

GSTR 2006/7A3 - Addendum - Goods and services tax: how the margin scheme applies to a supply of real property made on or after 1 December 2005 that was acquired or held before 1 July 2000

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Addendum

Goods and Services Tax Ruling

Goods and services tax: how the margin scheme applies to a supply of real property made on or after 1 December 2005 that was acquired or held before 1 July 2000

Goods and Services Tax Ruling GSTR 2006/7 explains how the margin scheme applies to a supply of a freehold interest, stratum unit,¹ or long-term lease² (referred to in GSTR 2006/7 collectively as 'real property') on or after 1 December 2005 that was acquired or held before 1 July 2000.

This Addendum amends GSTR 2006/7 to reflect the Full Federal Court decision of *Brady King Pty Ltd v Commissioner of Taxation* [2008] FCAFC 118; 2008 ATC 20-034; (2008) 168 FCR 558 (*Brady King*). The ATO's view of this decision was outlined in a Decision Impact Statement which issued on 12 August 2008. Incorporation of this view into GSTR 2006/7 was delayed pending the judgment of Greenwood J in *Aurora Developments Pty Ltd v Commissioner of Taxation* [2011] FCA 232; 2011 ATC 20-250. This judgment had the potential to provide further clarification on the issue of the time of supply and acquisition of real property.

This Addendum also amends GSTR 2006/7 to reflect the content of item 15.1.28 of the Building & Construction Industry Partnership issues register which dealt with representatives of incapacitated entities and the margin scheme.

¹ 'Stratum unit' is defined in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) as having 'the meaning given by subsection 124-190(3) of the *Income Tax Assessment Act 1997*. Subsection 124-190(3) of the GST Act defines a stratum unit as 'a lot or unit (however described in an Australian law or a foreign law relating to strata title or similar title) and any accompanying common property'.

² 'Long-term lease' is defined in section 195-1 of the GST Act as:
a supply by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence) for at least 50 years if:
(a) at the time of the lease, hire or licence, or the renewal or extension of the lease, hire or licence, it was reasonable to expect that it would continue for at least 50 years; and
(b) unless the supplier is an *Australian government agency – the terms of the lease, hire or licence, or the renewal or extension of the lease, hire or licence, as they apply to the *recipient are substantially the same as those under which the supplier held the premises.

GSTR 2006/7

GSTR 2006/7 is amended as follows:

1. Preamble

Omit the preamble; substitute

This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 37 of the Taxation Administration Act 1953 and former section 105-60 of Schedule 1 to the Taxation Administration Act 1953.

From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the Taxation Administration Act 1953.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you - provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

2. Paragraph 7

- (a) Omit '45' in subparagraph 7(b); substitute '45E'.
- (b) Omit subparagraphs 7(l), (m), and (n); substitute:
 - (l) representatives of an incapacitated entity and the application of the margin scheme (paragraph 134A);
 - (m) entitlement to input tax credits (paragraph 135);
 - (n) tax invoices (paragraph 136); and
 - (o) record keeping requirements (paragraph 137 to 139).

3. Paragraph 14

Omit the paragraph; substitute:

14. You can rely upon this Ruling on and from its date of issue for the purposes of section 357-60 of Schedule 1 to the Taxation Administration Act 1953 (TAA).

Note: The Addendum to this Ruling that issued on 22 June 2011, explains our view of the law as it applied both before and after its date of issue. However, if prior to the issue of this Addendum, you relied on the public ruling that the Addendum amends, you are protected in respect of what you have done up to the date of issue of the Addendum.

4. Paragraph 45

After the paragraph; insert:

When are you taken to have held or acquired real property for the purposes of subsection 75-10(3)?

45A. The Commissioner considers that the Full Federal Court decision in *Brady King v. Commissioner of Taxation*^{22A} (*Brady King*) is authority for the view that, for the purposes of subsection 75-10(3), an entity supplying real property is taken to have held or acquired a sufficient interest in that property at the time it entered into a contract for its acquisition. As such, if the entity entered into the contract before 1 July 2000, the entity may work out its GST liability under the margin scheme by reference to an approved valuation of the real property as at the day specified in subsection 75-10(3), even if settlement of the contract occurred on or after 1 July 2000 (assuming the requirements for application of the margin scheme are satisfied).

45B. In particular, under the Commissioner's view, if an entity entered into a contract for the acquisition of freehold title to land, out of which stratum units were to be created, the entity is taken, for the purposes of subsection 75-10(3), to have held or acquired a sufficient interest in the stratum units on entering into the contract. Similarly, if an entity entered into a contract for the acquisition of freehold title to land for subdivision, the entity is taken, for the purposes of subsection 75-10(3), to have held or acquired a sufficient interest in the subdivided lots at the time the entity entered into the contract.

