PS LA 2005/15 - The Commissioner's discretion to extend the time in which the agreement in writing must be made to apply the margin scheme under Division 75 of the A New Tax System (Goods and Services Tax) Act 1999

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Practice Statement Law Administration

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SUBJECT: **The Commissioner's discretion to extend the time in which the agreement in writing must be made to apply the margin scheme under Division 75 of the *A New Tax System (Goods and Services Tax) Act 1999***

PURPOSE: **To outline the circumstances in which the discretion may be exercised.**

STATEMENT

1. The Commissioner has discretion to extend the time in which the agreement in writing must be made to apply the margin scheme. This practice statement sets out the circumstances in which the Commissioner may exercise this discretion under subsection 75-5(1A).

2. The Commissioner will consider the circumstances of each case to consider what would be fair and reasonable to all parties. While each case will need to be considered on its individual merits, the discretion may be exercised where the Commissioner is satisfied that:

    (a) all the requirements (other than the requirement for the supplier and recipient of the supply to have made the agreement in writing on or before the making of the supply) to apply the margin scheme are met; and

    (b) there is no arrangement that has the effect of producing an outcome contrary to the policy of the legislation.[1]

3. It is expected that most entities that want to apply the margin scheme would agree in writing on or before the making of the supply. Therefore, there should only be a small number of cases requiring the discretion to be considered. While each case must be considered on its merits, it is anticipated that the discretion will mainly be exercised where the circumstances in paragraph 2 are satisfied.

[1] *Federal Commissioner of Taxation v. Asiamet (No.1) Resources Pty Ltd* (2004) 137 FCR 146; [2004] FCAFC 73.

EXPLANATION

4. All legislative references in this practice statement are to the *A New Tax System (Goods and Services Tax) Act 1999* unless otherwise stated.

5. Normally GST is calculated as 1/11th of the consideration for a taxable supply in accordance with Subdivision 9-C. This is referred to as the basic rule. However, if GST is calculated under the margin scheme for a taxable supply of real property the GST payable is 1/11th of the margin for the supply.

6. Under subsection 75-5(1), the margin scheme may only apply in working out the amount of GST on a taxable supply of real property if the supplier and recipient of the supply have agreed in writing that the margin scheme is to apply.

7. Subsection 75-5(1A) provides that the agreement must be made on or before the making of the supply, or within such further period as the Commissioner allows. Therefore, the Commissioner has discretion to allow a further period of time, after the making of the supply, for the supplier and recipient of the supply to make the agreement in writing.

8. The Explanatory Memorandum to the Tax Laws Amendment (2005 Measures No. 2) Bill 2005 which introduced new subsection 75-5(1A) states that:

> The agreement must be obtained by the day of supply (usually settlement). The Commissioner has discretion to extend the date by which the agreement in writing should be made, however, it is expected that most entities should have agreed whether to use the margin scheme by the date of settlement. It is not expected this will lead to significant additional compliance costs for entities that sell real property.

9. As it is expected that most entities that want to apply the margin scheme would agree in writing to do so by the time the supply is made, there should only be a small number of cases where the discretion will be required to be considered.

10. The discretion only applies to extending the time by which the agreement to apply the margin scheme must be made in writing. It does not alter the circumstances under which the margin scheme can be applied. Therefore, all the requirements (other than having an agreement in writing on or before the making of the supply) to apply the margin scheme must be satisfied before the discretion may be exercised.

11. It would be inappropriate for the Commissioner to exercise the discretion where there is an arrangement to avoid GST or otherwise obtain an outcome contrary to the policy of the legislation. Therefore, the discretion will not ordinarily be exercised where there is evidence that applying the margin scheme to the supply is part of such an arrangement.

Examples of cases where it may be appropriate to exercise the discretion

12. In considering whether to exercise the discretion, the Commissioner will look at the circumstances of each case to consider what would be fair and reasonable to all parties. In doing so, the Commissioner will consider the delay in entering into the agreement, the explanation for the delay and any other relevant circumstances, bearing in mind that this is an ameliorating provision designed to avoid injustice.[2] The following are examples of those cases which may be more common and where it may be appropriate to exercise the discretion:

- the supplier and recipient of the supply agreed to apply the margin scheme, but inadvertently failed to put the agreement in writing by the time the supply is made;
- the failure to agree to apply the margin scheme was due to a genuine mistake. For example, the supply was mistakenly believed to be a GST-free supply or the supplier mistakenly considered it was not required to be registered for GST;
- the supply was intended to be made to an entity that was entitled to an input tax credit on its acquisition, but instead the supply was made to an entity that was not entitled to an input tax credit. For example, the supply was made to an unregistered entity; or
- the supply was made without the parties agreeing to apply the margin scheme, but the recipient of the supply realises that it wishes to apply the margin scheme to a supply that it will subsequently make to a third party (which the recipient cannot do if GST on the supply to it is not calculated under the margin scheme).

Request for the discretion to be exercised

13. Requests for the discretion to be exercised should be made in writing to the Commissioner by or on behalf of the supplier, the recipient, or the supplier and recipient jointly. The written request should outline the delay in entering into the agreement, the explanation for the delay and any other relevant circumstances which led to the agreement not being made in writing by the time the supply is made. Additionally, it should contain sufficient detail for the Commissioner to determine whether the requirements in paragraph 2 are satisfied.

14. The Commissioner will advise the party that made the request, in writing, whether the discretion has been exercised. If the discretion is not exercised, the Commissioner will include reasons in the response.

15. Any decision to exercise the discretion must be approved by an Executive Level 2 officer (or above).

[2] *Brown v. Commissioner of Taxation (Cth)* (1999) 99 ATC 4516; (1999) 42 ATR 118; [1999] FCA 563 at para 59; appeal dismissed in *Commissioner of Taxation (Cth) v. Brown* (1999) 99 ATC 4852; (1999) 42 ATR 672; [1999] FCA 1198.

Review rights

16. A decision on the exercise of the discretion is a reviewable GST decision under subsection 62(2) of the *Taxation Administration Act 1953*. Therefore, if the supplier or recipient is dissatisfied with the decision, an objection under the provisions of Part IVC of the *Taxation Administration Act 1953* can be lodged.

Date of amendment	Part	Comment
15 September 2009	Contact details	Updated.
6 August 2008	Contact details	Updated.

Subject references	GST Margin scheme Commissioner's discretion to extend the time in which the agreement in writing must be made to apply the margin scheme
Legislative references	*A New Tax System (Goods and Services Tax) Act 1999* subsection 75-5(1) *A New Tax System (Goods and Services Tax) Act 1999* subsection 75-5(1A) *A New Tax System (Goods and Services Tax) Act 1999* Subdivision 9-C *Taxation Administration Act 1953* subsection 62(2) *Taxation Administration Act 1953* Part IVC
Related public rulings	GSTR 2005/D3 GSTR 2005/D4
Related practice statements	PS LA 2005/16
Case references	Brown v. Commissioner of Taxation (Cth) (1999) 99 ATC 4516; (1999) 42 ATR 118; [1999] FCA 563 Commissioner of Taxation (Cth) v. Brown (1999) 99 ATC 4852; (1999) 42 ATR 672; [1999] FCA 1198 Federal Commissioner of Taxation v. Asiamet (No. 1) Resources Pty Ltd (2004) 137 FCR 146; [2004] FCAFC 73
File references	05/5551

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Other Business Lines consulted	**OCTC, LB&I, SB, OPS, SPR, PTAX, EXC, SNC**