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21 January 2011

Ms Brenda Berkeley  
General Manager  
Indirect Tax Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [marginscheme@treasury.gov.au](mailto:marginscheme@treasury.gov.au)

Dear Ms Berkeley,

The Taxation Institute of Australia (**Taxation Institute**) welcomes the opportunity to comment on Treasury's Discussion Paper entitled "Implementation of the recommendations of Treasury's review of the GST margin scheme" released on 10 December 2010 (the '**Discussion Paper**'). We set out our comments on this Discussion Paper below.

We take this opportunity to express our thanks to Treasury for taking on board the Taxation Institute's suggestions for reform in this area, particularly insofar as such reforms are intended to reduce confusion in this area and minimise compliance costs.

## 1 Overview

In our submission dated 6 August 2009 to Treasury in response to Treasury's Consultation Paper entitled "Review of the margin scheme" (the '**Consultation Paper**'), we recommended the Government make six technical corrections to the margin scheme provisions to overcome deficiencies. We also recommended including specific provisions dealing with the margin scheme and partnerships, and the margin scheme and partitions of property, to overcome the complexity in the ATO's public rulings. This submission is attached at Appendix A to this submission for your reference.

We note that following from that Consultation Paper, the Government's response (as set out in the Discussion Paper) has been to agree to implement only one minor technical amendment. The Discussion Paper notes that this policy, involving no further amendments, "contains a number of trade-offs where what might appear to be the desirable policy outcome in relation to the amount of tax collected is foregone in favour of simplicity and integrity considerations".

We therefore have not proposed any corrections to the provisions in this submission. However, we hope to be involved in any further consultation that is undertaken if the Government's policy

changes so that amendments to the margin scheme provisions are considered (e.g. due to Court cases).

## **2 Restructure proposal**

The proposed restructure of Division 75 into three Subdivisions – Core Rules; Particular Circumstances; Adjustments, is a welcome initiative. However, we do not believe that the proposed form of restructure put forward by Treasury addresses the core concerns raised by the Taxation Institute in its submission of 6 August 2009.

In particular, the key concept underpinning the simplification proposed by the Taxation Institute was to give prominence to the core rules which apply to approximately 95% of all transactions involving the margin scheme. These core rules (described below in non-statutory language) are:

1. The margin scheme cannot apply if the property being supplied was acquired as a fully taxable supply.
2. The margin scheme only applies if there is an agreement in writing between the parties.
3. The GST liability is ordinarily  $1/11^{\text{th}}$  of the difference between the consideration for the supply of the property and the consideration for the acquisition of the property.
4. No input tax credits can be claimed for any GST payable on acquisition of the property under the margin scheme.

Importantly, the purpose of this proposed change is to bring together the core provisions which apply to a very high proportion of all supplies made under the margin scheme. As we have previously indicated, the margin scheme provisions are somewhat different from many other provisions of the GST Act in that they are applied on a regular basis by a broad range of stakeholders – conveyancers, property developers, property lawyers, real estate agents, as well as tax agents, accountants and other tax professionals.

We recognise that the core provisions will need to be subject to the special rules which cater for the full range of exceptional and unusual circumstances now contained in the law. However, by grouping the core provisions in this way, the risk of inadvertent error, misapplication or misunderstanding of the law is seriously diminished.

Treasury would no doubt be aware that there has been a plethora of cases before the Courts and Tribunals dealing with the margin scheme concerning the imposition of penalties where the taxpayer (or their adviser) had clearly not understood the law correctly, as well as professional negligence cases where conveyancers and lawyers had not made appropriate provision in contracts for the application of the margin scheme. The restructure of the provisions in this way is intended to address the underlying issue that these cases highlight.

The difference between the approach suggested by Treasury and that suggested by the Taxation Institute is that:

- Treasury's approach will still require taxpayers (and their advisers) to wade through a detailed set of core rules to find the rule which is applicable to their circumstances. So, for example, the restructured form of section 75-10 would still occupy around 3 pages of legislation and, likewise, the restructured ineligibility rules would contain a table that deals with many circumstances that would only ever apply very rarely in practise.
- The Taxation Institute's proposed approach is to emphasise the set of rules which apply to the very significant majority of all transactions in which the margin scheme applies.