45C. However, the Commissioner does not consider that it follows from the *Brady King* decision that a supply or acquisition of the real property itself^{22B} occurs at the time of entry into a contract for the sale and purchase of that property. As stated in paragraphs 44 and 45 of this Ruling, the Commissioner considers that the supply or acquisition of the property occurs on settlement of the contract.

^{22A} *Brady King Pty Ltd v. Commissioner of Taxation* [2008] FCAFC 118; 2008 ATC 20-034; (2008) 168 FCR 558.

^{22B} That is, the real property that is to be conveyed to the recipient on completion of the contract, as distinct from the contractual rights the recipient receives upon entry into the contract.

45D. In *Brady King*, the Full Court decided that the taxpayer, by holding or acquiring contractual rights as the purchaser under an uncompleted contract of sale, held or acquired a sufficient interest in the relevant real property for the purposes of items 1 and 3 in the table in subsection 75-10(3). The Full Court did not decide that a taxable supply or creditable acquisition of real property is made on entering into a contract for sale and purchase. Such a conclusion would be contrary to the High Court judgment in *Commissioner of Taxation v. Reliance Carpet Co Pty Limited*.^{22C} It is clear from that judgment that, in the case of a completed contract for the sale of real property, there is only a single taxable supply which occurs at settlement of the contract.

45E. The comments of Greenwood J in *Aurora Developments Pty Ltd v Commissioner of Taxation*^{22D} (*Aurora Developments*) provide further support for the Commissioner's view that the *Brady King* decision is not relevant in determining the time at which the supply or acquisition of the real property itself occurs. In *Aurora Developments*, Greenwood J considered the expression 'the day of the supply' as it appears in subsection 38-325(2) in the context of a contract involving the supply of land. Greenwood J concluded, taking into account the circumstances of the case, that 'the day of supply' for the purposes of subsection 38-325(2) was the date at which settlement occurred and not, as the applicant had contended, the date at which the contract had been entered into. Relevantly, Greenwood J noted (at paragraph 258):

[t]he decision of the Full Court in *Brady King Pty Ltd v Federal Commissioner of Taxation* 2008 ATC 20-034; [2008] FCAFC 118; (2008) 168 FCR 558 in relation to the proper construction to be adopted concerning s 75-10 of the GST Act does not assist in the determination of the construction of s 38-325(2).

5. Paragraph 134

After the paragraph; insert

^{22C} *Commissioner of Taxation v. Reliance Carpet Co Pty Limited* [2008] HCA 22 at [42]; (2008) 68 ATR 158; (2008) 2008 ATC 20-028.

^{22D} *Aurora Developments Pty Ltd v Commissioner of Taxation* [2011] FCA 232; 2011 ATC 20-250.

Representatives of an incapacitated entity and the application of the margin scheme

134A. A representative of an incapacitated entity^{42A}, in its capacity as a representative, may make a supply of real property that was acquired by the incapacitated entity. In this circumstance, Division 58, which deals with representatives of incapacitated entities, treats the supply as made by the incapacitated entity.^{42B} As a result, the term "you" in Division 75 is, when used to refer to the supplier of real property, taken to mean the incapacitated entity.

134B. If all the requirements for applying the margin scheme under Division 75 are satisfied when the incapacitated entity is taken to make the supply, the representative of the incapacitated entity may apply the margin scheme in respect of the supply. However, providing the requirements for a representative to be liable for GST under section 58-10 are met, it is the representative of the incapacitated entity (and not the incapacitated entity) that will be liable for the GST calculated under the margin scheme.^{42C}

6. Detailed Contents List

Insert:

When are you taken to have held or acquired real property for the purposes of subsection 75-10(3)?	45A
Representatives of an incapacitated entity and the application of the margin scheme	134A

7. Legislative References

Insert:

- ANTS(GST)A 1999 38-325(2)
- ANTS(GST)A 1999 Div 58
- ANTS(GST)A 1999 58-5
- ANTS(GST)A 1999 58-10

^{42A} The terms 'representative' and 'incapacitated entity' are both defined in section 195-1 of the GST Act. In general, they refer to insolvency practitioners such as liquidators, receivers and administrators, and the entity they are appointed over.

^{42B} Section 58-5.

^{42B} Section 58-5.

^{42C} Section 58-10 (providing the requirements for a representative to be liable for GST under this section are met).

8. Case references

Insert:

- Aurora Developments Pty Ltd v Commissioner of Taxation [2011] FCA 232; 2011 ATC 20-250
- Brady King Pty Ltd v. Commissioner of Taxation [2008] FCAFC 118; 2008 ATC 20-034; (2008) 168 FCR 558
- Commissioner of Taxation v. Reliance Carpet Co Pty Limited [2008] HCA 22; (2008) 68 ATR 158; (2008) 2008 ATC 20-028

This Addendum applies both before and after its date of issue.

Commissioner of Taxation

22 June 2011

ATO references

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margin scheme
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deceased estates