

GST, general law partnerships & the margin scheme

By Stella Bae, Law Graduate & Luis Batalha, Director

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The ATO recently released *GST Ruling GSTR 2009/1* explaining how the margin scheme provisions in Division 75 of *the A New Tax System (Goods and Services Tax) Act 1999 (GST Act)* apply to general law partnerships and the partners in such partnerships.

Meaning of “general law partnership”

The term partnership is defined in section 195-1 of the GST Act by reference to the definition of that term in section 995-1 of the ITAA 1997.

A general law partnership is defined as an association of persons carrying on business as partners with a view to profit (GSTR 2009/1, paragraphs 11 and 12).

Capital contribution

The GST Act treats a partnership as an entity separate from its partners. Consequently, real property becomes partnership property when a partner makes a capital contribution of their property to the partnership (GSTR 2009/1, paragraph 17). The issue is whether a capital contribution can amount to a taxable supply and whether the margin scheme is available on the making of such a capital contribution.

Sale

For the margin scheme to apply to a capital contribution of a partner to a partnership, the contribution made must amount to a sale.

The terms 'selling' or 'sale' are not defined in the GST Act. However, it would appear that the ordinary meaning of the word sale is broad enough to include a transfer or exchange of something for consideration or a price that is of a non-monetary nature, and is not restricted to a disposal of something for an amount of money (GSTR 2009/2, paragraph 104).

The supply of real property as a capital contribution, therefore, amounts to a sale and accords with the meaning of 'selling' in section 75-5(1) of the GST Act (GSTR 2009/1, paragraph 35).

Supply

The fact that a beneficial interest in the real property may remain with the supplying partners is irrelevant as a partnership is a separate entity for GST purposes and the supplies and acquisitions made by the partners as partners of the partnership are treated as supplies or acquisitions made by the partnership (GSTR 2009/1, paragraphs 38 and 39).

Consideration

The fact that a supply is for non-monetary consideration (an interest in the partnership) does not preclude the supply from being a sale for the purposes of the margin scheme provisions (GSTR 2009/1, paragraphs 35 and 36).

Consideration includes any payment 'in connection with' a supply of anything (GSTR 2009/1, paragraph 37). For real property transactions, 'consideration' may be regarded as anything that 'moves' the transfer (GSTR 2009/1, paragraph 38). Consideration for a supply is the value of the initial interest that the partner obtains in the partnership or the increase in the value of the partner's interest in the capital of the partnership as a result of a contribution (GSTR 2009/1, paragraphs 42 and 43).

In the course or furtherance of an enterprise

However, it should be noted that a capital contribution by a partner to their partnership may not amount to a taxable supply as it would be unusual for partners to be carrying on an enterprise before joining a partnership.

Registered or required to be registered for GST

Further, the partners in a partnership may not be registered or required to be registered for GST, thus their initial contribution to a partnership may not be liable to GST as a taxable supply.

In specie distribution during the continuance of the partnership

A partnership, as it is not a separate legal entity under general law, cannot hold the legal interest in real property and the legal interest in the property is held instead by the partners or by some of the partners on trust for all the partners (GSTR 2009/1, paragraph 18).

Thus, a transfer of the beneficial (and legal) interest in real property that is partnership property to a partner by way of an *in specie* distribution is taken to be a supply made by the partnership, the consideration being the reduction in the partnership interest (GSTR 2009/1, paragraphs 19 & 20). The reference to beneficial interest may be understood as referring to situations only where some of the partners hold the property on behalf of other partners, with the latter only holding beneficial interests in the property.

In specie distribution upon general dissolution

An *in specie* distribution of partnership property by the partnership to a partner upon general dissolution of the partnership is a supply made in the course of the termination of the partnership's enterprise (GSTR 2009/1, paragraph 20).

The *in specie* distribution of real property by a partnership to its partners is a supply for consideration consistently with section 75-5(1B) and is a sale within the margin scheme provisions (GSTR 2009/1, paragraph 82). If the distribution is a

taxable supply and all of the other requirements in section 75-5 are also met, the margin scheme may be applied to the *in specie* distribution (GSTR 2009/1, paragraph 83).

Margin scheme

An entity may apply the margin scheme to work out the amount of GST payable on a taxable supply. Absent the margin scheme rules, if an entity made a taxable supply of real property, the GST payable under the basic rules would be 1/11th of the price. However, the GST payable on a taxable supply of real property as a result of the margin scheme rules is 1/11th of the margin.

Usually, the margin is the amount by which the consideration for the supply exceeds the consideration for the acquisition of the property (Division 75 of the GST Act).

Margin calculation

More specifically, the margin is calculated under either sections 75-10 or 75-1, taking into account section 75-13.

A default provision is section 75-10(2) where the margin is the amount by which the consideration for the supply exceeds the consideration for the acquisition (GSTR 2009/1, paragraph 56). If the property is acquired before 1 July 2000 and the supplier has a valuation of the real property in accordance with one of the Commissioner's written determinations, under section 75-10(3), the margin is the amount by which the consideration for the supply exceeds a valuation of the interest, unit or lease at the valuation date prescribed in the section (GSTR 2009/1, paragraph 57).

Section 75-11 applies where a partnership supplies real property that was acquired from an associate. Section 75-11(6) applies to supplies of real property that were acquired on or after 9 December 2008 from an associate for nil consideration. Since a capital contribution of real property by a partner to a partnership and the *in specie* distribution of real property from a partnership to a partner are supplies for consideration, section 75-11(6) will have no application (GSTR 2009/1, paragraph

30).

Section 75-11(7) only has application to supplies of real property made on or after 17 March 2005 when a partnership makes an *in specie* distribution of real property acquired from its partner to a partner of the partnership (GSTR 2009/1, paragraph 68). Section 75-13 applies where, on or after 17 March 2005, real property is supplied under the margin scheme and the supply is to an associate. Under section 75-13, the consideration for the supply is the GST inclusive market value of the real property at the time of the supply (GSTR 2009/1, paragraph 32).

Conclusion

The margin scheme may be available to capital contributions of real property by partners to a partnership or to *in specie* distributions by a partnership to its partners if all of the requirements in sections 9-5 and 75-5 are met. However, the calculation of the margin under the scheme will depend on the timing of the acquisition and the supply of the real property.