

# ANGST UPDATE



Tony Evans - Editor

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## GST & ELECTIONS

From 21<sup>st</sup> December 2000, the Tax Administration Act ("TAA") required taxpayers making elections under the GST legislation to evidence these elections in writing (Section 70 (1AAA) of the TAA). This legislation amendment was not retrospective so prior to that date, written elections in relation to GST were not formally required. However where taxpayers had made elections under the GST provisions prior to 21<sup>st</sup> December 2000, there still needed to be evidence of some reasonable kind that the election had actually been made.

The most common GST election is the election to use the margin method under Division 75. It is absolutely essential that taxpayers using the margin method after 20<sup>th</sup> December 2000 make a written election to do so before the day of supply. Failure to do this will mean that the supply will be treated as if it was a full taxable supply. In almost every case, this will lead to a significant increase in the GST liability arising on the transaction.

The need to make these elections in writing is essential as the ATO is conducting audits on most

significant real property transactions. The ATO will show no mercy where no written election exists and will seek to recover the additional GST payable in all cases.

### How do you make a valid written election?

Most standard sale of land contracts allow the election to use the margin method to be made in the actual contract and this is the preferred method of making the election. There will either be a check box which can be marked indicating that the margin method is being used or the standard clauses can be modified to indicate that the margin method is being used. This is the preferred method of making the election as it is evidenced in writing prior to the day of supply. However, the election does not need to be made in the contract.

As long as the election is made in writing prior to the day of supply by the taxpayer (and there is nothing conflicting in writing elsewhere including in the contract), it will be effective. The election does not need to be lodged with the ATO or provided to the purchaser. However it is preferable that the purchaser is made aware from the outset that the supply is a supply under the margin method.

### **Q & A – Commonly asked GST questions and issues**

**Q: I am building premises on property acquired under the margin method which will include residential properties and commercial premises. Am I entitled to sell the sub-divided residential premises under the margin method and the sub-divided commercial premises as full taxable supplies?**

A: Yes. As long as the real property acquired was acquired either under the margin method, from an unregistered person or as a GST-free acquisition, you can apply the margin method by choice. However you are not compelled to sell under the margin method. The cost of the property acquired has to be allocated over the sub-divided properties on a reasonable basis. Thereafter, you have full choice to sell each sub-divided property as a full taxable supply or under the margin method. Keep in mind that you will not be able to recover the GST charged on the property acquisition under the margin method even if it is sold as a full taxable supply subsequently. ♦

It is clear that many taxpayers may not have made these elections in writing in the past. It is not possible to make these elections retrospectively and we strongly advise against such practices. The ATO will accept where there is sufficient other evidence that an effective written election was deemed to be made.

Such evidence will include advice from third parties, file notes from advisors and associated documents indicating a pattern of behavior consistent with the election having been made.

However we strongly suggest that taxpayers and advisors establish procedures that ensure that such elections are made in writing prior to settlement of the sale of real property.

Once the election has been made, it is also important to ensure that a valid valuation is in place prior to the day of supply where the valuation approach is to be taken. Otherwise the GST calculated under the margin method will be applied by comparing the sale proceeds with the consideration for the purchase. This will be the case, irrespective of the date of purchase and the cost of the real property.

#### **Other GST elections**

The amendment to the TAA applies to all elections, choices, estimates, determinations or calculations made under the GST Law. These written documents must be maintained 5 years after the election, choice, estimate,

determination or calculation was made or has an effect, whichever is the later. Therefore it is crucially important that taxpayers be aware that they document any elections choices etc. as they make them and keep these records.

Many choices or elections will be documented as there will be a form lodged supporting that choice or election. Choosing to

### **About the Editor**

Tony Evans is a Chartered Accountant who has extensive tax consulting experience over 20 years working in the profession including overseas experience working with VAT in the UK. The founder and Managing Director of GuSTAX Consulting Pty Ltd, he was previously a partner with a boutique tax division in one of the mid-tier accounting firms in Melbourne. Tony's diverse tax specialisation's include: -

- GST
- Employment taxes
- Corporate Taxes
- CGT
- PAYG
- Expatriate Taxation

He is also recognised as an excellent communicator and trainer and has conducted numerous technical sessions for the ICAA and members of the profession. ♦

### **CHANGE OF EMAIL DOMAIN & ADDRESS**

As a matter of convenience to our clients in pronouncing the name of our practice and remembering our email address, we have adopted the following email address;-

[tony@justtax.com.au](mailto:tony@justtax.com.au)

Please alter your records to reflect this new email address.

We will continue to trade as Gustax Consulting Pty Ltd (pronounced Just Tax Consulting) and will continue to provide specialist GST advice.

