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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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*

This Law Administration Practice Statement provides guidance on the circumstances in which the discretion to extend the time in which the agreement to apply the margin scheme should be made.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What this practice statement is about

The Commissioner has the discretion to extend the time in which the agreement in writing must be made to apply the margin scheme.[1] This practice statement sets out the circumstances in which this should be done.

2. When should I exercise the discretion?

When exercising the discretion, you must consider the circumstances of each case to consider what would be fair and reasonable to all parties.

You should consider the delay in entering in the agreement, the explanation for the delay and any other circumstances, bearing in mind that the discretion exists in order to avoid injustice.

While each case should be considered on its merits, you may exercise the discretion if you are satisfied that:

- all the requirements (other than the agreement being made) to apply the margin scheme are met, and
- there is no arrangement that has the effect of producing an outcome contrary to the policy of the legislation.[2]

It would be inappropriate for you to exercise the discretion where there is an arrangement to avoid GST or otherwise obtain an outcome contrary to the policy of the legislation.

3. Who can approve the exercise of the discretion?

Any decision to exercise the discretion must be approved by an Executive Level 1 officer (or above).

4. What is the limit to my discretion in relation to margin schemes?

The discretion only reaches as far as extending the time by which the agreement to apply the margin scheme must be made in writing. It cannot alter the circumstances under which the margin scheme can be applied.

You must be satisfied that all the requirements to apply the margin scheme have been met before you exercise the discretion to extend the timeframe.

5. When it may be appropriate to exercise the discretion

The following are examples of 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

[1] Subsection 75-5(1A) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
[2] *Federal Commissioner of Taxation v. Asiamet (No. 1) Resources Pty Ltd* (2004) 137 FCR 146; [2004] FCAFC 73.

an entity that was not entitled to an input tax credit. For example, the supply was made to an unregistered entity

- 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).

6. What do I need to exercise the discretion?

The request for the exercise of the discretion needs to be in writing and made on behalf of the supplier, the recipient, or both (jointly).

The request should outline (in sufficient detail for you to make the decision) the delay, why it occurred and any other relevant circumstances.

7. Notifying your decision

You should advise the supplier in writing of your decision regarding the discretion.

8. What are the review rights for the taxpayers?

A decision not to exercise the discretion to extend the time in which the agreement to apply the margin scheme should be made is a reviewable GST decision.[3]

However, if either the supplier or recipient is dissatisfied with the decision, they can lodge an objection under the provisions of Part IVC of the *Taxation Administration Act 1953*.

[3] Under subsection 110-50(2) of Schedule 1 to the *Taxation Administration Act 1953*.

9. More information

For more information:

- On the margin scheme, see GST and the margin scheme.
- On allowing further time to make an approved valuation for the purposes of working out the margin for the supply, see PS LA 2005/16.

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