3.4 The New *Business* Tax System also seeks to provide a basis for more robust investment decisions. This is achieved by:

- improving simplicity and transparency
- reducing the cost of compliance; and
- providing fairer, more equitable outcomes

It is **providing fairer, more equitable outcomes** which I wish to address.
The Post Implementation Review of Non-Commercial Losses has had a direct, disadvantaging impact on my work. In its present form it appears both unjust and inequitable, as it unfairly discriminates against individuals who fall outside its explanatory definitions.
Within the framework of non-commercial losses legislation I sought to offset losses for my Professional Practice against other income.
I began my Private Practice in January 2001.Typical of innovations, anything new, outside the norms of convention and contrary to popular thinking, frequently take time to become accepted.
As my business failed to satisfy the requirements of the Integrity Measures Tests items (a) to (d) I applied for a Private Ruling. This required the exercise of the use of the discretionary power available to the Commissioner to consider start up lead-time.
"This arm [paragraph 35-55 (1) (b)] of the safeguard discretion **will ensure that the loss deferral role in section 35-10 does not adversely impact on taxpayers who have commenced to carry on activities which by their nature require a number of years to produce assessable income."**

In a letter dated 09 October 2003 regarding my Application for Private Ruling I was advised **"We have ruled that the discretion to paragraph 35-55 (1) b of the *Income Tax Assessment Act 1997 (ITAA 1997)* will not be exercised for the business activity described in the ruling, for the years ended 30 June 2001 to 30 June 2005 inclusive."**
In the same letter came I quote **" EXPLANATION:**
Exception
5. Under subsection 35-10 (4) there is an exception to the general rule in subsection 35-10 (2) where loss is from a primary production business activity or a professional arts business activity ……"
6. On the facts given, the exception in subsection 35-10 (4) has no relevance for the purpose of this ruling.**"**
In my case under the existing law the exercise of the discretion by the Commissioner was denied.

It appears that the policies, guidelines and criteria issued by the Australian Taxation Office in respect to the Integrity Measures (used by the Commissioner to come to such a decision regarding individuals who apply to offset losses from non-commercial activities against other activities),unfairly disadvantage those whose business activity falls outside the terms of reference. Throughout the ruling I found that my business, a professional practice of an Auditory Verbal Therapist was being judged by Primary Production principles. This appears to be a total mismatch as Primary Production Principles have no relevance to a professional practice providing listening and language therapy.

In a letter dated 11th February 2004 addressed to the Deputy Commissioner I pointed out this discrepancy. I quote
"THE CATEGORY USED TO DETERMINE THE DECISION.
Using your headings I include the following underlined examples which illustrate this point.
General Indicators of a Business:

- **Purpose and intention to engage in business and nature of the activities**

"The taxpayer should be able to demonstrate an intention to derive assessable income from the sale of the produce of the business activity."
Application of section 35-55 (Commissioner's discretion) to this arrangement
Item 18 The note to paragraph 35-55 (1) (b) states:
Note: This activity is intended to cover a business activity that has a lead time between the commencement of the activity and the production of any assessable income. For example, an activity involving the planting of produce, trees for harvest**,** where many years would pass before the activity could reasonably be expected to produce income".
Item 20 "….. This is borne out further by paragraph 1.51 of the Explanatory Memorandum for the New Business Tax System (Integrity measures) Act 2000, which states:
This arm [paragraph 35-55 (1) (b)]…….Examples of activities which would fall into this category are forestry, viticulture and certain horticultural activities."
My business activity is a Professional Practice. It is a Non Primary Production endeavour.**"**

It appears that my business has no appropriate category in the existing law and as “a square peg in a round hole” is being condemned to unfair and inequitable treatment.
This disparity is further illustrated in the terms used in the legislation i.e. “hobby”. By assigning a business to the classification of being a “hobby”, when it “fails to make a profit or does not have any particular commercial purpose” and hence not qualifying for discretionary measures, seems to reflect a limited, uninformed and depressing view of Australian Society. There are individuals (of which I am one), and businesses that seek to assist the disadvantaged and are motivated by other than a desire to only make a profit. It is disturbing to encounter such an attitude inherent in legislation of our country whose lawmakers attest a wider view of human potential.

If these Integrity Measures are part of a New Business Tax System which has as one of its policy objectives providing fairer, more equitable outcomes, it seems the terms of reference need to be reviewed.
Having downloaded and read the Public material concerning policy intent of non-commercial losses legislation, I refer to **POLICY INTENT Attachment A TREATMENT OF LOSSES FROM NON-COMMERCIAL ACTIVITIES.**
The second paragraph states “These tests will ensure that only losses arising from commercial business activities can be deducted from other income. **They have been designed so that genuine business activities are not disadvantaged**…” and paragraph three
“This is an important integrity measure that contributes to the fairness and equity of the tax law.”
From my perspective and understanding there are flaws in the application and interpretation of the existing Non Commercial Losses legislation. Because my genuine business activity of listening and language intervention and support does not conform to the Notes regarding Application of section 35-55 (Commissioner’s discretion) or paragraph 1.51 Explanatory Memorandum for the New Business Tax System (Integrity measures) Act 2000, it suffers the consequence of being unfairly disadvantaged and penalised.

I appreciate the opportunity to present an individual case and thank the Board of Taxation for seeking submissions. I very much hope that the review rectifies this **“unintended consequence of a substantive nature”** as anticipated by the item dot three of The Board of Taxation Consultation Plan for the post-implementation review of non-commercial losses.

Jane Blanckensee

26/02/04 Submitted by email. Signed hard copy follows by post to Board of Taxation Parkes ACT

C.c Maureen Hancock Metcalf Spahn
Bob Jankovic ATO