To be clear, the Taxation Institute is supportive of Treasury's general approach and efforts in seeking to reduce compliance costs. However, the Taxation Institute considers that its alternative approach will fulfil that goal more efficiently and effectively.

A possible means of bringing together Treasury's approach with what the Taxation Institute has suggested is as follows:

1. Insert a 'guide' to Division 75 of the GST Act which contains the 4 core rules referred to above as **operative** provisions. Those 4 core rules referred to above would, in effect, be extracts of the existing provisions and drafted in simple terms. The guide should indicate that these 4 core rules, in practice, apply to most transactions in which the margin scheme is applied. However, these core rules are to be read subject to the detailed provisions in Division 75.
2. The detailed provisions of Division 75 would then contain the structure of the substantive provisions proposed by Treasury in its Discussion Paper. Significantly, the detailed provisions would build on the 4 core rules so as to not overlap with them.

Another possible means of bringing together Treasury's approach with what the Taxation Institute has suggested is, as follows:

1. Insert a guide to Division 75 of the GST Act which contains the 4 core rules referred to above as **non-operative** provisions, so that the existing provisions could then be included in their current or similar form. This would allow the 4 core rules to be written in plain English in the form proposed in the Taxation Institute's submission. An advantage of this approach is that of simplifying the provisions albeit in non-operative form for the various stakeholders identified above, who don't necessarily have to (or want to) read the intricacies of the GST Act. The status of the guide would then be governed by the rules in Divisions 4 and 182 of the GST Act.
2. As with the first proposal above, the detailed provisions of Division 75 would then contain the structure of the substantive provisions by Treasury in its Discussion Paper.

As a final observation, if Treasury's approach as set out in the Discussion Paper is implemented, we suggest that section 75-14 (which reflects the Federal Court's approach in *Sterling Guardian* and is merely for the avoidance of doubt) should be in the second Subdivision rather than a core rule. Alternatively, this section can be deleted in its entirety on account of the *Sterling Guardian* case, in which event it would be appropriate to reference this in the Explanatory Memorandum to the Bill effecting these changes.

We further note that once the provisions are re-structured, the "effective dates" of the provisions may become a challenge for taxpayers and the various stakeholders to follow, particularly as it is not intended, as we understand it, to change the effective dates of the law although the law will be recast into new sections. Treasury would be aware that amendments have been made to various rules in Division 75 which have differing application dates, for example, certain supplies are ineligible for the margin scheme where they are a 'new supply'—see application provisions relevant to s. 75-5(3). We encourage specific consideration to be given to how the application of the various provisions may be simply addressed, including, if appropriate, the insertion of a table in the Explanatory Memorandum so as to provide some 'point in time' references for the legislation.

### **3 Amendment for subdivided land**

The technical amendment proposed is to change section 75-15 to clarify that the relevant cost base for margin scheme purposes on the sale of sub-divided or strata-titled land, where the

valuation method is used, is a proportion of the valuation of the land that existed at the relevant valuation date.

We welcome this technical clarification to avoid any potential disputes.

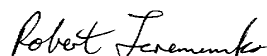
We note however, and it should be made expressly clear in the Explanatory Memorandum for this amendment, that it is a clarification of the law and not a change in the law. Not only does the ATO already apply the law in this way, but the Federal Court in *Brady King* confirmed that this is the correct interpretation of the current law.

For completeness, we note that the reference in paragraph 46 of the Discussion Paper to how the current provision works in the absence of this amendment does not reflect the correct interpretation of the law.

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If you would like further information or assistance in respect of our submission, please contact me on (02) 8223 0011 or the Taxation Institute's Tax Counsel, Deepti Paton on (02) 8223 0044.

Yours sincerely

A handwritten signature in black ink, appearing to read "Robert Schurgott".

Ken Schurgott FTIA  
Vice President