However, please keep in mind that we are income tax, employment taxes and GST specialists and can provide high level tax consulting services as well as competitive tax training in all of these areas. ♦

register for GST, changing from cash to accruals, changing from quarterly to monthly returns will be self evident from the lodgement. However, estimating a partial credit claim on a partially private use asset (without FBT applying) will be required to be documented. Estimating the turnover when choosing to make annual GST returns will also require documentation in writing. Allocating input tax credits over various acquisitions based on a reasonable estimate must also be documented. There are many other situations under the GST legislation which require written documentation.

In many cases, taxpayers are unaware that they need to document these choices, estimates, elections etc. in writing and they are failing to do this. ♦

## WHEN CAN YOU CLAIM INPUT TAX CREDITS ON CREDITABLE ACQUISITIONS?

Most taxpayers are aware that they cannot generally claim an input tax credit on a creditable acquisition until they hold a tax invoice in relation to that acquisition.

This causes problems for accounting systems which automatically generate BAS and GST returns from the accounting system. Therefore, if the

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acquisition has been included in your accounting system in one tax period but you do not obtain the tax invoice until a later time, you may be required to amend the BAS automatically generated by your accounting system to remove that credit claim.

Subsequently you will then need to make a manual adjustment to a later BAS when you have received the tax invoice to claim that credit at that time.

However, there are further complications in the law in relation to claiming input tax

credits. In some cases taxpayers will be eligible to claim input tax credits in a BAS because they hold a tax invoice at that time but still neglect to claim that tax credit. This may be due to an administrative oversight or uncertainty in relation to their entitlement to claim the credit. Can they do an amended BAS later on to claim that credit in the return in which they were originally entitled to claim the credit?

Unfortunately, the answer to this question is no. Section 29-10 (4) of the GST legislation states that

where you were entitled to claim an input tax credit and failed to do so, it will be deemed not to be attributable to the tax period you failed to correctly claim it in and will be considered attributable to the actual period the claim for the credit is made. Therefore you cannot do an amended BAS to claim that input tax credit in an earlier period.

Had you failed to declare some output tax in a BAS and it is above the BAS correction thresholds, you would be required to do an amended BAS to include that output tax. So the law treats input tax claims differently to output tax payments. The example below demonstrates.

Richard is registered for GST and buys some real property as a full taxable supply as part of his enterprise. He receives a tax invoice and is entitled to claim an input tax credit of \$500,000 on the acquisition. Due to illness of Richard, his bookkeeper was unaware of the entitlement to the input tax claim and failed to claim a credit for this amount in the BAS return.

In the same tax period, Richard sold a warehouse as a full taxable supply and there was \$480,000 in output tax collected on this sale. This transaction was also missed by the bookkeeper when they completed the BAS.

Six months later, when Richard is doing his year end accounts, he becomes aware of the mistakes. He realises that the two transactions were not reflected in

the appropriate BAS. He cannot put them in the current BAS as they are above the correction of GST mistakes administrative threshold allowed by the ATO.

Richard will be required to do an amended BAS in relation to the output tax of \$480,000 on the sale of the warehouse. He will need to pay GIC and may also be required to pay penalties for recklessness.

However, he cannot include the input tax claim of \$500,000 in the amended BAS as it is technically no longer a creditable acquisition for that BAS. He can claim the amount in his current BAS as Section 29-10 (4) will deem it to be creditable for that period. ♦

## CHECK YOUR CONTRACTS!

Recently I asked a client to show me a contract of sale of land so we could check to see if the margin method could apply. When we looked at the contract we were shocked to note that the clauses in the contract indicating whether:-

- GST applied or not,
- GST was included in the price
- the consideration could be grossed up for GST
- the margin method could apply

had all been ignored. Both parties had signed this contract at the instigation of the real estate

agent with all of these issues unresolved.

To add to the problem, the real estate agent had verbally indicated (without the consent of the vendor) that the sale was a full taxable supply subject to GST.

Remedial action was required immediately. Both parties to the contract had to re-negotiate the position from scratch as the consideration under the contract could not be determined. The vendor was placed in an impossible position by the real estate agent as the purchaser was now demanding that the contract consideration was GST inclusive as a full taxable supply.

These situations must be avoided at all costs but we ask the question of accountants generally – do you peruse all contracts before your client's sign or advise your client before they enter into contracts?

The situation can very quickly turn into a blame game between the accountants, lawyers, real estate agents and the parties to the contract. The solution is to get it right first time.

Instructions to estate agents and lawyers need to be clear and concise. When presenting contracts to prospective purchasers, the GST position should already be clearly defined. Estate agents should not make representations in relation to sales and refer to the contract. ♦